
(PRESIDENTIAL) POWERS IN THE EUROPEAN UNION

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1. *Presidential Powers and Functional Equivalence*

The comparative methodology embraced by Jenny Martinez, the first speaker on this panel, is functionalism – a traditional tool for comparative inquiries.¹ Functionalism starts from the pragmatic assumption that societies sharing similar values will perform identical tasks even if by means of different rules. Functionalism posits the possibility of comparing the relative success of such rules, and hence borrowing useful insights from analogous foreign experiences.² Accordingly, Professor Martinez has identified functional common ground in various legal systems, analyzed the scope and substance of presidential powers in several European States, and skillfully compared the status of chief executives in the old Continent and in the U.S.³

* Professor of Law, Boston University School of Law. Thanks to Jenny Martinez and Mark Tushnet for their thought-provoking presentations, to Anna di Robilant, Gary Lawson, and Francesca Strumia for insights and suggestions, and to Zachary Cochran, Stewart T. Moran, Benjamin B. Strawn, and the rest of the staff of the Boston University Law Review. The account of E.U. law and scholarly debates offered in this comment is necessarily quick and abridged. Footnotes are kept to a minimum.

¹ See generally KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW: VOLUME 1 – THE FRAMEWORK (Tony Weir trans., Oxford Univ. Press 2d ed. 1987) (1977); Max Rheinstein, *Comparative Law: Its Functions, Methods, and Usages*, 22 ARK. L. REV. 415 (1968-69); Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615 (1937-38).

Readers seeking an up-to-date account of European institutional developments should see the following works: GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW (2d ed. 2002 & Supp. 2004); DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: TEXT AND MATERIALS (2006); PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES AND MATERIALS (3d ed. 2002); and EUROPEAN UNION POLITICS (Michelle Cini ed., 2003). These volumes reference the literature that provides background for these pages.

² See Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 BROOK. J. INT'L L. 405, 409 (2007).

³ See generally Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480 (2006) (comparing executive powers in foreign governments ranging from European nations such as Germany and France to Mexico and South Korea). This Essay focuses only on Europe due to space constraints and to the limits of my research focus. Cf. Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L. L.J. 221, 231-232 (1999) (identifying Eurocentrism as a feature of traditional or mainstream comparative law); Teemu Ruskola, *Legal*

Based on her observation of presidency “in context,” Professor Martinez makes the important argument that the allegedly universal breadth of “inherent” presidential powers is in fact a matter of political contingency.⁴

This Essay, equally based on functionalist premises, shifts the focus away from individual states and onto the legal system of the European Union (E.U.). Here, comparison gets more haphazard. The E.U. is not a state. The failed Draft Constitutional Treaty contemplated a number of state-like features, but they were deemed excessively federalist and eventually had to be dropped out of the ongoing institutional reform project.⁵ According to some, the E.U. is a federal structure in the making.⁶ To others, it is little more than an international organization endowed with regulatory functions, where the old nation-states – as we have known them for centuries – still hold the levers of power.⁷ This half-empty, half-full sort of dispute depends in large part on the fact that the line between state competences and E.U. competences is blurred and discontinuous, so much so that it is hard to tell them apart without careful case-by-case investigation. In any event, the E.U. is certainly far from being a federal system *à l'américaine*, and there simply is no E.U. presidential figure meaningfully comparable to the U.S. chief executive. To be sure, there is no dearth of presidents in the European Union.⁸ In the Council of Ministers, the

Orientalism, 101 MICH. L. REV. 179, 181, 215 (2002) (questioning the enduring belief that Euro-American legal systems are necessarily superior because they embrace the Weberian concept of formal rationality).

⁴ Martinez, *supra* note 3, at 2510.

⁵ Stephen C. Sieberson, *Did Symbolism Sink the Constitution? Reflections on the European Union's State-Like Attributes*, U.C. DAVIS J. INT'L L. & POL'Y (forthcoming 2008).

⁶ See Michael Burgess, *Federalism and Federation*, in EUROPEAN UNION POLITICS, *supra* note 1, at 65.

⁷ See Ulrich Haltern, *Pathos and Pathina: The Failure and Promise of Constitutionalism in the European Imagination*, in CHALMERS ET AL., *supra* note 1, at 84.

⁸ This Essay refers to E.U. law as it stands in December of 2007. The acronym “E.U.” is used indistinctly to designate not only the European Union, but also the European Community and the European Economic Community. This inaccuracy is meant to reduce the technical complexities of these pages. For the exact and current structure of the E.U., see Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) 37 [hereinafter TEC], and Consolidated Version of the Treaty on European Union, Dec. 29, 2006, 2006 O.J. (C 321) 5 [hereinafter TEU]. When appropriate, this Essay refers as well to two sets of proposed changes. The first set was embodied in The Draft Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter Draft Constitutional Treaty], duly signed but famously voted down by referendum in France and in the Netherlands. The second set of proposed changes is embodied in the Reform Treaty, signed by the heads of all member states in Lisbon in December 2007 and now in the early stages of the ratification process. The outcome of this process cannot be anticipated at this stage. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 2007 O.J. (C 306) 1 [hereinafter Reform Treaty].

presidency rotates between the member states every six months.⁹ If the pending Reform Treaty is ratified by all the member states, the European Council will have a president of its own. Other European institutions – the Court of Justice, the Parliament, and most notably the Commission – also have presidents.¹⁰ But this plurality is only evidence of weakness: the E.U. presidency is diffuse, and therefore thin.¹¹ By contrast, each Member State has one obvious chief executive – be it the head of state or of government, depending on relevant constitutional specificities.¹²

The question then, in the functionalist mode embraced by Professor Martinez, is whether the institutional architecture of the E.U. hosts any practical equivalents of the U.S. presidency.¹³ Does anyone or any body in the E.U. hold decision-making powers similar to those of the U.S. President? In particular, and to narrow the question down to a theme that is central to this conference, does anyone or any body in the E.U. control the direction of foreign policy, in a way that resembles the U.S. President's role in contemporary foreign affairs? If so, a brief survey of the E.U. legal landscape may bring some more food for thought to this already rich symposium.

Two disclaimers are in order. The first one concerns the methodology of this Essay. Mark Tushnet, speaking on this panel, has questioned the normative usefulness of comparative inquiries and discounted the relevance of technical details in foreign law accounts.¹⁴ He has exposed the weaknesses of functionalism,¹⁵ cautioned us against the risk of generalization,¹⁶ and suggested that the comparative enterprise is simply “a form of liberal education in law.”¹⁷ These pages embrace entirely Professor Tushnet's qualifications. My

⁹ TEC, *supra* note 8, art. 203.

¹⁰ *Id.* arts. 197, 214, & 233.

¹¹ CHALMERS ET AL., *supra* note 1, at 106 (reporting different opinions on the feeble role of the Council president.)

¹² Each member state's “Head[] of State or Government” is granted membership in the European Council. TEU, *supra* note 8, art. 4.

¹³ See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999) [hereinafter Tushnet, *Possibilities*], stating:

Functionalism claims that particular constitutional provisions create arrangements that serve particular functions in a system of governance. Comparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems. It might then be possible to consider whether the U.S. constitutional system could use a mechanism developed elsewhere to perform a specific function, to improve the way in which that function is performed here.

¹⁴ *Id.* at 1308 (“[W]e can learn from experience elsewhere only to the extent that we avoid too much detail about that experience.”). Following this intuition, I shall give only a summary view of many technical aspects of E.U. law.

¹⁵ *Id.* at 1265-69.

¹⁶ *Id.* at 1238.

¹⁷ *Id.* at 1230, 1309.

immediate aim is not to develop normative arguments based on comparative analogies, but rather to contribute an outsider's perspective to this conference. The E.U. is still in the process of defining its constitutional nature, and reflections on the very essence of executive leadership at the crossroads of national democracies are still open-ended in Brussels. A foray into E.U. law makes it possible to suspend the conventional assumptions of U.S. constitutionalism, and to revisit certain questions of presidential power in a normative vacuum.

My second disclaimer concerns the possibilities of comparative law that go beyond functionalist assumptions.¹⁸ The quest for functional equivalence introduces readers to a foreign experience in relatively intelligible terms. Such introductions, however, are only the beginning of much larger comparative investigations.¹⁹ This Essay ends with pointers to other lines of inquiry that this panel's comparative assessment might also encompass.

2. *The E.U. Executive*

The E.U. system has a very strong executive branch, but heading the executive is not a job for one person only. The body with the strongest resemblance to State executives is the Commission.²⁰ Each State government selects one member of the Commission.²¹ The Commission negotiates trade agreements, oversees the implementation of laws, enforces antitrust rules, and can be censored *en bloc* by the Parliament.²² A strange hybrid of executive and legislative features, the Commission also holds control over legislative initiative as the exclusive entity which may propose new bills.²³ The Commission is considered the true engine of European integration. Its staff is entirely devoted to the promotion and success of E.U. policies. Commissioners pledge allegiance to the Union only, rather than to their States of origin.²⁴

The Council, another hybrid structure stemming from national executives, is ultimately in control of legislative affairs.²⁵ National affiliations, however,

¹⁸ See Vernon Valentine Palmer, *From Leretholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261, 263 (2005) (concluding that "[t]he possibilities are endless" when it comes to comparative law).

¹⁹ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 847 (1935).

²⁰ See TEC, *supra* note 8, art. 211.

²¹ *Id.* art. 214(2). If the Reform Treaty is ratified, the number of Commissioners will be reduced to two thirds of the number of member states. Reform Treaty, *supra* note 8, art. 1.18.

²² See Morten Egeberg, *The European Commission*, in EUROPEAN UNION POLITICS, *supra* note 1, at 131.

²³ See *id.*

²⁴ See TEC, *supra* note 8, art. 213(2).

²⁵ See *id.* arts. 202, 250, 251.

remain crucial in its workings. Council ministers are current members of State cabinets, sent to Brussels whenever proposed legislation deals with matters within their respective competences.²⁶

In the European Community's original architecture, Council and Commission would control the legislative process with only consultative input from the Parliament.²⁷ Today, in most matters the Parliament has as much say in the legislative process as the Council does,²⁸ but there is no question that the core of the E.U. remains executive in nature.

Why nation-states with strong traditions of representative democracy would allow for the supranational overgrowth of their cabinets, unencumbered by close parliamentary oversight, is a matter of both political contingency and historical happenstance. The Treaty of Rome was conceived of as a market-centered agreement among sovereign states.²⁹ Its obvious political goals – making war within Europe impossible, and creating a western bulwark against Soviet expansion – were only side effects of the treaty's immediate commercial and economic tasks: creating a healthy cross-border market and promoting economic interdependence among Member States.

Interstate trade regulation and external commercial policy are typical executive prerogatives. It only made sense then to allocate such powers to an (elaborate) extension of states' cabinets. What we now call E.U. *legislation* was then conceived of as a set of administrative acts, necessary simply for implementing policies which would still be formulated by states' governments. The Court of Justice's power of judicial review over such acts was designed along the lines of mere administrative control (typical of French administrative tribunals), not in the mode of constitutional scrutiny.³⁰

As the tremendous constitutional shift logically demanded by economic integration became obvious, the E.U. gave itself increasingly visible democratic credentials. In 1979, members of the Parliament were for the first time directly elected by the peoples of Europe. The Parliament also acquired judicial standing, stronger voice, and even veto power in most legislative matters. In the eyes of many, however, the E.U. is still plagued by one form or another of democratic deficit.³¹ A creature of the executive, the E.U. may don

²⁶ *Id.* art. 203.

²⁷ See 1 BERMANN ET AL., *supra* note 1, at 51.

²⁸ See TEC, *supra* note 8, art. 251.

²⁹ See *id.* art. 2 (envisaging an entity engaged in “establishing a common market and progressively approximating the economic policies of the Member States”). In its early days, the Treaty establishing the European Community was only intended to abolish custom duties, facilitate the movement of goods, labor, services, and capital, and to manage certain economic policies such as agriculture, transport, and antitrust. See CHALMERS ET AL., *supra* note 1, at 11-12.

³⁰ See Ron Levi, *La fabrique du droit: Une ethnographie du Conseil d'Etat*, 1 L. CULTURE & HUMAN. 137, 137 (Austin Sarat et al. eds., 2005).

³¹ See Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533, 533-34 (2006).

the outfit of a parliamentary democracy and speak with constitutional grandeur. But, for better or for worse, it maintains the traits of an opaque regulatory engine. Scholarly and political opinions vary extensively on this issue, but prominent scholars make the point that the E.U. version of democracy is one of a kind, with no match in either unitary or federal state models.³²

Like many other things, Europe boasts mythical origins. Zeus allegedly fell in love with Europa, a beautiful Phoenician girl. In order to seduce her, he took on the irresistible semblance of a bull, and brought Europa from Lebanon to Crete.³³ Structurally, this myth represents the shift of civilization from Asia Minor to Europe, and the dawn of western dominance.³⁴ However, the persistence of strong executive features and the weakness of political participation in the E.U. may evoke a different myth. The E.U. is rather like Athena, goddess of wisdom: a head born out of the head of Zeus, executive from executive; a woman whose full body of democratic attributes has the only function of keeping the head up, and letting the head lead.

3. *Foreign Policy*

A bit of Euro-jargon is unavoidable. The E.U. is an intricate mix of “intergovernmental” and “supranational” features.³⁵ “Intergovernmental” is a term pointing at the autonomy and sovereignty of each member state. For instance, direct taxation on personal income is an intergovernmental matter, and so is control over military forces. By contrast, the word “supranational” characterizes those Community competences which imply at least a partial surrender of state sovereignty. In many matters, no single state has veto power over decisions made by a majority of states, the European Court of Justice (the ECJ) adjudicates issues of state compliance, and even state courts of ordinary jurisdiction must contribute to E.U. law enforcement. Interstate trade is also handled in an intensely supranational mode.

In general, the strength of E.U. powers varies noticeably from one area of competence to the next. Even within the narrow sphere of foreign policy, the Union’s powers range from minimal to significant.³⁶ In strictly trade-related matters, such as the definition of a common commercial policy, the Union has exclusive and general competence.³⁷ The Commission speaks with one voice

³² See, e.g., J.H.H. Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7, 23 (J.H.H. Weiler & Marlene Wind eds., 2003).

³³ CHALMERS ET AL., *supra* note 1, at 3.

³⁴ *Id.* at 4.

³⁵ See J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2410 (1991).

³⁶ PIET EECKHOUT, *EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS* (2004).

³⁷ TEC, *supra* note 8, art. 133.

on behalf of all member states when negotiating trade issues in WTO rounds.³⁸ The Commission determines, with interpretive guidance from the ECJ, the external reach of its antitrust policy.³⁹ E.U. legislation sets uniform custom codes and tariffs upon imports anywhere in the E.U.⁴⁰ In other words, commercial policy is entirely supranational and, as is often the case in the management of external trade matters, the democratically elected assembly (the Parliament) has virtually no role. As a result, when drafting trade deals, the Commission has free rein, and only needs ex-post majority, not unanimous, approval from the Council.

On the other hand, the political and military aspects of foreign policy are still handled in intergovernmental fashion. Member states remain absolutely sovereign in such matters, and while they may decide to pool their resources and consult with one another, the political handling of foreign affairs remains non-delegated state sovereignty. Most tellingly, there is no real European army,⁴¹ and hence no real Commander-in-Chief.⁴² An immediate example of intergovernmentalism was given at the outset of the Iraqi war. As is well known, Europe displayed a wide range of attitudes towards military intervention, from materially supportive (United Kingdom) to firmly opposed (France). Against this background, the question initially set forth in these pages seems to receive an outright negative answer. The European Union does not possess the equivalent of presidential powers with regard to foreign policy. At a closer look, however, the picture proves more nuanced, and more interesting.

³⁸ See 2 BERMANN ET AL., *supra* note 1, at 1073.

³⁹ See CHALMERS ET AL., *supra* note 1, at 982-83.

⁴⁰ See 2 BERMANN ET AL., *supra* note 1, ch. 30.

⁴¹ See Karen E. Smith, *EU External Relations*, in EUROPEAN UNION POLITICS, *supra* note 1, at 229, 238-240.

⁴² The European Union Military Staff is the body that comes closest to an E.U. army. Established in 2001, the EUMS is "a General Directorate within the Council General Secretariat [the Director General is currently Lt. Gen. David Leakey]. It is the only permanent integrated military structure of the European Union." http://www.consilium.europa.eu/uedocs/cms3_fo/showPage.asp?id1039&lang=en. The main operational functions of the EUMS are early warning, situation assessment, and strategic planning. For the rest, the military capabilities of the E.U. are a function of member states' voluntary contributions of troops and infrastructure. On recent developments see EUROPEAN UNION FACT SHEET, THE E.U. BATTLEGROUPS AND THE E.U. CIVILIAN AND MILITARY CELL (2005) <http://www.consilium.europa.eu/uedocs/cmsUpload/Battlegroups.pdf>; and James Shea, *A NATO for the 21st Century: Toward a New Strategic Concept*, 31 FLETCHER F. WORLD AFF. 43, 47 (2007) (noticing that "the EU is developing its own military forces, such as the recently launched EU battle groups, and initiating its own defense research and investment programs via the newly created European Defence Agency").

4. *The Case of Economic Sanctions*

Iran provides a better standpoint than Iraq to gauge the extent of presidential powers in E.U. foreign policy. Despite talk to the contrary, military action in Iran is not on the immediate European horizon. Economic sanctions, by contrast, are already in place and more are imminent. The permanent members of the United Nations Security Council are currently trying to agree on a third round of sanctions. The task is proving difficult. Business with Iran is hard to give away, and no sovereign nation wants to surrender its share unless everyone else does, both officially and below the table.

Within the United Nations, the E.U. does not speak with one voice. All of its members are represented as sovereign and independent parties. The E.U. delegation has the status of mere observer. On the other hand, the E.U.'s role is, *de facto*, a relevant one. The U.N. Security Council hosts two big E.U. players: France and the United Kingdom. Germany is also a regular participant in all informal talks, so that Security Council meetings are often referred to as "5+1" affairs. While debating whether to impose a third round of sanctions on Iran, the Security Council is collecting information not only from the International Atomic Energy Agency (IAEA), but also from Javier Solana (who is on a diplomatic mission on behalf of the European Union).⁴³ Solana bears a mouthful of a title: High Representative of the Union for Foreign Affairs and Security Policy.⁴⁴ The switch to the more straightforward "Union Minister for Foreign Affairs," foreseen in the draft Constitution, was voted down because of its excessive supranational implications.⁴⁵

Foreign and security policy is recognized as a purely intergovernmental matter, so much so that it is still kept, pending reform, in a separate "Pillar" in the E.U. Treaty.⁴⁶ Unanimity, lack of enforcement capabilities, and veto power for all member states are the rule in this Pillar.⁴⁷ Yet, when the strategy of foreign and security policy is executed through a trade embargo, its proximity with commercial policy is obvious.⁴⁸ As a result, intergovernmental foreign politics comes close to the most supranational E.U. matter – external

⁴³ See Council of the European Union, Summary of Intervention by EU High Representative Javier Solana at the Conference of Foreign Affairs Committee Chairs of National Parliaments of EU Member States (Mar. 17, 2008) http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/discours/99522.pdf (reporting Solana's diplomatic initiatives in Iraq).

⁴⁴ This is the title appearing in the Reform Treaty, *supra* note 8, art. 1.19, while the current one is slightly less impressive: High Representative for the Common Foreign and Security Policy. TEU, *supra* note 8, art. 18.3.

⁴⁵ See Sieberson, *supra* note 5.

⁴⁶ See TEU, *supra* note 8, tit. V. This part of the TEU, conventionally known as the second Pillar, is characterized by a low degree of legal integration. See, e.g., *id.* arts. 23.1, 46.

⁴⁷ See *id.* art. 23.1.

⁴⁸ See, e.g., C-84/95, *Bosphorus v. Ireland*, 1996 E.C.R. I-3953.

trade policy. Economic sanctions are devised by means of Council regulations.⁴⁹ These regulations are aligned with relevant resolutions of the U.N. Security Council and require consistent compliance throughout the Union.⁵⁰ Occasional attempts to deviate from the regulations for the sake of state-specific political reasons have been ruled out by the ECJ as incompatible with the uniform application of E.U. law.⁵¹ Solana's diplomatic role is a formidable one because it secures compatibility between a very diverse political outlook and an ultimately uniform trade policy.

If the Reform Treaty survives the process of national ratification, the role of Solana's successors will be even more obviously straddled across politics and trade. The High Representative, an intergovernmental entity,⁵² will be vice-president of the Commission at the same time; therefore, the High Representative will be even closer to the supranational engine of legal integration.⁵³

5. *Functional Equivalence?*

The functionalist premise that justifies this excursus in E.U. law can now be restated as follows: if someone, or some body, in the institutional architecture of the E.U. gets to define the guidelines of conduct vis-à-vis the nuclear ambitions of Iran, then the E.U. institutional machinery hosts powers that overlap with those of the U.S. president in such matters. If any of the institutions of the E.U. can control geopolitical strategies, then the E.U. is a proper subject of comparison in a conference on presidential powers.⁵⁴

As observed above, the E.U. executive powers in external matters are most prominent in the trade sphere. By contrast, the military and diplomatic aspects of external relations are controlled by Member States and only loosely coordinated within the intergovernmental structure of the E.U.'s second Pillar. The partition, however, is weak. A quick realist glance at the picture shows how the back door of trade sanctions lets the E.U. executive exert meaningful control over the foreign policies of the member states.⁵⁵ In terms of substance,

⁴⁹ Smith, *supra* note 41, at 232.

⁵⁰ Case C-124/95, *The Queen ex parte Centro-Com Srl v. HM Treasury*, 1997 E.C.R. I-81, ¶ 47.

⁵¹ *Id.* ¶ 24-25.

⁵² The High Representative will be chosen by the European Council. Reform Treaty, *supra* note 8, art. 1.19.

⁵³ *Id.*

⁵⁴ See *infra* Part 7 (on the limits of such functional equivalences).

⁵⁵ See Piet Eeckhout, *Address at Leuven Centre for a Common Law of Europe, Ius Commune Research School: Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU External Relations* (Oct. 7, 2005), in WALTER VAN GERVEN LECTURES (5) 4 (Europa Law Publishing 2005), available at <http://www.law.kuleuven.ac.be/ccle/pdf/wvg5.pdf> (explaining how "the conclusion of a trade agreement with a third country may have stronger foreign policy than economic objectives"); Michel Petite,

functional links between the powers of the E.U. executive and those of the U.S. president exist indeed.

This statement posits the equivalence of display of military capabilities on one hand and economic strategy on the other. Arguably at least, economic sanctions can steer world politics and prevent or delay military action. In the eyes of many, concerted economic pressure is a plausible and even astute alternative to military threat.⁵⁶ The idea of effective geopolitical intervention without war can generate humor,⁵⁷ but is taken very seriously in E.U. circles.⁵⁸ Recent history sheds light on Europe's specific attitude towards external relations. Trade and politics are embedded together in the E.U.'s genetic code. The E.U. came into being in the 1950s for the purpose of preventing another war between Germany and France.⁵⁹ Economic integration was the way in which the French and others embraced their historic German enemies and hugged them all the way to military incapacitation.⁶⁰ To this day, the blending of geopolitics and free trade is the hallmark of Europeanization. It is visible in the recent accession of eastern European States, whose nascent democracies are now firmly anchored to the moors of Antwerp.⁶¹ The strategy of politics through trade has not yet exhausted its potential. At every round of new accessions, (political) peace and (economic) prosperity are the two sides of the coin with which the E.U. seeks to purchase popular consent for enlargement.⁶²

Securing supranational control over external trade has historically granted the E.U. ever growing political significance. In spite of colossal failures in the Balkans, the E.U. has elsewhere succeeded at bypassing political conflict via commercial collaboration. Europe may not have an army or a Commander-in-

Director-General, Legal Services of the EC, Current Legal Issues in the External Relations of the European Union, Lecture at European University Institute, Academy of European Law, Florence (July 7, 2006), available at http://www.ec.europa.eu/dgs/legal_service/pdf/20060707extrel.pdf ("[T]he Commission has . . . invited the Court to shed greater light on the border line between the Community domain and the Common Foreign Policy. This is not without reason, since especially development policy has many objectives in common with the CFSP . . .").

⁵⁶ See Kalypso Nicolaidis, *The Power of the Superpowerless*, in *BEYOND PARADISE AND POWER: EUROPE, AMERICA AND THE FUTURE OF A TROUBLED PARTNERSHIP* 93, 94-96 (Tod Lindberg ed., 2005).

⁵⁷ Cf. *id.* at 93 (recounting Aesop's story about a tail-less fox who persuaded all others that tails were an unnecessary nuisance).

⁵⁸ See ZYGMUNT BAUMAN, *EUROPE: AN UNFINISHED ADVENTURE* 39 (2004).

⁵⁹ See Derek W. Urwin, *The European Community: From 1945 to 1985*, in *EUROPEAN UNION POLITICS*, *supra* note 1, at 11.

⁶⁰ See *id.*

⁶¹ Antwerp is close to Brussels. Its port is of huge commercial importance in Europe, hence the maritime metaphor.

⁶² European Commission – EU Enlargement – Homepage, http://ec.europa.eu/enlargement/index_en.htm (last visited Feb. 21, 2008) ("Enlargement . . . [extends] peace, stability, prosperity, democracy, human rights and the rule of law across Europe.").

Chief, but its strategy of diplomacy through trade may be just as important. If one takes functionalism seriously, the E.U. has no real President, but it has real executive power.

6. *Athena's Ratchet*

The point of functionalism is to enable comparative reflections on seemingly very different legal systems. It is now possible to look at the E.U. legal order as a plausible source of relevant considerations. One feature, in particular, is worth highlighting: in spite of undeniable enmeshment with strongly supranational trade policies, foreign policy remains doggedly intergovernmental in form. Symbolism is important, and the Reform Treaty keeps the symbols of state sovereignty in foreign affairs at the forefront of its text.⁶³ In terms of institutional design, this insistence on traditional allocation of powers keeps foreign affairs at least geographically close to the loci of national politics.

As observed, the foreign policy of the E.U. is characterized by a striking degree of executive dominance.⁶⁴ Within the traditional structure of a nation-state, keeping foreign affairs in the hands of the executive branch is normal; in the context of the E.U., however, where democratic participation is remote and accountability less obvious, this institutional feature comes across as worrisome.

In the failed Draft Constitutional Treaty, there were a number of proposed reforms to formally emphasize the authority of the E.U. executive.⁶⁵ Of course, such executive enhancements came in a package that would have significantly boosted participatory democracy.⁶⁶ Athena, head from head, necessitates a body, and a heavier head calls for broader shoulders. It is in the nature of strong executives to equip themselves with constitutional checks and balances, so as to reinforce their own legitimacy in the aftermath of their establishment. The story of the E.U. is indeed one of executive growth spurts, legitimated *ex post* by attributes of representative and participatory democracy.⁶⁷ Over the years, a combination of judicial activism and administrative ingenuity has expanded the scope of E.U. competences far beyond the seemingly narrow path of market integration. These same forces

⁶³ Reform Treaty, *supra* note 8, art. 1.5 ("The Union shall respect the equality of Member States before the Treaties as well as their national identities In particular, national security remains the sole responsibility of each Member State.").

⁶⁴ Eeckhout, *supra* note 55, at 3.

⁶⁵ See, e.g., Draft Constitutional Treaty, *supra* note 8, art. I-28 (establishing a Union Minister of Foreign Affairs).

⁶⁶ See, e.g., *id.*

⁶⁷ The latest example of this pattern is given by the Reform Treaty, which on one hand enhances the scope of the E.U. powers in several salient areas, and on the other hand enhances the role of national parliaments in the making of E.U. law. See Reform Treaty, *supra* note 7, art. 8c.

transformed the Parliament from consultative body to legislator, and invented unforeseen regulatory mechanisms.⁶⁸

Today, this growth pattern causes much apprehension in national politics. It no longer seems sufficient to balance executive super powers with increased democratization. The trend – at least in political Euro-jargon, if not in the actual text of the Reform Treaty – is now one of consolidation of democracy within the range of established E.U. competences.⁶⁹ Further expansion of E.U. executive powers has been postponed. The Minister of Foreign Affairs that Henry Kissinger once hoped for is no minister; the Commission's power is diluted; the allocation of votes among Council Ministers is more openly linked to the peoples of each nation;⁷⁰ and the European Council – an essentially intergovernmental forum of heads of States – is more prominent than ever. The old pattern seems to be politically on hold.

In the United States, a significant portion of the debate on presidential powers is centered on the “ratchet” question.⁷¹ Emergency powers, claimed by the U.S. President on grounds of national security, get locked in and then normalized through practice, judicial endorsement, and Congress's fiat.⁷² Many scholars deplore such developments as politically dangerous and

⁶⁸ See GIANDOMENICO MAJONE, *DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH* 143-44 (2005) (arguing that “integration by stealth” has produced sub-optimal policies and a steady loss of legitimacy by the supranational institutions).

⁶⁹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Legislative and Work Programme 2008*, at 9, COM (2007) 640 final (Oct. 23, 2007), available at http://ec.europa.eu/atwork/programmes/docs/clwp2008_en.pdf.

⁷⁰ Reform Treaty, *supra* note 8, art. 1.17 (establishing that fifty-five percent of Council members representing Member States comprising at least sixty-five percent of the E.U. population forms a qualified majority).

⁷¹ James Morone, Keynote address at Boston University School of Law Conference: Extraordinary Powers in Ordinary Times (Sept. 29, 2006), *video available at* <http://www.bu.edu/law/events/audio-video/extraordinarypowers.html>; *see also* Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 235 (1998), stating:

The new presidentialism arms the President to insist that he, uniquely, possesses the constitutional prerogative, democratic mandate, and managerial competence to direct the administrative state. These claims of singular entitlement and ability to control the regulatory agenda establish a norm of confrontation, rather than collaboration. By raising the stakes for other actors in the system, such hegemonistic claims may trigger an oversight arms race. Indeed, many would say that this is exactly what happened in the 1980s, as Congress reacted to what it perceived as aggressive unilateral White House deregulatory initiatives with a variety of equally aggressive countermeasures. . . . If we encourage political actors to regard regulatory oversight as a battle for the soul of the administrative state, we may be unpleasantly surprised at the weapons each turns out to have available in its arsenal.

⁷² Morone, *supra* note 71.

constitutionally unwarranted.⁷³ Others consider the President's use of emergency powers fully legitimate and even mandated by constitutional design.⁷⁴

It may be meaningful to note, at the margin of this debate, that the once anodyne ratchet-like pattern of legal integration is now under heavy suspicion in European circles. As it is, the executive power of the Union in matters of foreign policy is significant enough to prompt back-pedaling. Further centralization, if announced openly rather than through the backdoor of trade policy, causes political resistance. The result is a patchwork of compromises, awkwardly arranged within the structure of the Reform Treaty. For instance, on one hand, the image of the E.U. presidency is strengthened.⁷⁵ Chosen from within the European Council, an essentially intergovernmental institution, the E.U. President will enjoy a relatively long and renewable term of 2.5 years.⁷⁶ The E.U. President will "ensure the external representation of the Union" in matters of common foreign and security policy.⁷⁷ On the other hand, this power is shared with the High Representative,⁷⁸ and, most importantly, "national security remains the sole responsibility of each Member State."⁷⁹ The Union's way forward is a multi-level attempt to retain reasonable distinctions between the legislative and executive functions of the Union, while at the same time guaranteeing a strong role for both national executives and national parliaments.

In the game of Europeanization, caution is the rule. The current point of political equilibrium lies in the diffused control of foreign and security policy, the stability of intergovernmental constraints, and the formal rejection of untrammelled executive action. When the stakes are high, it is not enough to control the executive from without. At the drawing table of institutional reform, the point is the careful definition of the executive's inner scope and structure.

7. Other Possibilities

As always, functionalism bears its share of fruits. A liberal education in the law benefits from a bird's eye view of the E.U. legal order, where the relation between executive and law-making institutions is configured in very unusual ways, and where a new constitutional design is currently being written on a

⁷³ See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 692 (2008).

⁷⁴ See, e.g., Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 299 n.55 (2007).

⁷⁵ See Reform Treaty, *supra* note 8, art. 1.16.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* art. 1.5.

clean slate.⁸⁰ The world of comparative law, however, is larger than functionalism. In Professor Tushnet's taxonomy of comparative methodologies, expressivism is just as important.⁸¹

Comparative expressivism consists of identifying *faux amis*, namely legal categories that seem identical in two legal systems yet carry very different meanings due to varying cultural and historical backgrounds. In the context of transatlantic comparison, James Whitman has recently given notable examples of this methodology with regard to protection of privacy and separation of church and state.⁸² In the realm of constitutional architecture, expressivism leads Jed Rubenfeld to posit that U.S. constitutional law is the result of the national democratic process, and is therefore less permeable to international influences;⁸³ in Europe, by contrast, the "legal" horrors of World War II prompted higher regard for universal values and for international constraints upon national constitutional law.⁸⁴

Both functionalism and expressivism aim at piercing the surface of legal forms. Functionalists focus on similarities of substance, hidden by divergent discourse. Expressivists focus on substantive differences, papered over by common language.

⁸⁰ See Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510, 527 (1998), stating: [W]e have no interest in amusing ourselves with institutional possibilities that will fall apart at the slightest stress. And so we should be looking not just to our imaginations, but to the experience of other countries with various alternative systems, to see which bright ideas have proven resilient under real life conditions and which have proven impracticable.

⁸¹ Tushnet, *supra* note 1, at 1269. Tushnet also identifies a third comparative methodology, "bricolage," a term borrowed from Levi-Strauss, which consists of ad hoc, unprincipled borrowings from foreign experience. *Id.* at 1285.

⁸² According to Whitman, the protection of privacy is an equally popular legal concept on both sides of the Atlantic. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1160 (2004). Whitman observes, however, that in the United States privacy refers to liberty from government's intrusion, while in Europe it implies governmental protection against intrusion by media and the market. *Id.* at 1161. By the same token, the United States's concept of separation of church and state differs from its equivalent in Europe, where the state carries on the roles of social assistance and community building once performed by the clergy. See James Q. Whitman, *Church and State: Why are America and Europe so Different?* 10 (Sept. 14, 2006) (unpublished seminar paper on file with Kadish Center for Law, Morality & Public Affairs), available at <http://www.law.berkeley.edu/centers/kadish/Whitman%20Church%20and%20State%20for%20Boalt%20091406.pdf>.

⁸³ See Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 27.

⁸⁴ *Id.* at 24-25; see also ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003) (positing that "on major strategic and international questions today, Americans are from Mars and Europeans are from Venus").

At the opposite end lies a strand of research that overlooks substantive rules, and focuses on the uniformity of legal forms, terms, and figures of speech.⁸⁵ Uniformity of legal discourse carries no interest per se, but it becomes relevant when its pervasive and virtually global diffusion steers public debate away from issues that matter.⁸⁶ The discourse on constitutional reform in Europe is characterized by headings that are coterminous with those of U.S. constitutionalism – role of the President, extent of federalism, optimal level of decentralization, institutional balance, etc. Along these lines, some of the stickiest points in the failed Draft Constitutional Treaty were remarkably predictable: How many votes per head in the Council of Ministers?⁸⁷ How many seats per state in the European Parliament?⁸⁸ How much more power to the European Council? How much less to the Commission?⁸⁹ Whither judicial review? These variations on known themes took such discursive prominence as to obscure issues of wealth redistribution, local government, and balance between free markets and social protection. The risk of uniform juridical thought is the suppression of other, less popular and less universal legal issues.⁹⁰ Today, transatlantic comparison is at its best when it reveals a dramatic absence of differences – a flattening of legal and political discourse along lines vaguely characterized as “western,” and increasingly detached from meaning.

⁸⁵ See generally MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (2004) (comparing judicial discourse and identifying overlaps in the adjudicatory styles of the European Court of Justice and the U.S. Supreme Court).

⁸⁶ See Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT’L L. & POL. 1, 6 (2006) (discussing the impact of a uniform western conception of private law upon the development of post-national sovereignty.); Anna di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 504 (2006) (reflecting upon the concept of soft law as a category invented and re-invented by the West at large as a metaphor for many diverse phenomena.).

⁸⁷ HUGO BRADY & KATINKA BARYSCH, CTR. FOR EUROPEAN REFORM, THE CER GUIDE TO THE REFORM TREATY 2 (2007), http://www.cer.org.uk/pdf/briefing_reform_treaty_17oct07.pdf (discussing Poland’s demand for additional votes in the Council of Ministers).

⁸⁸ See *EU Parliament Votes to Cut Seats for 17 Countries*, EUBUSINESS, Oct. 11, 2007, <http://www.eubusiness.com/Institutions/1192099627.04/> (explaining the issues involved in capping the number of members of the European Parliament to 750, and Italy’s ensuing resentment).

⁸⁹ The Reform Treaty foresees a diminished role for the Commission. See BRADY & BARYSCH, *supra* note 87, at 2 (explaining that “after 2014, the number of commissioners will be capped at two-thirds of the number of member-states. A rotation principle will determine which country sends a commissioner for any given term”).

⁹⁰ See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 22-23 (David M. Trubek & Alvaro Santos eds., 2006).