

# WHAT CAN EUROPE TELL US ABOUT THE FUTURE OF AMERICAN FEDERALISM?

Ernest A. Young\*

It is humbling for an American scholar of federalism to admit that the most interesting developments in federalism are happening in Europe, not the United States. But this has been true for some time. Kicking off the European Union's convention to draft a constitutional treaty in 2001, former French president Valéry Giscard d'Estaing compared the proceedings to "the famous convention of Philadelphia of 1787."<sup>1</sup> The comparison was apt, in that the fundamental relationship between Brussels and the EU's Member States has been under renegotiation for much of the past decade and a half. Since the unsuccessful constitutional convention,<sup>2</sup> the EU has seen the world's most significant contemporary crisis of fiscal federalism,<sup>3</sup> foundational disagreements between the European Court of Justice and the constitutional courts of the Member States over judicial supremacy,<sup>4</sup> and the prospect of a real-live secession by a major Member State.<sup>5</sup>

American federalism has often served as an instructive example for those developments—sometimes as a role model, perhaps more often as a cautionary tale.<sup>6</sup> The general federalism literature on this side of the Atlantic, however, has paid relatively little attention to Europe. This inattention is both intellectually unsatisfying and, increasingly, practically dangerous. As the

---

\* Alston & Bird Professor, Duke Law School.

1. Valéry Giscard d'Estaing, Letters to the Editor, *The European Convention*, INT'L HERALD TRIB., Dec. 27, 2001, at 7, [http://www.lexisnexis.com.ezproxy1.lib.asu.edu/hottopic/lnacademic/?verb=sr&csi=8357&sr=HEADLINE\(Letters+to+the+Editor\)%2BAND%2BDATE%2BIS%2B2001](http://www.lexisnexis.com.ezproxy1.lib.asu.edu/hottopic/lnacademic/?verb=sr&csi=8357&sr=HEADLINE(Letters+to+the+Editor)%2BAND%2BDATE%2BIS%2B2001).

2. The constitutional treaty was shelved after successive rejections by Dutch and French voters in 2005. But much of the constitutional treaty's substance was adopted—*without* popular referenda in most Member States—in the 2007 Treaty of Lisbon.

3. See, e.g., JEAN PISANI-FERRY, *THE EURO CRISIS AND ITS AFTERMATH* 35 (2014).

4. See, e.g., Russell Miller, *Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration*, 54 VA. J. INT'L L. 579 (2014).

5. HAROLD D. CLARKE, MATTHEW GOODWIN & PAUL WHITELEY, *BREXIT: WHY BRITAIN VOTED TO LEAVE THE EUROPEAN UNION* (2017).

6. See, e.g., Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002) [hereinafter Young, *Member State Autonomy*].

European Union has slid into a series of crises over the euro, terrorism and refugees, and now Brexit, it has become increasingly urgent to understand what is going on over there and what it portends for our own federal system. In some instances, these crises may offer previews of coming attractions for America; we have, after all, our own debates over sovereign debt, immigration, and populist politics. In other respects, European structures and solutions may offer some options that Americans have previously failed to consider or appreciate.

It is, alas, easier to see that Europe can teach us something important than to decipher what the actual lessons are. Comparative law has long encouraged a healthy skepticism about deriving “answers” to one country’s problems from another’s experience,<sup>7</sup> and the crises rocking Europe are so complex that it will be decades before they are understood with any confidence. But all this counsels humility, not inattention. It is time to start talking about what the arc of European federalism can tell us about federalism in our own system.

At the outset, one must acknowledge considerable debate as to whether the European Union is properly described as a federal system at all.<sup>8</sup> In other work, I have focused on competing visions of the EU as “federal” and “intergovernmental” in nature.<sup>9</sup> It seems best to begin here with capacious standard definitions. Political scientist Jenna Bednar, for example, classifies a government as federal if it meets structural criteria of “geopolitical division” (mutually exclusive territories are constitutionally recognized and may not be abolished by the central authority); “independence” (state and national governments have electorally or otherwise independent bases of authority); and “direct governance” (each level of government governs its citizens directly and is constitutionally sovereign in at least one policy realm).<sup>10</sup> The EU is plainly a federal system under these sorts of criteria, even

---

7. See, e.g., Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001) (encouraging cautious attention to other federal systems while noting difficulties in comparison).

8. See, e.g., Andrew Moravcsik, *Europe Without Illusions*, in EUROPE WITHOUT ILLUSIONS: THE PAUL-HENRI SPAAK LECTURES, 1994–1999, at 3, 8 (Andrew Moravcsik ed., 2005).

9. See Ernest A. Young, *The European Union: A Comparative Perspective* [hereinafter Young, *Comparative Perspective*], in 1 OXFORD PRINCIPLES OF EU LAW (Robert Schutze & Takis Tridimas eds., forthcoming 2018) (manuscript at 3) (on file with Duke Law School Library), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6271&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6271&context=faculty_scholarship).

10. JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 18–19 (2009). Professor Bednar’s definition is similar to William Riker’s. See WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 11 (1964) (stating that a system is federal if (1) it involves “[t]wo levels of government rul[ing] over the same land and people,” (2) “each level has at least

if it may also be usefully analyzed as an international organization or some other sort of entity.<sup>11</sup> The point is simply to suggest that comparisons to other federal systems may be useful—not to exclude other models.

I want to focus on two sets of questions about European federalism, each of which has significant implications for America. The first involves the factors that limit centralization in Europe. Most observers seem to consider the EU to be a less centralized polity than the United States,<sup>12</sup> yet the scope of the EU's regulatory jurisdiction is equal to or greater than that of the American national government. Member State autonomy vis-à-vis Brussels owes much more the disparity in governmental capacity and resources between the Member States and the Union, as well as to the primary identification of Europeans with their Member States, than it does to any constitutive limitation on the Union's powers. This suggests that the American literature's focus on regulatory jurisdiction—the old problem of limited and enumerated powers—may be misplaced. American scholars need to pay a lot more attention to the structure and capacity of the institutions that enforce national law, as well as to the interaction of Americans' dual identities as citizens of state and nation.

The second set of questions arises from Europe's recent travails. Over the past several years, the European Union has faced a wave of successive crises over the euro, terrorism, migration and refugees, and the rise of euro-skepticism illustrated by the United Kingdom's Brexit vote. Americans have viewed these developments with concern, but have not generally asked what they portend for American federalism. The euro crisis, however, illustrates the central importance of *fiscal* federalism—the relationship between the

---

one area of action in which it is autonomous," and (3) "[t]here is some guarantee . . . of the autonomy of each government in its own sphere"); see also DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 12 (1987) ("The simplest possible definition is *self-rule plus shared rule*. Federalism thus defined involves some kind of contractual linkage of a presumably permanent character that (1) provides for power sharing, (2) cuts around the issue of sovereignty, and (3) supplements but does not seek to replace or diminish prior organic ties where they exist."); 5 *OXFORD ENGLISH DICTIONARY* 795 (J. A. Simpson ed., 2d ed. 1989) (defining "federal" as "that form of government in which two or more states constitute a political unity while remaining more or less independent with regard to their internal affairs").

11. See, e.g., DAVID MCKAY, *DESIGNING EUROPE: COMPARATIVE LESSONS FROM THE FEDERAL EXPERIENCE* 8–9 (2001) (arguing that the EU meets standard federal criteria); see also Andrew Moravcsik, *The European Constitutional Settlement*, in *MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE AT FIFTY* 23, 47 (Sophie Meunier & Kathleen R. McNamara eds., 2007) [hereinafter Moravcsik, *Constitutional Settlement*] (viewing the EU as an international organization); see also Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 *COLUM. L. REV.* 628 (1999) (viewing the EU as a giant administrative agency).

12. See, e.g., Moravcsik, *Constitutional Settlement*, *supra* note 11, at 24.

taxing, spending, and borrowing authority of the center and the periphery. The American states (and Puerto Rico) face debt crises of their own, and these crises are already requiring the national government to reconsider the means by which it supports troubled states and territories.<sup>13</sup> Likewise, intra-European disagreements about how to regulate immigration and its differential impact on the Member States have echoes in American disputes over immigration policy between Washington, D.C. and the border states.<sup>14</sup> Finally, the Brexit vote and the parallel rise of Euroskeptic movements in France and other Member States reflects profound popular concerns about the legitimacy of governance at the center.<sup>15</sup> Although the United States has not generally been thought to suffer from the same sort of “democratic deficit” that haunts European discourse, we are experiencing profound frustration with gridlocked and nonresponsive government in Washington, reflected in the precipitous decline in public trust in national governing institutions.<sup>16</sup> We are unlikely to see a “Texit” (or perhaps more likely, a “Utexit” or “West Virgexit”) but it is nonetheless time to ask how the eroding legitimacy of national government may affect American federalism.

---

13. See, e.g., Matt Egan, *How Illinois became America's Most Messed-up State*, CNN (July 1, 2017, 8:50 AM), <http://money.cnn.com/2017/06/29/investing/illinois-budget-crisis-downgrade/index.html?iid=EL> (describing Illinois's fiscal crisis); Marry Williams Walsh, *Puerto Rico: A Debt Problem that Kept Boiling Over*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/business/dealbook/puerto-rico-debt.html?mcubz=0> (discussing Puerto Rico's debt default). See generally WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS (Peter Conti-Brown & David Skeel eds., 2012) (discussing the fiscal crises in various states).

14. See, e.g., Tal Kopan, *House Passes 'Kate's Law' and Bill Declaring War on Sanctuary Cities*, CNN (June 29, 2017, 6:30 PM), <http://www.cnn.com/2017/06/29/politics/kates-law-sanctuary-cities-house-bill-immigration/index.html>; *Texas Leads Coalition of States in Lawsuit Against Obama Immigration Actions*, FOX NEWS (Dec. 3, 2014), <http://www.foxnews.com/politics/2014/12/03/texas-leads-lawsuit-by-17-states-against-obama-immigration-actions.html>.

15. See, e.g., Bruce Stokes, *Euroskepticism Beyond Brexit: Significant Opposition in Key European Countries to an Ever Closer EU*, PEW RES. CTR. (June 7, 2016), <http://www.pewglobal.org/2016/06/07/euroskepticism-beyond-brexit/>.

16. See, e.g., Clare Malone, *Americans Don't Trust Their Institutions Anymore*, FIVETHIRTYEIGHT (Nov. 16, 2016, 12:54 PM), <https://fivethirtyeight.com/features/americans-dont-trust-their-institutions-anymore/>. A growing literature explores the significance of political trust, but it generally does not focus on the dynamics of trust in federal systems. See, e.g., MARC J. HETHERINGTON, *WHY TRUST MATTERS: DECLINING POLITICAL TRUST AND THE DEMISE OF AMERICAN LIBERALISM* (2006).

## I. JURISDICTION, CAPACITY, AND IDENTITY

American federalism debates have tended to focus on the scope of national regulatory jurisdiction. That was the issue in landmark Supreme Court decisions like *United States v. Lopez*<sup>17</sup> and *Gonzales v. Raich*.<sup>18</sup> It was also the question on which most people focused in *National Federation of Independent Business v. Sebelius*,<sup>19</sup> although I shall suggest it was not the most important part of that decision. American discussions of federalism have tended to equate what the national government *can* do with what it *will* do, and they have analyzed “can” in terms of constitutional jurisdiction rather than pragmatic capacity. They have assumed, moreover, that the states will retain only those functions that are constitutionally reserved to them under the Tenth Amendment. Certainly one can find important exceptions to these tendencies in the literature,<sup>20</sup> but the general focus has remained on the scope of the national government’s constitutionally-enumerated powers and the corresponding enclaves that are reserved to the states.

It is not hard to see why this focus arose or why it persists. Constitutional lawyers tend to gravitate toward the limits on governmental powers—particularly those limits that courts may enforce. They tend to leave what government may choose to do within those limits to political scientists and public policy types. But constitutional law operates within this policy space as well, by framing many of the procedures by which decisions are made,<sup>21</sup> structuring the political accountability of those who make them,<sup>22</sup> and affecting the resources available to carry them out.<sup>23</sup> Neglecting these dynamics distorts our view of the role that constitutional law plays in our federal system.

Looking to Europe helps clarify the centrality of these non-jurisdictional constitutional factors. Europe’s version of the enumerated powers doctrine is the principle of “conferral,” which holds that the EU may exercise only those powers conferred on it by its foundational treaties. Hence, Article 5 of the treaty establishing the European Community provided that “[t]he Community

---

17. 514 U.S. 549 (1995).

18. 545 U.S. 1 (2005).

19. 569 U.S. 519 (2012).

20. See, e.g., Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014).

21. See U.S. CONST. art. I, § 7.

22. See *id.* art. I, §§ 2, 3; *id.* art. II, § 1.

23. See *id.* amend. XVI.

shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”<sup>24</sup> Robert Schütze has described this provision as “the European equivalent of the Tenth Amendment to the American Constitution.”<sup>25</sup>

Although originally conceived in narrow terms,<sup>26</sup> these conferred powers have become quite broad over time. This has occurred not only through the addition of new EU competences in successive treaties, but also through the expansive interpretation of the EU’s power over the internal market in Article 100a and its implied powers in Article 235.<sup>27</sup> These provisions have functioned effectively as a Commerce Clause and a Necessary and Proper Clause, respectively, with results that should surprise no one familiar with *Wickard v. Filburn*<sup>28</sup> and *McCulloch v. Maryland*.<sup>29</sup> Just as Congress’s power over interstate commerce came to be used for a variety of non-economic objectives, “[t]he Commission and the European Council . . . conceptualized the single market in a broader, more holistic, manner. Consumer welfare, social policy, and environmental policy were regarded as important facets of the internal market strategy.”<sup>30</sup> More generally, a British Member of the European Parliament recently concluded that “[t]he EU now has exclusive competence in some, and a degree of competence in almost all, policy areas.”<sup>31</sup>

---

24. Consolidated Version of the Treaty Establishing the European Community art. 5, Dec. 24, 2002, 2002 O.J. (C 325) 41.

25. ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW 130 (2009).

26. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2433–34 (1991) (“[T]he ‘original’ understanding [of the various European agreements] was that the principle of enumeration would be strict and that jurisdictional enlargement . . . could not be lightly undertaken.”); see also *id.* at 2434 (“This understanding was shared not only by scholars, but also by the Member States and the political organs of the Community . . .”).

27. See, e.g., Paul Craig, *Competence and Member State Autonomy: Causality, Consequence and Legitimacy*, in THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 11, 11 (Hans Wolfgang-Micklitz & Bruno De Witte eds., 2012); Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 J. PUB. POL’Y 95, 125 (1994).

28. 317 U.S. 111, 128–29 (1942) (upholding Congress’s power to regulate small-scale activities with indirect connections to the interstate economy).

29. 17 U.S. (4 Wheat.) 316, 406–07 (1819) (upholding Congress’s power to use unenumerated means to further its enumerated objectives in Article I).

30. Craig, *supra* note 27, at 20.

31. Geoffrey Van Orden, *Britain’s Departure from “Ever Closer Union” is of Great Significance*, LONDON SCH. ECON. & POL. SCI.: BREXIT (Apr. 28, 2016), <http://blogs.lse.ac.uk/brexit/2016/04/28/britains-departure-from-ever-closer-union-is-of-great-significance/>.

Much like the United States, then, the European Union has moved from a regime of “dual federalism,” predicated on sharp jurisdictional divisions between the central government and its subunits, to “cooperative federalism,” in which both levels of government share responsibility over most regulatory subjects.<sup>32</sup> One would be hard pressed to come up with anything that the EU can’t regulate under the powers that the Treaties give to Brussels, as well as the broad implied powers jurisprudence of the European Court of Justice. A somewhat notorious 2001 EU directive, for example, regulates the use of ladders in the workplace.<sup>33</sup> Nonetheless, the EU is generally perceived to be far more decentralized than the U.S. Andrew Moravcsik has written, for example, that “[t]he EU remains, despite a few federal elements, essentially a confederation of nation-states: the most ambitious and successful among international organizations, rather than a federation aiming to replicate and supplant European nation-states.”<sup>34</sup>

For American scholars this presents a puzzle. If Brussels and Washington enjoy largely equivalent regulatory jurisdiction, why does the EU remain so much less centralized than the United States? I think the answer actually has at least three distinct aspects.

The first has to do with legal culture. Although the EU institutions, including the European Court of Justice as well as the Commission, have interpreted the Union’s conferred powers expansively, one still comes away with the sense that they have not been read as aggressively as they might have been on this side of the Atlantic. An American lawyer looks at, say, the treaty provisions allowing the EU to regulate in order to create and preserve an internal market among the Member States, and says “Bingo, it’s a Commerce Clause!” And we know that commerce can be *anything*, because everything

---

32. See SCHÜTZE, *supra* note 25, at 346. On these different models of federalism, see, Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in FEDERALISM AND SUBSIDIARITY: NOMOS LV, at 34 (James E. Fleming & Jacob T. Levy eds., 2014).

33. Directive 2001/45/EC, of the European Parliament and of the Council of 27 June 2001 Amending Council Directive 89/655/EEC Concerning the Minimum Safety and Health Requirements for the Use of Work Equipment by Workers at Work, 2001 O.J. (L 195) 46. The directive states that it “is a practical contribution towards creating the social dimension of the internal market[,]” and it purports to comply with the EU’s subsidiarity principle by asserting that it “is the most appropriate means of achieving the desired objectives and does not go beyond what is necessary for that purpose.” *Id.*; see also Charles Wyplosz, Eur. Comm’n for Econ. & Fin. Affairs, *The Centralization–Decentralization Issue*, at 26 & n.18 (Sept. 26, 2015), [https://ec.europa.eu/info/sites/info/files/file\\_import/dp014\\_en\\_2.pdf](https://ec.europa.eu/info/sites/info/files/file_import/dp014_en_2.pdf) (suggesting that such directives are “needless entrenchments on national sovereignty”).

34. Moravcsik, *Constitutional Settlement*, *supra* note 11, at 25.

affects it.<sup>35</sup> Hence we end up with a Federal Government prosecuting robberies of local drug dealers and incarcerating sex offenders,<sup>36</sup> all in the name of protecting interstate commerce. The American enumerated powers jurisprudence has deconstructed the phrase “commerce among the several states” to the point that it largely lacks meaning today.<sup>37</sup>

My strong impression is that Europeans generally don’t think that way. They are not cursed by Legal Realism, or at least not to the same degree as American lawyers, and so when they read a textual provision purporting to grant a limited regulatory power, their first instinct is *not* to deconstruct the purported limits on that power and turn it into a blank check. The fact that EU powers may be expanded by new treaties—and that such treaties have proved fairly frequent—may also relieve the pressure for adventurous interpretation of existing provisions. Because the U.S. Constitution is functionally unamendable, after all, American lawyers have a strong incentive to find some basis for desired innovations in the original text. In any event, I submit that one reason that the EU’s powers are more limited in practice than Congress’s is that European lawyers aren’t as inclined to kick over the limits every time they want to legislate more broadly.

But I think two other aspects of the puzzle are considerably more important. Both illustrate the relative importance of regulatory jurisdiction vis-à-vis other aspects of the federal balance. To begin, the EU is more decentralized than the United States because despite the breadth of the EU’s jurisdiction, its actual institutional capacity is far more limited in several respects:

1. The EU’s capacity to make decisions independent of the Member States is far more limited than Congress’s;
2. it has far less money to spend, and far less power to raise more, than does the American federal government; and

---

35. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (holding that home-grown medicinal marijuana use affects the interstate market for illicit drugs); *Wickard v. Filburn*, 317 U.S. 111, 130–33 (1942) (holding that on-farm wheat consumption sufficiently affects the interstate market for wheat).

36. See *Taylor v. United States*, 136 S. Ct. 2074, 2081–82 (2016) (holding that in a prosecution under the Hobbs Act, 18 U.S.C. § 1951, for robbery of a drug dealer, federal prosecutors need not show that the relevant drugs moved in or affected interstate commerce); *United States v. Comstock*, 560 U.S. 126, 149 (2010) (upholding federal civil commitment of sexually dangerous persons as necessary and proper to operation of a federal prison system, which is in turn necessary and proper to enforcement of Congress’s enumerated powers).

37. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994) (“Of course, in this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds. There is now virtually no significant aspect of life that is not in some way regulated by the federal government.”).



3. it depends on Member States almost completely to implement European law.

Take decision-making first. One may fairly debate the height of the institutional hurdles facing EU legislation,<sup>38</sup> but the EU legislative process plainly incorporates a great deal more *political* constraint on central lawmaking that adversely affects the Member States than does its American analog.<sup>39</sup> The EU Council—which retains a decisive role in approving EU legislation—does not simply represent the Member States; it is actually *composed* of Member State ministers or (when it meets as the Council of Europe) heads of state. And although the Council’s traditional unanimity requirement has largely eroded over time, the “qualified majority” voting procedure (as well as the EU’s norms favoring consensus decision-making) still affords considerable scope for minorities of states to block legislation they oppose.<sup>40</sup> In any event, one need only have paid marginal attention to the development of recent European crises over the euro, terrorism, and migration to note that the political lead has been taken by leaders of the Member States, not the Community institutions.<sup>41</sup> The EU institutions are not yet the problem-solvers of first resort when the going gets tough. And German Chancellor Angela Merkel, not EU Council President Donald Tusk, remains the essential figure in EU politics.

---

38. Compare, e.g., Moravcsik, *Constitutional Settlement*, *supra* note 11, at 34 (“Formally, [the European lawmaking process] makes everyday legislation in the EU as difficult to enact as a constitutional amendment in the USA.”), with Young, *Comparative Perspective*, *supra* note 9, at 22–23 (noting that the EU legislates at a rate comparable to Congress and that its constitutive treaties are amended far more often than the U.S. Constitution).

39. See Young, *Comparative Perspective*, *supra* note 9, at 23.

40. See *id.* at 24–25; see also LUUK VAN MIDDELAAR, *THE PASSAGE TO EUROPE: HOW A CONTINENT BECAME A UNION* 41 (Liz Waters trans., 2013) (“[T]o this day most decisions—and certainly the more important—are taken on the basis of consensus between the member states.”). To put the situation in terms of American legislative procedure, the current state of EU legislation seems analogous not simply to a pre-Seventeenth Amendment U.S. Senate, in which the Senators are selected by the state legislatures, but rather one in which those legislatures also have an absolute right to instruct their Senators on particular votes *and* in which each Senator has a “blue slip”—like veto over not only nominees to office, as in this country, but much legislation.

41. See, e.g., Sergio Fabbrini, *The European Council, Careful of the Elephant that Prowls Brussels*, ITALY 24 (Mar. 20, 2017), <http://www.italy24.ilsole24ore.com/art/politics/2017-03-10/the-european-council-careful-of-the-elephant-that-prowls-brussels-182601.php?uuid=AEPrckl> (“To emerge from decision-making stall, leaders of the strongest national governments have taken unilateral action to manage challenges that threatened their internal consensus.”); Charles Grant, *What is Wrong with the European Commission?*, CTR. FOR EUR. REFORM (June 27, 2013), <http://www.cer.eu/insights/what-wrong-european-commission/> (observing that “the euro crisis has drawn the EU into taking increasingly political executive decisions”).

Perhaps even more important, “the EU does not (with a few exceptions) enjoy the power to coerce, administer, or tax.”<sup>42</sup> Start with the money. The EU is, as Daniel Ziblatt notes, “fiscally speaking, a political pygmy; its actual budget is minuscule, and it is arguably the largest political unit in history *without* the power to raise debt for itself.”<sup>43</sup> EU revenue comes predominantly from three sources: duties on imports, collected by the Member States and transferred to the EU; a share of the value-added tax collected by the Member States; and a levy on the gross national income of each Member State capped at slightly under 1.3 percent.<sup>44</sup> The last of these—which is simply a transfer from Member State budgets to the central authority—now accounts for about sixty percent of EU revenue.<sup>45</sup> In this, the EU looks much like America under the Articles of Confederation (although without the incessant failures by the American states to actually pay their contributions<sup>46</sup>). None of this yields a great deal of revenue, and even the duties and VAT components are not structured in such a way as to allow the EU much flexibility to pursue regulatory objectives through the tax code.<sup>47</sup>

Given these modest revenues, the EU accounts for only about two percent of European public spending; the U.S. national government, on the other hand, collects roughly seventy percent of American tax revenue and accounts for over half of total public expenditure in the United States.<sup>48</sup> Hence, “the EU is not anywhere near other federal states” in terms of fiscal muscle.<sup>49</sup> Much of the EU budget, moreover, goes to the common agricultural policy and transfers to developing regions; “[I]ittle room exists for discretionary

---

42. Moravcsik, *Constitutional Settlement*, *supra* note 11, at 34.

43. Daniel Ziblatt, *Between Centralization and Federalism in the European Union*, in *THE GLOBAL DEBT CRISIS: HAUNTING U.S. AND EUROPEAN FEDERALISM* 113, 113 (Paul E. Peterson & Daniel Nadler eds., 2014); *see also* Moravcsik, *Constitutional Settlement*, *supra* note 11, at 35 (“Redistributing wealth by taxation and spending is the preeminent activity of the modern state, yet the EU does little of this.”).

44. *See, e.g.*, EUROPEAN COMM’N, EUROPEAN UNION PUBLIC FINANCE 237 (4th ed. 2008), <https://www.ogora-parl.org/sites/default/files/EU%20public%20finance%20-%202009.pdf>.

45. *See id.* at 238.

46. On the failure of the states to pay their “requisitions,” *see* CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 43–45 (2005).

47. *Compare, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) (holding that Congress could employ its taxing power to encourage individuals to purchase health insurance), *with* *United States v. Kahriger*, 345 U.S. 22, 27 (1953) (noting that the Court had upheld a wide variety of taxes with regulatory effects).

48. Wyplosz, *supra* note 33, at 8; Moravcsik, *Constitutional Settlement*, *supra* note 11, at 35; *see also* PISANI-FERRY, *supra* note 3, at 153 (noting that Europe “is not equipped with a meaningful federal budget”).

49. Wyplosz, *supra* note 33, at 8.

spending by Brussels technocrats.”<sup>50</sup> This minuscule budget has led some commentators to conclude that “the EU does not have the main attributes of a federal state.”<sup>51</sup>

The lack of broad fiscal powers sharply constrains the sorts of policies that the EU can enact and, therefore, the functions that Brussels can “take over” from the Member States. As Giandomenico Majone has suggested, lack of fiscal authority effectively limits the EU to regulatory policies, as opposed to non-regulatory or benefits-based programs.<sup>52</sup> The EU also lacks the means to play the counter-cyclical role of ratcheting up welfare spending in times of recession that central governments typically play in federal states.<sup>53</sup> And these fiscal constraints deprive the EU institutions of a tool frequently used by Congress to regulate outside the scope of its enumerated authority, which is the ability to make large financial grants to state governments conditioned on the implementation of federal policies that Congress could not enact directly.<sup>54</sup> Perhaps most important, the EU’s budgetary constraints leave few opportunities to win the loyalty of European citizens by providing essential benefits analogous to American programs like Social Security or Medicare.<sup>55</sup>

These disparities in resources are, unsurprisingly, mirrored in administrative capacity. As Professor Moravcsik points out, “the notion of a European ‘superstate’ swarming with Brussels bureaucrats is a delusion (or a deception) of Euroskeptics.”<sup>56</sup> The European Commission, the principal administrative arm of the EU, employed 32,666 people in 2013—which made it about half the size of the U.S. Social Security Administration and a slightly smaller employer than the City of Chicago.<sup>57</sup> This lack of administrative

50. Moravcsik, *Constitutional Settlement*, *supra* note 11, at 35; *see also* Wyplosz, *supra* note 33, at 8 (noting that “[l]ess than half of the Commission’s budget is used for collective spending, mostly the administrative costs of the EU institutions . . . [T]he remaining is used for transfers, not for direct spending.”).

51. Wyplosz, *supra* note 33, at 8.

52. *See* Giandomenico Majone, *The European Commission as Regulator*, in *REGULATING EUROPE* 61, 61 (Jeremy Richardson ed., 1996); *see also* PISANI-FERRY, *supra* note 3, at 157 (identifying difficulties in creating a larger budget for the euro zone or the EU as a whole).

53. Wyplosz, *supra* note 33, at 10.

54. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (upholding Congress’s requirement that states raise their minimum drinking age to twenty-one as a condition on receipt of a portion of federal highway funds).

55. Even in the area of farm policy, where most of the EU’s money goes, national payments still outstrip benefits to farmers from the EU. *See* Moravcsik, *Constitutional Settlement*, *supra* note 11, at 36.

56. *Id.*

57. *Compare* EUR. COMM’N, HR KEY FIGURES CARD: STAFF MEMBERS (2017), [http://ec.europa.eu/civil\\_service/docs/hr\\_key\\_figures\\_en.pdf](http://ec.europa.eu/civil_service/docs/hr_key_figures_en.pdf), *with* RAHM EMMANUEL, CITY OF CHICAGO: 2013 BUDGET OVERVIEW 23 (2013),

capacity radically constrains the EU's ability to enforce its own laws and administer its own programs. Outside certain key institutions like the European Central Bank or the Commission's Competition Directorate, the overwhelming responsibility for enforcing EU law falls to the Member States.<sup>58</sup>

A final centrifugal force in the EU is the strong tendency of Europeans to identify primarily with their national political communities.<sup>59</sup> Europe has the opposite problem: Citizens strongly identify with their Member States—as Frenchmen, Germans, or Poles—but it is not clear they think of themselves as “Europeans.”<sup>60</sup> Both the Maastricht and Lisbon treaties bow to this reality by stating explicitly that “[t]he Union shall respect the national identities of its Member States.”<sup>61</sup>

The primary identification of European citizens with their Member States—as well as the far more democratic quality of governance at the Member State level than in Brussels—has meant that the Member States remain the primary font of governmental legitimacy within the EU. In the United States, by contrast, the national government has long drawn upon a well of legitimacy at least as deep as those of the States (although public opinion data showing radical declines in public trust for national institutions may be altering this picture<sup>62</sup>). Europeans' primary identification with their Member States enhances political checks on the EU's use of its conferred powers and likely goes a long way toward explaining why Brussels has not

---

[http://www.cityofchicago.org/content/dam/city/depts/obm/supp\\_info/2013%20Budget/2013Overview.pdf](http://www.cityofchicago.org/content/dam/city/depts/obm/supp_info/2013%20Budget/2013Overview.pdf) (proposing 33,550 employees in 2013); SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 2.73 (2016), <https://www.ssa.gov/policy/docs/statcomps/supplement/2016/supplement16.pdf> (listing 65,873 employees).

58. See Moravcsik, *Constitutional Settlement*, *supra* note 11, at 36. Professor Moravcsik also notes the EU's general lack of coercive capacity: “It has no army, police and intelligence capacity, and a miniscule tax base, discretion on spending, and administration.” *Id.* at 35.

59. See, e.g., VAN MIDDELAAR, *supra* note 40, at 212–25 (noting the problem and discussing different historical strategies for overcoming it); Hartmut Kaelble, *Identification with Europe and Politicization of the EU Since the 1980s*, in EUROPEAN IDENTITY 193, 205–08 (Jeffrey T. Checkel & Peter J. Katzenstein eds., 2009) (collecting evidence).

60. See, e.g., Anthony D. Smith, *National Identity and the Idea of European Unity*, 68 INT'L AFF. 55, 58 (1992).

61. Treaty on European Union tit. I, art. F, Feb. 7, 1992, 1992 O.J. (C 326); see also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 4(2), Dec. 13, 2007, 2007 O.J. (C 306); Leonard F. M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 40–44 (2010) (discussing these Lisbon treaty provisions).

62. See *State Governments Viewed Favorably as Federal Rating Hits New Low*, PEW RES. CTR. (Apr. 15, 2013), <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/>.

been granted greater fiscal and bureaucratic resources.<sup>63</sup> And as the Brexit vote and the rise of Euroskeptic populism on the Continent demonstrate, nationalist ties to the Member States can blossom into a significant threat to integration.<sup>64</sup>

So what can Americans learn from all this? Most fundamentally, we should stop obsessing about the scope of regulatory jurisdiction. The point is not that jurisdiction is unimportant; surely a real constraint on the scope of congressional regulation would be a powerful limit on national power. But we have arguably *never* had such a constraint. In the early Republic, the Supreme Court never struck down a federal statute on the ground that it exceeded Congress's enumerated powers. And while the political branches may have internalized some sort of jurisdictional constraint,<sup>65</sup> they have tended to get over it when the national interest seemed to truly compel federal action. Likewise, even the *Lochner*-era Court was a highly inconsistent enforcer of jurisdictional limits on national power.<sup>66</sup> And the Rehnquist Court's "Federalist Revival," which struck down national legislation on enumerated powers grounds in a few cases,<sup>67</sup> did more to fuel the careers of young academics than to meaningfully limit Congress's powers.<sup>68</sup> What Europe teaches, however, is that meaningful federalism can flourish even in a regime where central regulatory jurisdiction is exceptionally broad. We should focus more on how this can be so.

More particularly, we should think hard about representation, governmental capacity, and identity in our own system. The political safeguards of Member State autonomy work in Europe because the Member States' representation is so direct.<sup>69</sup> The EU Council represents the Member

---

63. See, e.g., Wyplosz, *supra* note 33, at 8, 12.

64. See CLARKE, GOODWIN & WHITELEY, *supra* note 5, at 173 (citing English national identity as a contributing factor in the Brexit vote). It is unclear that this factor was as important as more specific concerns about immigration, however. See *id.* at 161. Moreover, national identities can cut in different directions; those identifying as Scottish tended to vote *against* Brexit. See *id.*

65. See, e.g., Wechsler, *supra* note 20, at 545.

66. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (demonstrating that the *Lochner*-era Court upheld many federal statutes against constitutional challenges on enumerated powers grounds).

67. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down the federal Violence Against Women Act as exceeding Congress's commerce power); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down the Religious Freedom Restoration Act as exceeding Congress's enforcement authority under the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (striking down the federal Gun Free School Zones Act as exceeding Congress's commerce power).

68. Which is not to say that the (then) young academics are not eternally grateful.

69. See, e.g., Young, *Member State Autonomy*, *supra* note 6, at 1689.

States' governing institutions, not simply people and interests in the Member States. The political safeguards of federalism in our own system are far more attenuated.<sup>70</sup> At best, national politicians elected by particular states are only imperfectly responsive to the interests of state governments;<sup>71</sup> at worst, they may view state politicians as rivals for political and financial support.<sup>72</sup> Perhaps the mistake of “political safeguards” scholarship in this country has been its focus on federal representatives—who are, after all, national officials—rather than on the important role that state officials play in implementing and enforcing federal law.

American scholars are starting to wake up to what my friend Heather Gerken calls “the power of the servant”<sup>73</sup>—that is, the ability of state officials who implement federal law to shape the content and impact of that law, sometimes in ways that are quite different from what federal authorities intend. The EU experience puts an exclamation point on this line of research, because there the central authority is almost completely dependent on potentially “uncooperative federalists” to implement European law. It suggests that we ought to spend less time worrying about the scope of the Commerce Clause and more about how federal programs structure the role of state implementation. That would suggest, for example, that the most important federalism case in recent memory is not *Lopez* but *Sebelius*'s

---

70. See, e.g., Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 213, 237 (Kalypso Nicolaidis & Robert Howse eds., 2001) (noting that, in contrast to the EU, “neither the governments nor the legislatures of the several States in their corporate capacities are represented in the federal decision-making bodies”); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223–24 (2000) (pointing out that in America, Members of Congress have no particular incentive to protect the prerogatives of state governments). Professor Kramer thought that political parties created an alternative set of safeguards, but that notion has come under serious criticism. See, e.g., Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 960–61 (2001); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1471–89 (2000).

71. See Young, *Member State Autonomy*, *supra* note 6, at 1649. This has been true not only since the Seventeenth Amendment divested state legislatures of the power to select U.S. senators, but rather since the Founders declined to give states power to instruct or recall their national senators and representatives. See William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 456 (1955).

72. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112 (2001).

73. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 33–37 (2010); see also JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 168–212 (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

holding on the Medicaid expansion, which crucially gave state governments a choice about whether to implement federal programs.<sup>74</sup>

European Member States have a credible power of the servant because, given the general lack of capacity in Brussels, they are in most cases the only game in town.<sup>75</sup> (A recent study by Daniel Kelemen, however, suggests that Europeans are increasingly turning to courts, via American-style private rights of action, to enforce EU law when national executive actors drag their feet.<sup>76</sup>) American states have correspondingly less scope to be uncooperative federalists, however, because at least in principle the federal government can step in and enforce federal law directly whenever it likes.<sup>77</sup> Limited resources and bureaucratic capacity constrain this option, but as noted Washington, D.C., is considerably better endowed in these respects than Brussels. And the national government's vast financial resources—derived from its (legally) unconstrained ability to tax and borrow—allows Washington to offer the States deals they cannot refuse in a way that is largely unavailable to Brussels.<sup>78</sup>

This comparison suggests that the American literature on uncooperative federalism ought to focus in more detail upon the constraints that prevent the national government from superseding state implementation of federal law. Those constraints are likely to vary significantly across different statutory regimes. And to the extent that the constraints are statutory, their efficacy may turn in significant part on the willingness of courts to enforce those constraints in the face of executive circumvention. Likewise, the states' power of the servant may be avoided where private plaintiffs have federal rights of action to compel particular action under federal law.<sup>79</sup> Although

---

74. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578–79 (2012); United States v. Lopez, 514 U.S. 549 (1995); see also Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 440–43 (2013) (discussing *Sebelius* and the importance of states' option to refuse to participate in federal programs).

75. See Halberstam, *supra* note 70, at 238–39.

76. R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011).

77. See, e.g., John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1201 (1995). The earliest example of national authorities stepping in to supersede state implementation that proved overly “uncooperative” involved the Fugitive Slave Act in the antebellum period. H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1138–39 (2012).

78. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (recognizing Congress's broad power to impose conditions on federal grants of funding to states).

79. In this regard, the Supreme Court's recent cases curtailing private rights of action to enforce rights conferred under federal cooperative federalism regimes may play an important role in maintaining the autonomy of state officials' enforcement discretion. See, e.g., *Gonzaga Univ.*

many of us concerned about preserving state autonomy have long viewed uncooperative federalism as an attractive substitute for Herbert Wechsler's idealized "political safeguards of federalism," it has always been difficult to pin down the extent to which this state-protective dynamic actually *works* in this country.<sup>80</sup> The European experience suggests that the allocation of resources and implementation capacity is an appropriate starting point for that inquiry.

Finally, American federalism scholars need to think considerably more deeply about identity. The fact that citizens of the EU still identify chiefly as Frenchmen, Spaniards, or Poles—not Europeans—continues to have enormous political consequences for the structure of European federalism. In the United States, we take virtually for granted that Americans identify quite strongly with the nation, and many have doubted whether they identify with their States as well.<sup>81</sup> On this conventional view, we have only Americans—not Vermonters, Californians, or North Carolinians.<sup>82</sup> This "one nation" orthodoxy looks less plausible, however, in light of mounting evidence of polarization and fragmentation across the American political landscape. Other observers have acknowledged a division of loyalties within the American political community, but questioned whether it breaks down along state lines.<sup>83</sup>

The basic question whether Americans identify with their states breaks down into a host of more specific issues, all of which deserve further investigation. Do the states represent distinct political communities that

---

v. Doe, 536 U.S. 273, 290 (2002) (refusing to let private plaintiffs enforce rights under the Family Educational Rights and Privacy Act against state officials under 42 U.S.C. § 1983).

80. For a first-rate attempt at an answer, see NUGENT, *supra* note 73, at 213–29.

81. Compare, e.g., MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 25 (2008) (assuming, without evidence, that they do not), with Ernest A. Young, The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System 123 (Feb. 24, 2015) (unpublished manuscript) (on file with the Duke Law Scholarship Repository), [http://scholarship.law.duke.edu/faculty\\_scholarship/3431/](http://scholarship.law.duke.edu/faculty_scholarship/3431/) (arguing that often Americans *do* identify with their states as well as with the nation).

82. We definitely still have Texans. See, e.g., WAYNE THORBURN, RED STATE: AN INSIDER'S STORY OF HOW THE GOP CAME TO DOMINATE TEXAS POLITICS 2 (2014) (observing that many people "think of themselves first and foremost as Texans").

83. See, e.g., BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 5–6 (2008) (arguing that identity breaks down neighborhood by neighborhood); COLIN WOODARD, AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA 2–3 (2011) (arguing for strong regional identities based on historical migration patterns).



meaningfully affect political beliefs?<sup>84</sup> To what extent do personal attachments to states affect political behavior? And do attachments to states trade off with, or complement, loyalty to the nation? Few American legal scholars have taken these questions seriously, but they go to the basic sociological underpinnings of federalism. The European literature has long had a much better handle on these questions,<sup>85</sup> and it is time Americans paid more attention to them.

## II. CRISES OF FINANCE, MIGRATION, AND DISTRUST

This is a difficult historical moment to be writing about the European Union. It has always been difficult for outsiders to keep up; notwithstanding the requirement of unanimity to amend the Union's foundational treaties, the Member States have proven remarkably willing to undertake major structural revisions at relatively frequent intervals. If a scholar thought that he understood the basic workings of the EU institutions in, say, 2002,<sup>86</sup> he would on returning to the subject today find the landscape significantly reshaped by the Lisbon Treaty as well as the various agreements that have dealt with the euro crisis—not to mention the still-unresolved conflicts opened by the Brexit vote.

Recent years, however, have been particularly tumultuous. The euro crisis exposed a basic contradiction between the fiscal and monetary arrangements of the EU's fiscal federalism. Intertwined crises of migration and terrorism highlighted the Union's difficulty in formulating responses to common problems. And rejection of the proposed constitutional treaty by French and Dutch voters in 2005, dramatically underscored by Britain's Brexit vote and rise of Euroskeptic populism in many other Member States, signaled that the masses may not share elites' enthusiasm for "ever closer union."<sup>87</sup>

---

84. See, e.g., ROBERT S. ERIKSON, GERALD C. WRIGHT & JOHN P. MCIVER, *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* 71 (1993) (finding, based on extensive public opinion data, that one's state is a significant predictor of ideological and partisan identification).

85. See, e.g., NEIL FLIGSTEIN, *EUROCLASH: THE EU, EUROPEAN IDENTITY, AND THE FUTURE OF EUROPE* 4–6 (2008); THOMAS RISSE, *A COMMUNITY OF EUROPEANS? TRANSNATIONAL IDENTITIES AND PUBLIC SPHERES* 4–8 (2010).

86. See, e.g., Young, *Member State Autonomy*, *supra* note 6, at 1735–37.

87. The election of Emmanuel Macron in France—more importantly, the defeat of populist Marine le Pen—has suggested to many that the populist wave has crested in Europe. That may well be so. But again and again the EU has proven the truth of Yogi Berra's famous pronouncement that "it's tough to make predictions, especially about the future."

Each of these crises is, in critical respects, unique to Europe. But each also resonates with particular tensions that exist in American federalism as well. I want to suggest that each highlights a way in which conventional wisdom about American federalism may need to be re-thought.

*A. Fiscal Federalism and the Euro*

I suspect that most American constitutional lawyers are the sort of people who were attracted to law school on the understanding that there would be no math. As a result, much of the federalism literature in this country skirts the topic of *fiscal* federalism. But one lesson of comparative federalism studies generally—whether of Europe or Canada or Australia or Switzerland—is that it’s crucial to follow the money.<sup>88</sup> Most fundamentally, the way a polity allocates taxing and spending authority may provide clues to more fundamental democratic dynamics. As Charles Wyplosz has pointed out, “[d]emocracy was born when elected bodies were given the final say on taxation and public spending. European citizens still consider fiscal policy as a key attribute of the State.”<sup>89</sup> Hence, the fact that “fiscal policy [remains] wedded to national sovereignty” indicates that Europeans “consider that the State is fundamentally national.”<sup>90</sup> Likewise, until Europeans “recognize the European Parliament as representing their interests, there is little scope for EU taxation.”<sup>91</sup>

The EU’s euro crisis vividly illustrates a more complex set of fiscal federalism dynamics involving monetary policy, fiscal policy, and debt. It suggests that Americans should pay more attention to our own fiscal federalism arrangements before we find ourselves in a similar predicament. Europe’s crisis arose out of a basic asymmetry between the EU’s retention of fiscal authority at the Member State level (Member States decide how much they want to tax, spend, and borrow) and the centralization of monetary policy among the states that adopted the euro. States like Greece were able to borrow extensively because their credit was tied to more fiscally sound euro countries, then when the financial crisis hit and the debt came due, they were unable to adjust by pursuing traditional monetary policy remedies (like devaluation). Because the loans to Greece and other troubled economies were

---

88. See, e.g., MCKAY, *supra* note 11, at 136 (concluding that “distributional issues are often at the heart of conflicts between central and state governments; and of these none is as important as intergovernmental fiscal relations”).

89. Wyplosz, *supra* note 33, at 8.

90. *Id.*

91. *Id.* at 12.

held by banks throughout Europe, a Greek default would have had serious systemic effects. In the end, the more healthy euro zone economies (along with the European central bank and the IMF) agreed basically to bail the Greeks out.<sup>92</sup>

The literature on fiscal federalism suggests that there are basically two ways to organize the financial relationship between a central government and its subunits.<sup>93</sup> In most federal systems, the center guarantees the debts of the subunits.<sup>94</sup> These guarantees create a potential for moral hazard; subunits may spend and borrow willy nilly (and creditors will be willing to lend to them), knowing that the central government will make good their debts.<sup>95</sup> In order to avoid that problem, most central governments retain control over fiscal policy by constraining the taxing, spending, and borrowing authority of subnational governments.<sup>96</sup> The alternative viable arrangement is for the subunits to retain fiscal sovereignty over taxing, spending, and borrowing, while the central government ensures that the credit markets will discipline them by committing not to bail the subunits out in the event of a default.<sup>97</sup> The trick, of course, is in making the no-bailout commitment credible. Where that effort succeeds, the costs of borrowing for each subunit—reflected in the interest rates it must pay on the bonds it issues—will vary according to the creditworthiness of each subnational government.<sup>98</sup>

The United States has generally pursued the latter arrangement. Federal law imposes no general constraints on state taxing, spending, or borrowing. The national government has, however, generally refused to bail out state governments when all that autonomy gets them into trouble. Because the United States has no *formal* prohibition of bailouts, the credibility of the

92. See, e.g., PISANI-FERRY, *supra* note 3, at 80; JOHAN VAN OVERTVELDT, THE END OF THE EURO: THE UNEASY FUTURE OF THE EUROPEAN UNION 141–44 (2011).

93. See, e.g., JONATHAN A. RODDEN, HAMILTON'S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM 10–12 (2006); Michael S. Greve, *Our Federalism is Not Europe's. It's Becoming Argentina's.*, 7 DUKE J. CONST. L. & PUB. POL'Y 17, 19 (2012).

94. See Paul E. Peterson & Daniel Nadler, *Freedom to Fail: The Keystone of American Federalism*, 79 U. CHI. L. REV. 251, 253 (2012) (“Except in Canada and Switzerland [and the U.S.], state debts in all federal systems in the industrialized countries of the world are implicitly or explicitly guaranteed by the federal government.”).

95. See, e.g., Wyplosz, *supra* note 33, at 16.

96. See Greve, *supra* note 93, at 19; Peterson & Nadler, *supra* note 94, at 252–53; Jonathan Rodden, *Market Discipline and U.S. Federalism* [hereinafter Rodden, *Market Discipline*], in WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS 123, 128 (Peter Conti-Brown & David Skeel eds., 2012).

97. See Rodden, *Market Discipline*, *supra* note 96, at 128; Peterson & Nadler, *supra* note 94, at 253–54.

98. See Rodden, *Market Discipline*, *supra* note 96, at 137 (collecting data on credit-default swaps on state debt obligations).

American “no bailout” commitment rests instead on historical practice.<sup>99</sup> Eight states defaulted in the 1840s, ten more in the late nineteenth century following Reconstruction, and Arkansas defaulted during the Depression.<sup>100</sup> Although there have been efforts to get the national government to intervene in each instance, those efforts have generally been unsuccessful.<sup>101</sup> The current significant differences among bond yields and credit ratings for the various American states strongly suggest that financial markets continue to perceive the national government’s “no bailout” commitment as highly credible.<sup>102</sup>

Germany—the leading federal system *within* the EU—has chosen a mixed model; the central government controls taxation by the Länder but not expenditures or borrowing, and bailouts are available but not automatic.<sup>103</sup> Because of the strong bailout expectation, the credit ratings of the various Länder do not vary according to actual creditworthiness of the particular Länder governments.<sup>104</sup> But the EU itself purports to follow the American model of fiscal federalism. The Member States do their own taxing, spending, and borrowing, and Brussels does not formally guarantee their debts.<sup>105</sup> Indeed, the Treaty of Lisbon incorporated an explicit “no bailout” clause.<sup>106</sup> Nonetheless, financial markets appear to have treated the various Member States’ debts as if they were part of a fiscally-unitary federation.<sup>107</sup> The no-bailout commitment, in other words, was not taken seriously.

---

99. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 168–69 (2012).

100. Peterson & Nadler, *supra* note 94, at 264–65.

101. See RODDEN, *supra* note 93, at 57–64.

102. See Rodden, *Market Discipline*, *supra* note 96, at 137–40; see also Pamela M. Prah & Stephen C. Fehr, *Infographic: S&P State Credit Ratings, 2001–2014*, PEW CHARITABLE TR. (June 9, 2014), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/06/09/sp-ratings-2014> (showing the variation over time in state credit ratings from Standard & Poor’s).

103. See RODDEN, *supra* note 93, at 153–66.

104. See, e.g., UNICREDIT, *HANDBOOK OF GERMAN STATES* 3 (2012), [https://www.research.unicreditgroup.eu/DocsKey/credit\\_docs\\_2012\\_125692.ashx?EXT=pdf&KEY=n03ZZLYZf512PWPzZLYmH9qxdmQRVPZI4GAa4YUoXKk=](https://www.research.unicreditgroup.eu/DocsKey/credit_docs_2012_125692.ashx?EXT=pdf&KEY=n03ZZLYZf512PWPzZLYmH9qxdmQRVPZI4GAa4YUoXKk=) (stating that “[a]ll 16 [German] states enjoy credit ratings in the highest rating category” and attributing this to “the federal solidarity principle . . . guaranteeing support to states should they ever be in real financial difficulties”).

105. Prior to the euro crisis, the Union did impose some fiscal constraints on the euro zone countries in the form of the “Stability and Growth Pact,” but those constraints quickly lost most of their credibility when the Union failed to enforce them after French and German violations of the Pact’s deficit limits. See, e.g., *The Death of the Stability Pact*, *ECONOMIST* (Nov. 27, 2003), <http://www.economist.com/node/2246457>; see also PISANI-FERRY, *supra* note 3, at 31.

106. Consolidated Version of the Treaty on the Functioning of the European Union art. 125, Mar. 30, 2010, 2010 O.J. (C 83) 47, 99.

107. See, e.g., VAN OVERTVELDT, *supra* note 92, at 85 (noting that prior to the crisis, “[t]he spread between Greek and German bonds almost disappeared”); Greve, *supra* note 93, at 21.

Nothing in these fiscal or monetary arrangements can be said to have *caused* the euro crisis. The trouble was that the various euro zone countries varied considerably in their vulnerability to the worldwide financial crisis that began in 2007, and the EU lacked the central stabilization mechanisms available to more centralized states.<sup>108</sup> In particular, countries like Greece, Portugal, and Ireland—which generally had less competitive economies and more profligate public sectors—had been able to borrow at rates driven by the euro area’s stronger economies, like Germany. When the crisis came, these weaker economies suddenly found themselves in danger of defaulting on their debts. Because of their commitment to monetary union, these states lacked the ability to respond through monetary policy—a devaluation of the Greek drachma, for example.<sup>109</sup>

As financial markets had correctly predicted, the euro arrangement made the EU’s no-bailout commitment difficult to keep.<sup>110</sup> An actual debt default by a euro zone country would put pressure on that Member State to exit the euro so as to regain the monetary tools to respond to the crisis. Moreover, the integration of the euro zone economies meant that much of the Greek debt, as well as debt issued by other struggling Member States, was held by banks in Germany and other powerful EU countries.<sup>111</sup> Under the circumstances, it is hardly surprising that the no-bailout pledge went by the boards.<sup>112</sup>

---

108. See Ziblatt, *supra* note 43, at 115.

109. See, e.g., PISANI-FERRY, *supra* note 3, at 87 (noting that “an important factor was that [Greece] was borrowing money in a currency that was its own, but over which it had no control”); Juan F. Navarro-Staicos, *Greece Should Follow Argentina into Default and Devaluation*, CHRISTIAN SCI. MONITOR (Apr. 2, 2012), <http://www.csmonitor.com/Commentary/Opinion/2012/0402/Greece-should-follow-Arentina-into-default-and-devaluation> (noting that, in similar fiscal circumstances, Argentina defaulted on its debt and devalued its currency).

110. See PISANI-FERRY, *supra* note 3, at 69 (“[I]nvestors believed that in the unlikely event of an accident, euro-area member states would put together some type of rescue operation . . . [T]hey did not see the so-called no-bailout clause as credible enough to fully price the risk of individual sovereign default.”).

111. See, e.g., Greve, *supra* note 93, at 21–22.

112. See Alicia Hinarejos, *Fiscal Federalism in the European Union: Evolution and Future Choices for EMU*, 50 COMMON MKT. L. REV. 1621, 1627 (2013) (suggesting that allowing Greece and other troubled Member States to default could “have had fatal consequences for the future of the EU as a political project”). The measures addressing the debt crisis were not technically a “bailout,” and the ECJ has held that they did not violate the no-bailout clause in the Treaty. See *Pringle v. Gov’t of Ireland*, Case C-370/12 [2012] E.C.R. I-00000 (Ir.). But as a practical matter, most observers seem to view these measures as bailouts. See Hinarejos, *supra* note 112, at 1628; P.W., *From Bail-out to Bail-in*, ECON.: FREE EXCHANGE (Dec. 14, 2013), <http://www.economist.com/blogs/freeexchange/2013/12/european-banks>.

It is too early to tell how the euro crisis will ultimately play out.<sup>113</sup> But one can already see the central question for American federalism. No-bailout commitments are absolutely central to the traditional theory of fiscal federalism, which posits that without them the central government would *have to* take over the fiscal policy of its subunits. Otherwise, the subunits have strong incentives to spend or borrow as much as they like, knowing that the center will come to their rescue if trouble arises.<sup>114</sup> Consistent with this model, we see that the euro zone countries *have* agreed to a “Fiscal Compact” that requires those countries to balance their budgets.<sup>115</sup> This is not quite the same as ceding Member State control over spending and borrowing, as those states still retain the ultimate political authority over these decisions. But the compact is meant to be legally enforceable, and in any event the direction of institutional movement is clear: The weakening of the central authority’s no-bailout commitment leads to significant pressure to weaken the subunit’s fiscal autonomy.<sup>116</sup>

This point is significant because the United States faces its own quiet crisis of fiscal federalism.<sup>117</sup> State and local governments report upwards of \$1 trillion dollars in unfunded pension liabilities.<sup>118</sup> The most recent flare-up has occurred in Puerto Rico, which has announced its inability to pay its debt and sought relief from the national government.<sup>119</sup> The resulting legislation provided no financial assistance, but it did protect the Commonwealth from creditor litigation for a limited period of time.<sup>120</sup> Even this minimal federal

---

113. See, e.g., Jennifer Rankin, *No Bailout Funds for Greece as Eurozone Finance Chiefs Fail to Agree Deal*, GUARDIAN (May 23, 2017), <https://www.theguardian.com/business/2017/may/23/no-bailout-funds-for-greece-as-eurozone-finance-chiefs-fail-to-agree-deal>.

114. See RODDEN, *supra* note 93, at 274–75.

115. See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union art. 3, Mar. 2, 2012, <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2012008>; Federico Fabbrini, *The Fiscal Compact, The “Golden Rule,” and the Paradox of European Federalism*, 36 B.C. INT’L & COMP. L. REV. 1, 4–5 (2013); Hinarejos, *supra* note 112, at 1633.

116. See, e.g., Wyplosz, *supra* note 33, at 18 (emphasizing the conflict between the Fiscal Compact and national sovereignty).

117. See Emily D. Johnson & Ernest A. Young, *The Constitutional Law of State Debt*, 7 DUKE J. CONST. L. & PUB. POL’Y 117, 147–48 (2012).

118. See Steve Malanga, *Covering up the Pension Crisis*, WALL ST. J. (Aug. 25, 2016), <http://www.wsj.com/articles/covering-up-the-pension-crisis-1472164758>; Joshua D. Rauh, *The Public Pension Crisis*, HOOVER INSTITUTION (Apr. 12, 2016), <http://www.hoover.org/research/public-pension-crisis>.

119. See Mary W. Walsh, *Puerto Rico Declares a Form of Bankruptcy*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/business/dealbook/puerto-rico-debt.html>.

120. See Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016).

bailout was accompanied by appointment of a financial-oversight board that eliminated much of the Commonwealth's financial autonomy.<sup>121</sup> The new act is unlikely to provide a permanent solution to the Commonwealth's woes, and any further assistance will likely come with still further restrictive strings attached.

Nor is Puerto Rico necessarily unique; Illinois, for example, may not be far behind, and plenty of American states find themselves in precarious financial condition.<sup>122</sup> Some scholars and policymakers have already begun thinking about what happens when a State of the Union finds itself in Puerto Rico's predicament.<sup>123</sup> The tradition of American fiscal federalism says that the national government must let the states default, resisting any temptation to bail them out. Recent government bailouts during the financial crisis, however, provide one reason to doubt this commitment. If major investment banks and automakers are "too big to fail," then it is hard to see how the same could not be true of California or Illinois.<sup>124</sup> More fundamentally, the euro-area bailouts suggest that the institutional dynamics of modern federal systems may make no-bailout commitments increasingly difficult to keep.

Most discussion of the euro-area bailouts has focused on the need to keep Member States like Greece from exiting the common currency and to contain systemic risks, such as a wave of bank failures in other parts of Europe. But one should also ask what would have happened to Union law in the wake of a general collapse or weakening of Greek public institutions. As already discussed, virtually all of EU law is implemented and enforced by the Member States. Given its dependence on the Member States to enforce European law, Brussels has to care about the health and solvency of those governments. They're too helpful to fail.

If I am right about Europe on this point, then we should also worry about the no-bailout commitment in the United States. After all, the federal government in this country depends on the states to enforce much of federal

---

121. See Gillian B. White, *Puerto Rico's Problems Go Way Beyond Its Debt*, ATLANTIC (July 1, 2016), <http://www.theatlantic.com/business/archive/2016/07/puerto-rico-promesa-debt/489797/>.

122. See Egan, *supra* note 13 (discussing Illinois); Eileen Norcross & Olivia Gonzalez, *Ranking the States by Fiscal Condition 2017 Edition*, MERCATUS CTR. (July 11, 2017), <https://www.mercatus.org/statefiscalrankings>. It is worth noting that the States are not necessarily more profligate than the national government; rather, they simply are more likely to actually have to pay up in a pinch.

123. See generally WHEN STATES GO BROKE, *supra* note 13; Johnson & Young, *supra* note 117.

124. See Rodden, *Market Discipline*, *supra* note 96, at 135; Svea Herbst-Bayliss & Jonathan Stempel, *Buffett: US Can Bail Out States, Insurers Pained*, REUTERS (May 1, 2010, 1:59 PM), <http://www.reuters.com/article/berkshire-buffett-goldman-idUSN0225004920100502>.

law as well. Although the anti-commandeering doctrine precludes Congress from *forcing* the States to implement federal law, most federal regulatory and benefit schemes nowadays are cooperative federalism regimes where state officials play a critical role.<sup>125</sup> State and federal regulation and benefit programs are now intertwined—and interdependent—in a way that they simply were not during earlier state default episodes. One thus wonders whether, in the contemporary era, Washington could really tell Illinois or California to “drop dead” if either state were about to default on its debt.<sup>126</sup>

Several commentators have suggested that the American no-bailout pledge is already fading. Jonathan Rodden, for example, has noted that federal stimulus funding and Medicaid supplements amounted to “implicit bailouts” during the most recent recession.<sup>127</sup> Perhaps the erosion of the no-bailout commitment is not overly threatening, given that other institutional mechanisms—such as the balanced budget requirement in nearly every state constitution—restrain state fiscal policy. On the other hand, financial markets still appear to take the no-bailout commitment more seriously than may be warranted; once it is perceived to have eroded, then one can expect the financial costs of profligate state borrowing to decline as state credit ratings come to be a function of national credit rather than actual state behavior. In other words, the current state of affairs may not be stable and the future is uncertain.

The EU experience can provide few guideposts indicating where American fiscal federalism should go from here. The point, however, is simply that in Europe the financial issues driving constitutional structure have been more publicly salient than they have been in this country since the Founding era. American federalism scholars and policymakers should not wait for a true fiscal federalism crisis to pay more attention to money.

---

125. See, e.g., Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–72 (2001).

126. See Johnson & Young, *supra* note 117, at 147–48 (questioning the strength of the no-bailout commitment). President Gerald Ford was famously reported to have told New York City to “drop dead” in 1975 in response to requests for federal aid. See Frank Van Riper, *Ford to City: Drop Dead in 1975*, N.Y. DAILY NEWS (Oct. 29, 2015), <http://www.nydailynews.com/new-york/president-ford-announces-won-bailout-nyc-1975-article-1.2405985> (originally published on Oct. 30, 1975). It turns out that President Ford never actually said “drop dead,” and in fact he signed legislation approving federal loans to the city two months later. See Sam Roberts, *Infamous ‘Drop Dead’ Was Never Said by Ford*, N.Y. TIMES (Dec. 28, 2006), <http://www.nytimes.com/2006/12/28/nyregion/28veto.html>. The moral is not simply to take things one reads in the paper with a grain of salt, but that “no bailout” commitments are difficult to maintain no matter how emphatically expressed.

127. Rodden, *Market Discipline*, *supra* note 96, at 135.



### B. Migration, Immigration, and Terrorism

As if the euro were not enough, 2015 saw the EU reeling under two additional and related crises. An “unprecedented” number of refugees from Syria, Libya, Iraq, sub-Saharan Africa, and other places flooded into Europe in 2015, “more than in any previous European refugee crisis since World War II.”<sup>128</sup> Through the first nine months of the year, over 800,000 people claimed asylum in the EU.<sup>129</sup> The influx impacted some Member States considerably more than others, and individual states varied widely in their willingness to accept the migrants.<sup>130</sup> Immigration was already a sensitive issue in Europe, with right-leaning anti-immigration policies making remarkable gains in recent years. It is thus unsurprising that the refugee crisis has produced vocal disagreements both within and among the EU’s Member States, or that the EU’s central institutions have commenced legal action to enforce various Member States’ obligations in relation to the influx.<sup>131</sup>

Responding to the migrant crisis became considerably more difficult in November, when Islamic terrorists killed 130 people in Paris.<sup>132</sup> Unsurprisingly, the attacks seemed to spur opposition across Europe to accepting more migrants, especially in light of concerns that some potential terrorists may be among the many thousands of Middle Eastern refugees.<sup>133</sup>

128. ORG. FOR ECON. CO-OPERATION & DEV., IS THIS HUMANITARIAN MIGRATION CRISIS DIFFERENT? 1 (2015), <http://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf>.

129. *Migrant Crisis: Greece, Croatia and Italy Face EU Legal Action*, BBC NEWS (Dec. 10, 2015), <http://www.bbc.com/news/world-europe-35064599>.

130. See, e.g., *Europe’s Migrant Acceptance Rates*, ECONOMIST (Sept. 1, 2015), <http://www.economist.com/blogs/graphicdetail/2015/09/daily-chart> (showing that rates range from over 300 migrants per 100,000 population in Sweden to a fraction of that in Hungary, Spain, and Poland); *Hungary Closes Border to Refugees as Turkey Questions EU Deal to Stem Crisis*, GUARDIAN (Oct. 16, 2015), <http://www.theguardian.com/world/2015/oct/17/hungary-closes-border-to-refugees-as-turkey-questions-eu-deal-to-stem-crisis> (recounting Hungary’s efforts to block refugees).

131. See Peter Teffer, *French PM: Europe Can Receive No More Refugees*, EUOBSERVER (Nov. 25, 2015), <https://euobserver.com/migration/131262> (reporting tensions among Member States on refugees); Marcus Walker & Anton Troianovski, *Behind Angela Merkel’s Open Door for Migrants*, WALL ST. J. (Dec. 9, 2015), <http://www.wsj.com/articles/behind-angela-merkels-open-door-for-migrants-1449712113>; *Bridge of Sneers*, ECONOMIST (Dec. 5, 2015), <http://www.economist.com/news/europe/21679476-strange-spectacle-sweden-and-denmark-sniping-each-others-immigration-policies-bridge> (describing conflict between Denmark and Sweden over refugee policy); *Migrant Crisis: Greece, Croatia and Italy Face EU Legal Action*, *supra* note 129.

132. See Adam Nossiter & Rick Gladstone, *Paris Attacks Kill More than 100, Police Say; Border Controls Tightened*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/world/europe/paris-shooting-attacks.html?mcubz=0>.

133. See, e.g., Holly Ellyatt, *After Paris, Is There a EU Backlash Against Migrants?*, CNBC (Nov. 27, 2015, 3:28 AM), <http://www.cnbc.com/2015/11/27/paris-attacks-turn-eu-leaders->

Moreover, the terrorist threat has brought pressure to revisit the Schengen Agreement, which abolished border controls among twenty-six European countries.<sup>134</sup> Reinstating permanent border controls, of course, would be a highly-visible marker making Europe more like an intergovernmental federation and less like a federal state.

Although the United States has not experienced a recent influx of migrants comparable to that in Europe, immigration has become particularly salient politically and legally in recent years. Although political debate has focused on national policy, that debate has spilled over into the courts as a question of federalism. That is because, as in Europe, opinion on immigration policy tends to be unevenly distributed geographically, and particular states have taken the lead in proposing a more rigorous enforcement policy. That, in turn, has brought those states into political and legal conflict with the national government. In particular, Arizona has sought to pursue a more rigorous enforcement strategy than that preferred by the Obama administration, and Texas has challenged the administration's efforts to relax immigration restrictions by executive action.<sup>135</sup> Although the latter dispute centers upon a question of national separation of powers, it became a federalism issue as well when the administration challenged Texas's standing, as a state government, to participate in litigation over the legality of federal policy. The Supreme Court upheld Arizona's effort to crack down on employers of undocumented aliens but largely struck down its efforts to ramp up criminal enforcement against the undocumented aliens themselves.<sup>136</sup> In the Texas litigation, an equally divided Supreme Court affirmed the Fifth Circuit's decision enjoining the administration's policy.<sup>137</sup>

Again, it is too early to tell how the EU's migration policy, such as it is, will play out. But two aspects of the European experience are worth

---

against-migrants.html; Anton Troianovski & Marcus Walker, *Paris Terror Attacks Transform Debate over Europe's Migration Crisis*, WALL ST. J. (Nov. 16, 2015, 12:06 PM), <http://www.wsj.com/articles/paris-terror-attacks-transform-debate-over-europes-migration-crisis-1447608944>.

134. See *After Paris, Drawbridges Up?*, ECONOMIST (Nov. 19, 2015), <http://www.economist.com/news/europe/21678832-schengen-system-open-borders-was-already-under-pressure-latest-terrorist-attacks-may> (noting that "[c]alls to curb borderless travel were already growing louder" prior to the Paris attacks, and that a number of countries had already implemented limited border controls in response to the migrant crisis and prior terrorist incidents).

135. Texas has been complaining about the inadequacy of federal policy to secure the border since it entered the Union in the 1840s. See T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* 275 (2d ed. 2000).

136. *Compare* Chamber of Commerce v. Whiting, 563 U.S. 582 (2011) (upholding the Legal Arizona Workers Act of 2007), *with* Arizona v. United States, 567 U.S. 387, 416 (2012) (striking down most provisions of a state law authorizing state and local law enforcement to enforce federal immigration restrictions more aggressively than federal authorities).

137. United States v. Texas, 136 S. Ct. 2271 (2016), *aff'g* 809 F.3d 134 (5th Cir. 2015).

considering in relation to American debates about immigration. First, migration policy is asymmetrical in Europe; many Member States have signed onto the Schengen Agreement, which abolished border controls among signatory nations, but several others have not. The EU has thus functioned as a federal system for some time *without* a uniform policy on migration. This reality undermines the assumption, pervasive in critiques of state governments' efforts to pursue policies that impact immigration, that such policies must necessarily be uniform throughout the United States.

A second, more technical point is that in Europe Member States are generally accepted as appropriate litigants to challenge the lawfulness of EU policy. The Fiscal Compact among euro zone countries, moreover, even confers rights on signatory states to challenge the budgets of other states in court if they violate the compact. The linchpin of the Obama administration's position in the Texas immigration litigation (as well as in the healthcare litigation before that) has been that American state governments lack standing to participate in such litigation. The argument has been that inter-institutional litigation of this kind involves essentially political disputes that belong in the political process rather than in courts.<sup>138</sup> European inter-institutional litigation demonstrates that this need not be the case, and that courts can often effectively resolve legal disputes among the constituent units of a federal system.

The most striking aspect of the EU's migration and terrorism crises, of course, has been these crises' effect in fueling the rise of populist euro-skepticism and undermining trust in EU institutions. I turn to that dynamic in the next section.

### C. Crises of Legitimacy and Trust

The Treaty of Rome—and most subsequent EU treaties—commit the signatories to an “ever closer union among the peoples of Europe.”<sup>139</sup> From the general statements of EU politicians to the interpretive baselines set by the European Court of Justice, the teleology of inexorable integration has been a prominent feature of EU discourse for decades. Yet that feeling of inevitability seems a distant memory in the wake of the United Kingdom's

---

138. Although, as the Arizona litigation demonstrates, the United States does not hesitate to sue state governments when it thinks *they* have violated federal law.

139. On the provenance and significance of the phrase, see *Never Closer Union: Does the European Treaty Commitment Matter?*, *ECONOMIST* (Oct. 24, 2015), <http://www.economist.com/news/britain/21676749-does-european-treaty-commitment-matter-why-david-cameron-wants-exemption-ever-closer>.

vote to leave the Union on June 23, 2016. The Brexit vote reflects—and is likely to stimulate—euro-skeptic tendencies across the EU.<sup>140</sup> Public opinion polling on trust in the EU had already hit an all-time low in 2013.<sup>141</sup> Even before the Brexit vote, “[a]n economic crisis, record unemployment and five euro zone bailouts have taken their toll on the standing of the European Union that . . . is increasingly viewed as an overbearing, cumbersome bureaucracy.”<sup>142</sup>

Part of the problem is that, for decades, the EU has gotten by largely on “output legitimacy”—that is, its remarkable record of delivering peace and economic prosperity has caused many to overlook fundamental concerns about the “democratic deficit” of its governing institutions.<sup>143</sup> The euro crisis (and the serious austerity measures imposed in some countries to remedy it) called the Union’s ability to ensure prosperity into serious question, and the migration and terrorism crises made the EU institutions seem ineffectual in the face of external threats. With confidence in its outputs in tatters, the EU found itself with little democratic legitimacy to fall back on.

We might compare this crisis of public confidence to recent developments in the United States. Here, too, survey after survey confirms that trust in public institutions is in decline. It is relatively commonplace to liken the rise of populist euro-skepticism in Europe to the anti-government anger that fueled Donald Trump’s candidacy in this country.<sup>144</sup> Most of these analyses focus on nationalism, xenophobia, anti-elitism, and the like. It is less common to think of these developments in more institutional and structural terms.

To begin, it may help to view the decline in trust in American government through the lens of input and output legitimacy. Academic lawyers have labored for decades to come up with an input-based theory of legitimacy for the administrative state, stressing the participatory procedures of the agency process, for example, or the links between agency decision making and the

---

140. See, e.g., Anne-Sylvain Chassany, Stefan Wagstyl, Duncan Robinson & Richard Milne, *How Will Brexit Result Affect France, Germany and the Rest of Europe?*, FIN. TIMES (June 23, 2016), <https://www.ft.com/content/2b75023a-371d-11e6-9a05-82a9b15a8ee7>.

141. See *Record 60% of Europeans ‘Tend Not to Trust’ EU*, EURACTIV (July 25, 2013), <https://www.euractiv.com/section/elections/news/record-60-of-europeans-tend-not-to-trust-eu/> (reporting figures from a Eurobarometer poll).

142. *Id.*

143. See Craig, *supra* note 27, at 24.

144. See, e.g., J.A., *Donald Trump Finds Hope in British Euroscepticism*, ECONOMIST: DEMOCRACY AM. (Aug. 18, 2016), <http://www.economist.com/blogs/democracyinamerica/2016/08/mr-brexit>; Eduardo Porter, *In ‘Brexit’ and Trump, a Populist Farewell to Laissez-Faire Capitalism*, N.Y. TIMES (June 28, 2016), <http://www.nytimes.com/2016/06/29/business/economy/the-anger-wave-that-may-just-wipe-out-laissez-faire-economics.html>.

democratically-accountable Congress and/or President.<sup>145</sup> But however much these accounts impress other academics, one suspects that the real staying power of the American national administrative state is the sense that we cannot do without it. Its public legitimacy rests not on its attenuated ties to democratic theory, but rather—much as in the EU—on a democratically-challenged institution’s ability to deliver prosperity and security. And also as in Europe, those Americans who feel the administrative state no longer delivers those public goods are much more likely to question its legitimacy as a matter of democratic principle.

The much-neglected point, however, is that in both Europe and the United States the decline of trust in government has a critical federalism dimension. One can debate the relative weights of xenophobia and good old-fashioned nationalism in motivating the Brexit vote and populist euro-skepticism in other European countries.<sup>146</sup> What is clear is that Brexit was a vote to shift power to a smaller geographical unit that its proponents viewed as closer to the people. It was, in other words, a choice to put trust in Westminster rather than Brussels.<sup>147</sup>

Similarly, in this country, the precipitous decline in trust for *national* public institutions contrasts with increasing public trust in state and local government. One summary of the public opinion research concludes that

[c]itizens on average evaluate the performance of the federal government as significantly lower than that of the state and local governments, report less faith in the federal government to ‘do the right thing,’ have significantly lower confidence in the ability of the federal government to solve problems effectively, see the federal government as significantly less responsive than lower levels of

---

145. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

146. Compare, e.g., Rich Lowry, *A Vote for Self-Government*, NAT’L REV. (June 28, 2016), <http://www.nationalreview.com/article/437222/brexit-about-sovereignty-not-xenophobia>, with Andrew Solomon, *A Perilous Nationalism at Brexit*, NEW YORKER (June 28, 2016), <http://www.newyorker.com/news/daily-comment/a-perilous-nationalism-at-brexit>. One suspects that this is not simply an empirical question but also a question of the proper definitions of terms. It is not uncommon, from some viewpoints, to see nationalism (and federalism) as inherently xenophobic and/or racist.

147. And, interestingly, the vote seems to have renewed the movement to further devolve power from Westminster to Edinburgh. See, e.g., *No Agreement in Latest Scots-UK Brexit Powers Talk*, BBC NEWS: SCOT. POL. (Aug. 9, 2017), <http://www.bbc.com/news/uk-scotland-scotland-politics-40868557>.

government, and nearly 60 percent see the federal government as the most corrupt level of government.<sup>148</sup>

Americans have lost faith in the federal government much more than they have lost faith in government generally.

It is not hard to see why this should be so. In the early twentieth century—especially during the New Deal—the national government enjoyed a massive trust advantage over the states. That was reflected in significant institution-building at the national level and the increasing primacy of national politics. The public entrusted national authorities with expanded power because it perceived the states as institutionally incompetent to deal with economic dislocation, environmental degradation, and other critical problems. And for the most part, in this period, the national government did not disappoint. But national politics in the first part of the twenty-first century presents an unedifying spectacle of partisan gridlock, bureaucratic incompetence, financial irresponsibility, and lackluster results in addressing national problems.

Meanwhile, state governments have largely avoided similar degrees of partisan paralysis while considerably upgrading their institutional capacity. Although the number of states with divided government fluctuates, it has generally declined in recent years; as of October 2016, thirty states enjoyed unified partisan control of both houses of the legislature and the governorship.<sup>149</sup> And the literature on state governance tends to conclude that “states have vastly improved their capacity for dealing with problems” by building the institutional capacity of legislatures, executive branches, and state bureaucracies.<sup>150</sup>

My point is not that Brexit should reopen the nineteenth century debate on American secession. It is, rather, that the EU probably undermined the legitimacy of its federal union by seeking more uniformity than its publics

---

148. Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589, 598 (2007) (reporting results from the 2000 Attitudes Toward Government Study, but concluding that “[t]hese findings are consistent with those reported by other scholars, using other nationally representative surveys”); *see also State Governments Viewed Favorably as Federal Rating Hits New Low*, PEW RES. CTR. (Apr. 15, 2013), <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/>.

149. *See Gubernatorial and Legislative Party Control of State Government*, BALLOTPEdia, [https://ballotpedia.org/Gubernatorial\\_and\\_legislative\\_party\\_control\\_of\\_state\\_government](https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government) (last visited Sept. 16, 2017); *see also* Karl Kurtz, *A Significant Decline in Divided Government*, THICKET (Nov. 7, 2012), [http://ncsl.typepad.com/the\\_thicket/2012/11/a-significant-decline-in-divided-government.html](http://ncsl.typepad.com/the_thicket/2012/11/a-significant-decline-in-divided-government.html).

150. Virginia Gray, *The Socioeconomic and Political Context of States*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 1, 28 (Virginia Gray & Russell L. Hanson eds., 8th ed. 2004).

were ultimately willing to support. We run the same danger in this country. Our national politics is so nasty in part because the stakes are so high; control of the national government, even by the narrowest of margins, allows one or the other faction to impose its worldview on huge swaths of the country that fundamentally disagree. It is not hard to imagine, however, a de-escalation by returning some of these divisive issues to jurisdictions where they can be resolved to the satisfaction of a higher proportion of a smaller electorate, with exit rights preserved for those who cannot live with the result.

It may, in other words, be time to reassess the allocation of responsibility between the national government and the states—much as *state* governmental failure caused us to reassess an earlier allocation in the twentieth century. However it ultimately plays out, Europe’s crisis of governance demonstrates that there is nothing inevitable about “ever closer union”; no iron law of history requires consolidating more and more power in centralized institutions. Indeed, one fairly likely scenario is that the EU will survive and prosper by trying to do somewhat less. That would be a valuable lesson for American federalism.

#### CONCLUSION

One should not take all this talk of crises too much to heart. I tell my students each year that if one wants to know whether the EU is a success one need ask only one question: “Has Germany invaded France?” More generally, the map of the present-day EU reflects the healing of Europe’s twentieth century division; Europe’s economy, democracy, and civil liberties continue to remain—as they have for much of the past half-century—the envy of much of the world. Although historian Brendan Simmons is right to say that we have entered “a period of exceptional European uncertainty,”<sup>151</sup> suggestions that the EU’s “failure” is imminent are surely premature.

Both the EU’s successes and its dilemmas can help us think about American federalism. I have tried to suggest here that the primary value of looking to Europe is to help us question our domestic assumptions. European federalism demonstrates that—contrary to much of the American literature—the scope of regulatory jurisdiction may not be the best measure of a federal balance. The euro crisis highlights the importance of fiscal federalism, and the European debate about migration questions the inevitability of centralized control. Finally, the EU’s recent setbacks remind us that centralization is not inexorable, and that central power should take care in overreaching the

---

151. BRENDAN SIMMS, *EUROPE: THE STRUGGLE FOR SUPREMACY FROM 1453 TO THE PRESENT* 532 (2013).

bounds of national consensus. In all these areas, the point is not to copy or avoid particular actions or arrangements pursued by the other governmental system. Comparative law works best, rather, when it simply helps us figure out what questions to ask.