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## Summary

Critics of the EU's democratic deficit standardly attribute the problem to either socio-cultural reasons, principally the lack of demos and public sphere, or institutional factors, notably the lack of electoral accountability due to the limited ability of the European parliament to legislate and control the executive powers of the Commission and the Council of Ministers. Recently two groups of theorists have argued neither deficit need prove problematic. The first adopt a rights-based view of democracy and claim a European consensus on rights, as represented by the Charter of Fundamental European Rights, can offer the basis of citizen allegiance to EU wide democracy, thereby overcoming the demos deficit. The second adopt a public-interest view of democracy and argue that so long as delegated authorities enact policies that are 'for' the people, then the absence of institutional forms that facilitate democracy 'by' the people are likewise unnecessary - indeed, in certain areas they may be positively harmful. This paper argues both arguments are normatively and empirically flawed. For no consensus on rights or the public interest exists apart from the majority view of a demos secured through parliamentary institutions. To the extent these remain absent at the EU level a democratic deficit continues to exist.

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## I. Introduction<sup>1</sup>

Criticism of the EU's democratic deficit has standardly centred on the absence of a European demos and the shortcomings of its institutional arrangements. Though related, these two arguments also work against each other to some degree. Those who emphasise the first critique focus on the low levels of popular identification with the EU, a factor associated with apathy and even antagonism towards EU politics. According to this argument, the lack of a European 'demos', along with the complexity and distance of European decision making, necessarily weakens the potential for EU-wide democracy. Advocates of the second critique tend to respond that political identification would be strengthened by enhancing the role of democratic institutions within the EU, particularly the European Parliament. However, supporters of the no-demos thesis counter that such measures would deepen rather than alleviate the EU's democratic deficit. Without a demos, EU wide democratic decision-making risks producing the majority tyranny of one or more demoi over others. On this view, there are limits to what the EU should attempt to achieve if democratic accountability and legitimacy are to be retained.

Recently, this debate has been reinvigorated by two approaches to the problem that challenge the respective presuppositions of these conventional positions. In rather different ways, these scholars relate the EU's legitimacy problems and democratic deficit to parallel difficulties and changes within the democracies of most advanced industrial societies, many of which stem from the impact on nation states of the very global economic and social processes that have given rise to the EU. As a result, the Member States are said to have been similarly afflicted by a weakening of affective national bonds and a loss of confidence in the competence of politicians.<sup>2</sup> They argue that the virtual absence of a demos-based, majoritarian parliamentary model of democracy at the EU level merely reflects its attenuation and partial replacement by new forms of democratic legitimation at the Member State level.

What I shall call the 'rights-orientated' strand of this argument suggests EU wide democracy can work, but it needs to be established on a new basis to some form of European identity.<sup>3</sup> This strand stresses how citizens now tend to justify their claims in terms of rights and regard them as constraints on the behaviour of their compatriots and politicians. A commitment to justice is said to be a more powerful political bond within a pluralist society than ethnicity,

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<sup>1</sup> An earlier version of this paper was given at a Conference on Shifting the Boundaries of Sovereignty: Governance and Legitimacy in the EU and Australasia, organized by the National Europe Centre, ANU, and is based on research undertaken while a Visiting Fellow at the Centre as part of the 'Democracy Task Force' of the EU funded 6<sup>th</sup> Framework Integrated Project on New Modes of Governance (Contract No CIT1-CT-2004-506392). Later versions have been delivered to the NoSoPhi seminar at the Université Paris 1, the Second Annual Conference of the Consortium on Democratic Constitutionalism at the University of Victoria on 'Supranational Political Community: Substance? Conditions? Pitfalls?' and the Graduate School of Politics and International Studies, Hull University. I'm grateful to the other participants at these events for their comments and to Neil Walker, Jo Shaw, Chris Hilson, David Coen, Andrew Moravcsik and Albert Weale for written remarks.

<sup>2</sup> Its noticeable, for example, that the White Paper on European Governance explicitly treats the EU's legitimacy problems as symptomatic of various common difficulties confronting advanced democracies more generally (*European Governance: A White Paper* Commission of the European Communities, Brussels 25.7.2001, Com (2001) 428, p. 3).

<sup>3</sup> The most prominent exponent of this view is Jürgen Habermas. See his 'Citizenship and National Identity: Some Reflections on the Future of Europe', (1992) 12 *Praxis International*, 1 and 'Why Europe Needs a Constitution', (2001) 11 *New Left Review* 5. Among the many others promoting this strand, see Eriksen, Fossum, and Menéndez, 'The Chartering of a European Constitution', in E. O. Eriksen, J. E. Fossum, and A. J. Menéndez, (eds), *Constitution Making and Democratic Legitimacy*, Oslo: ARENA Report, No 5/2002, pp. 1-11.

history or shared cultural values. Most important, it offers the prospect of a post-national form of democracy suited to the EU. After all, the EU has created a transnational legal system guided by international norms of rights and the rule of law. Though EU law originated to secure the basis for a common market, it has reached beyond the narrowly economic sphere. It now disseminates standards of equality and fairness in a whole range of areas: from consumer protection to the recognition of gay relationships. The Charter of Rights and Constitutional Treaty are seen as the culmination of this process and said to offer an alternative, civic, basis for a pan-European constitutional democracy to a shared European identity of an ethnic or cultural kind similar to the nationalisms of the Member States. As they note, the potential for rights protection at the EU level already provides a focus for many transnational civil society groups.

By contrast, what I shall call the ‘public interest-orientated’ strand, while not indifferent to these concerns, argues that democratic accountability plays a diminished role in the operation of most states.<sup>4</sup> It proves not just unnecessary but potentially pernicious. EU governance simply reflects this situation. According to this strand, what matters most to citizens are the securing of certain goods – such as high employment, economic growth and environmental protection. Citizens no longer look to states to provide these directly but indirectly, through regulation. Moreover, policies in these areas are often highly technical and susceptible to being distorted to favour particular powerful private interests. What people want in such fields are expertise, efficiency and equity. They look for Pareto-efficient improvements that correct for market failure. Proponents of this strand argue that the democratic output of policies that reflect such public interests do not require – indeed they may even be subverted by – too much democratic input. There should be consultation with affected parties, but this exercise is for information gathering not to promote democratic accountability or responsiveness. Even at the domestic level, technical regulatory issues tend to be delegated to unelected expert bodies. To the extent the EU merely oversees those regulatory problems best tackled at an international level, and of a kind that democratic politicians in any case handle badly, then the relative absence of direct democratic control poses no problem. In fact, intergovernmental democratic bargaining would inevitably raise transaction costs and might well produce distorted and suboptimal outcomes as politicians sought to protect a variety of national level interests. The indirect control and checks provided by elected politicians within the Council of Ministers and the European Parliament are sufficient.

These two views appear to be at variance with each other: the one advocating the expansion of democracy on a new basis, the other defending the attenuation of older forms. Indeed, some advocates of ‘the rights-orientated view’ have criticised what they regard as the utilitarian and instrumental emphasis of ‘the public interest- orientated view’.<sup>5</sup> Yet that criticism is not entirely fair. For the ‘public interest’ view sees the technocratic setting and upholding of regulatory standards as a parallel to, and constrained by, the judicial maintenance of rights standards.<sup>6</sup> In that respect, the rights-based view also seeks to limit democracy. Moreover, to a surprising degree the two views share certain common normative assumptions: namely, that

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<sup>4</sup> The prime examples of this strand are G. Majone, e.g. ‘Europe’s Democratic Deficit: the Question of Standards,’ (1998) 4 *European Law Journal* 5 and A. Moravcsik, e.g. ‘In Defence of the Democratic Deficit: Re-assessing Legitimacy in the EU’, (2002) 40 *Journal of Common Market Studies* 603.

<sup>5</sup> E. O. Eriksen and J. E. Fossum, ‘Europe in Search of Legitimacy: Strategies of Legitimation Assessed’, (2004) 25 *International Political Science Review* pp. 439-41.

<sup>6</sup> G. Majone, ‘Regulatory Legitimacy’ in G. Majone et. al. *Regulating Europe*. (Routledge, 1996), p. 286 and A. Moravcsik, ‘Is There a “Democratic Deficit” in World Politics? A Framework for Analysis’, (2004) 39 *Government and Opposition* pp. 344-46.

impartial procedures, fostering deliberation and openness among well-informed and appropriately motivated persons, and consulting with affected civil society groups, will generate a consensus on rights or the public interest in their respective areas.

The following examination of these two accounts concentrates primarily on a normative assessment of their common core. In contrasting ways, both views claim they are more ‘realistic’ than the standard critiques of the EU’s democratic deficit. The ‘rights-orientated’ theory takes issue with the ‘no-demos’ thesis and contends the emphasis on nationality as a source of political identity harks back to an outmoded, and often malign, ideal of cultural and ethnic homogeneity.<sup>7</sup> The ‘public-interest’ view criticises those seeking more democratic-decision making within the EU for applying highly idealised standards of an ‘ancient, Westminster-style’ democracy.<sup>8</sup> However, I shall argue that both views involve idealised assumptions of their own that are only credible in the context of the very positions they criticise.

The basic problems can be summarised as follows: 1) Both rights and the public interest are subject to reasonable disagreement. As a result, democratic legitimacy cannot be secured by arriving at an ‘objective’ view of rights or the public interest that all European peoples could be assumed to espouse, regardless of whether they are actually involved in reaching that view or not. 2) When independent bodies, such as courts or regulators, set such standards they are often controversial. Within established democracies public pressure can be brought to bear on these bodies in ways that render them broadly responsive to sustained majority opinion. Such pressures are often indirect and inadequate, yet when ignored, in whole or in large part, they give rise to concerns about a national democratic deficit. 3) To the extent a consensus exists on rights or the public interest it is because it reflects the majority view of a demos. Therefore, the possibility of such consensuses cannot be used as substitutes for collective democratic decision-making among a people who accept its legitimacy because they feel a sense of commonality and acknowledge the authority of the state to decide issues of public concern within its territorial sphere. If at least part of the reason the EU suffers from a democratic deficit lies in the absence of a demos, then that deficit may be intensified rather than diminished by the development of EU level rights or regulatory standards possessing minimal democratic endorsement or control by a yet to be created European people.

I shall start by outlining the nature of such disagreements and the role democracy can play in deciding them. I shall also briefly explore whether democracy at the EU level possesses the same normative qualities to perform this role as at the Member State level. I then look in more detail at the merits of the post-national rights-orientated view of EU democracy and a public interest based delegatory democracy. Both are found wanting, with the democratic deficit a continuing problem.

## II. Democracy and Disagreement

The vast majority of citizens within democracies believe in the importance of rights and regard certain state activities to be in the public interest. However, they also disagree about the character and substance of both, and often divide over the policies most conducive to securing them. No doubt self-interest, prejudice and ignorance lie behind many of these differences. However, they also stem from nothing more sinister than the limitations of the human condi-

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<sup>7</sup> Habermas, ‘Citizenship and National Identity’ pp. 13-18, Eriksen and Fossum, ‘Europe in Search of Legitimacy’, pp. 443-45.

<sup>8</sup> Majone, ‘Regulatory Legitimacy’ p. 285, Moravcsik, ‘In Defence of the Democratic Deficit’ p. 605 and ‘Is There a “Democratic Deficit”’ p. 337.

tion. Not only can various worthwhile goals and values prove either contingently or logically incompatible, and so cannot be contained within one social world, but also our evaluations of which mix should be preferred are subject to conflicting appraisals. Such conflicts need not reflect bias or bad faith but simply what Rawls's calls 'the burdens of judgement'.<sup>9</sup> These burdens range from the difficulty of weighing empirical evidence to the conscientious employment of differing normative standards. All these elements can produce divergent opinions among even reasonable, well-motivated people. Indeed, they lie at the heart of most political debates and divisions. Debates between right and left over the best mix of public and private in running the economy or the legitimacy of social rights are both legitimate and enduring precisely because they do not admit of any definitive, knock down solution – even if academics and politicians on each side of these and other issues attempt to offer their alternative answers.

The existence of reasonable disagreement in these areas makes the assumption of an underlying European (or national) consensus on rights or the public interest debateable. It also poses a difficulty for the 'objective' setting of standards by supposedly impartial bodies, such as courts and regulators. Either they will disagree as much as the rest of the population, or their agreement will reflect a somewhat false professional consensus that fails to take into account many factors that legitimately matter for ordinary people.

Within democracies such as those existing in all the Member States, the problem of reasonable disagreement is largely overcome through appeals to rights and the public interest being nested within a national public sphere and democratic system. Indeed, Albert Weale and Jeremy Waldron see reasonable disagreement on matters that nonetheless require a mutually acceptable collective decision as framing the 'circumstances of democratic politics' in much the same way Hume and Rawls regarded moderate scarcity and limited altruism as forming the 'circumstances of justice'.<sup>10</sup> Four factors lead citizens to accept the authority of democracy to resolve their differences in these cases. The first three factors serve to establish a political community, the fourth concerns the character of democratic decision making. First, they must share certain common interests and acknowledge that various collective decisions have to be made if their lives are to go well and social cooperation is to be possible. For example, in the case of certain co-ordination problems, having an agreed collective decision, even one you do not like, can be better than the uncertainty resulting from having no agreed decision at all. Second, the institution towards which the democratic decision is directed must have de facto and de jure authority over the issue – it can actually deliver and is widely regarded as being entitled to do so. Third, there has to be a degree of trust and solidarity among citizens. They need to believe their fellows will honour their mutual obligations and stand by decisions that go against them, and be prepared to make sacrifices to promote certain public goods and common purposes. Finally, they regard democracy as a fair procedure for selecting a collectively binding decision. Two common misconceptions about democracy need to be avoided in this regard. The language of preferences can suggest collective decision making to be about satisfying conflicting wants. This characterisation misdescribes the nature of political choice. Rather than straightforwardly expressing their own wants, voters are offering judgements on the nature of their common interests and the best ways to promote them. However, democracy is not about producing the 'right' answer on these matters either. Those on the losing side of a democratic vote rarely concede they were wrong – at most they admit to having misjudged

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<sup>9</sup> J. Rawls, *Political Liberalism* (Chicago University Press, 1993) pp. 55-57.

<sup>10</sup> J. Waldron, *Law and Disagreement* (Oxford University Press, 1999) pp. 107-18, A. Weale, *Democracy*, (Macmillan, 1999) pp. 8-13.

the public mood and may even endeavour to win people round next time. People typically accede to a democratic vote to resolve, rather than to dissolve, their continuing disagreements. Indeed, democracy's attractiveness lies in its not requiring their substantive agreement in order to arrive at an agreed decision. It simply offers a fair way of overcoming differences of opinion that is not intrinsically biased towards any given decision. This fairness consists in treating different views on an equal basis and responding to the majority opinion. It also allows mistakes to be corrected and the losers to try again by permitting the periodic revision of decisions and the removal of those responsible for them.<sup>11</sup>

A number of features of actually existing democratic decision-making are worth noting for what follows. First, even local democracy usually involves a large degree of delegation to elected representatives. Switzerland apart, citizens rarely vote on individual policies. Rather, they elect politicians to enact political programmes. Basically, elections screen for politicians possessing certain qualities of political leadership and build coalitions between different groups of people, often by log-rolling and arranging trade-offs between their various policy objectives. By allowing those politicians who disappoint to be deselected, elections provide an incentive for them to pursue policies that are in the interests of stable majorities. This system does not rely on voters offering expert opinions on how the economy works, the causes of crime and the best means of reducing it or any other complex policy issue. They merely choose between the different policy prescriptions of the parties in contention and judge on results. As Max Weber noted in a famous analogy,<sup>12</sup> elections in this respect resemble consumption in the market – most voters no more know how to run the country than they know how to make shoes, but they know when the shoe pinches and likewise when governments fail.

Second, within all democratic states certain policies are delegated to bodies that are either formally outside the control of democratically elected politicians, or only very indirectly subject to them – such as central banks, courts and other independent regulatory agencies. However, these bodies are not thereby isolated from any political pressure. Both politicians and public opinion more generally will express views on their performance. Usually, these bodies respond to sustained criticism. Moreover, supplementary political action is often required to give real effect to their decisions – giving politicians an indirect source of control.

Finally, the first three of the four factors noted above are, on most accounts, considerably weaker at the EU level than in the Member States. Eurobarometer polls reveal that on average a (bare) majority of Europeans believe they benefit from the EU and view EU institutions reasonably favourably, indicating that by and large the first factor applies – if only for just over 50% of EU citizens. So, by implication, does the second factor – at least for the limited policy sphere in which the EU operates. That said, support is lukewarm even among pro-Europeans. Strong enthusiasm for the EU, like hardline Euroscepticism, is a minority pursuit.<sup>13</sup> However, identification with the EU and fellow Europeans is far lower, suggesting that the third factor

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<sup>11</sup> On both these caveats see Waldron, *Law and Disagreement*, Ch. 5 and Weale, *Democracy*, Ch. 7.

<sup>12</sup> M. Weber, 'Parliament and Government in a Reconstructed Germany', in *Economy and Society*, Vol 2, (Berkeley, 1978) p. 1456.

<sup>13</sup> E.g. When the image of the EU is broken down into 'very positive' and 'fairly positive', then around 7-10% opt for the former category and 35-40% for the latter. A similar division can be found in most assessments of the EU, with the overall positive view fluctuating around 50% with a small but steady decline in support among long term members, albeit with large differences between member states. See J. Blondel, R. Sinnott, and P. Svensson, *People and Parliament in the European Union: Participation, Democracy and Legitimacy* (Clarendon Press, 1998) pp. 56-62.

of trust and solidarity is very weak. By and large, around 3% of citizens generally view themselves as ‘Europeans’ pure and simple, with barely 7% saying a European identity is more important than their national one. By contrast, approximately 40% describe themselves as national only and 47% place nationality first and Europeanness second. Indeed, though 89% of these citizens usually declare themselves attached to their country and 87% to their locality, only 58% feel attached to the EU.<sup>14</sup>

As we shall see, ‘public interest’ defenders of the EU’s democratic deficit often argue that criticisms of the EU’s political arrangements apply unrealistic democratic standards. However, it does not seem wildly utopian to expect a degree of democratic accountability and control concerning the overall direction of EU policy, the performance of individual decision-makers and the impact of particular decisions – particularly if, as I shall argue below, the deliberations of delegated bodies prove more contentious than is claimed. The issue then becomes how far such democratic control is achieved, possible or acceptable within the EU. Those who cite the absence of a ‘demos’ as a limiting factor on EU democracy normally focus on the weakness of the first, second and third factors. The ‘rights-orientated’ strand comes in here, arguing that a common commitment to justice rather than a shared national identity and public culture provide the best basis for trust and solidarity. The difficulty with this argument is that the ties of justice apply to all human beings – not just one’s fellow citizens. Moreover, they are themselves deeply contested. As such, they are too thin and controversial to bind citizens to a specific state as the locus where disagreements about their collective interests and rights might be appropriately negotiated and decided.<sup>15</sup> In addition, a shared culture often provides a common language that facilitates public discussion. Though there are many multilingual states and most are multinational, they have tended towards ever greater autonomy of subnational and sublinguistic units. The key issue concerns how far a set of common entitlements and concerns can allow the EU to buck this trend.

### III. Rights-Orientated Post-National Democracy

The rights-orientated, post nationalist strategy conceives the EU ‘as building on ... principles and rights that are uniquely European and normatively uncontroversial, since every Member State subscribes to them and since these moral norms are increasingly spread worldwide.’<sup>16</sup> Their ‘presumption is that public support will reside in a *constitutional patriotism*, which emanates from a set of legally entrenched fundamental rights’.<sup>17</sup> These rights provide the basis ‘both for protecting the integrity of the individual (private freedom) and for making possible participation in the opinion-formation and decision-making processes (that is, political

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<sup>14</sup> These figures come from Eurobarometer 60 (published February 2004 and based on fieldwork October-November 2003), and the results of earlier studies reported there. I have used results based on the old 15 rather than the new 25 because these can be placed in the context of a general trend. Figures from Eurobarometer 62 (Field work October-November 2004, Publication December 2004) reveal the new members to be on average a little more positive about the benefits coming from the EU. As a result, the slow decline in approval of the EU from the high point reached in the early 1990s appears, temporarily at least, to have been slightly reversed. In fact, new members almost always boost average support for the EU, after which it declines slightly. The figures relating to identity have been remarkably stable over the past decade or so (see Blondel, Sinnott and Svensson 1998: 62-65).

<sup>15</sup> Arguably Rawls himself partly acknowledges this fact when he explicitly assumes cultural attachments as undergirding agreement on the principles of justice in Rawls, *Political Liberalism* p. 277.

<sup>16</sup> Eriksen and Fossum, ‘Europe in Search of Legitimacy’ p. 447.

<sup>17</sup> Eriksen and Fossum, ‘Europe in Search of Legitimacy’ p. 446.

rights that establish public freedom.)'<sup>18</sup> Indeed, these rights are supposedly both the foundations for and the product of a 'European public sphere'.

I think all these claims are flawed. As I have already noted, there is a problem with viewing rights as sources of a European political identity given their allegedly universal status. That ambivalence is present in the contradictory statement, cited above, to the effect that these principles are 'uniquely European' and yet 'increasingly spread worldwide'. They can be hardly be both. If these rights ought to be (and to a large degree are) upheld by all liberal democracies, including those outside Europe - such as the United States, India, Australia or Japan, then they do not provide grounds in and of themselves for any sort of 'uniquely European' allegiance.

Meanwhile, the belief that rights are 'normatively uncontroversial', in part 'since every Member State subscribes to them' is too simple. All Member States do 'take rights seriously'. All adhere to the European Convention on Human Rights and have domestic Bills of Rights of various kinds and some form of rights-based judicial review. But though they share roughly the same liberal democratic values, their valuations of them frequently diverge.<sup>19</sup> For example, though all acknowledge a 'right to participate', 'freedom of speech' and the other 'political rights that establish public freedom', they have very different political and electoral systems. Consequently, they interpret citizenship rights in correspondingly diverse ways. They also employ different constructions of the fundamental rights 'protecting the integrity of the individual', or 'private freedom', such as the right to life. Thus, Belgium and the Netherlands are the only Member States that currently allow certain forms of euthanasia, and even they define and regulate it differently.

These different valuations not only differ from each other but also may conflict. For example, Germany understands privacy and its relationship to freedom of speech somewhat differently to Britain. As a result, Chancellor Schroeder was able to prevent *Die Bild* reporting certain details about his personal life that *The Sun* was allowed to publish. Moreover, not only do Member State valuations often conflict with each other, but they may also clash with the valuations offered by the ECJ at the EU level, as cases such as *Grogan* notoriously revealed.

These differences render the notion of rights providing a 'normatively uncontroversial' basis for EU democracy somewhat problematic. The aspiration was to see these rights as somehow transcending national differences, but they now seem to be shaped by them. Of course, it might be objected that all these countries already subject themselves to certain common international rights regimes, and accept the rulings of international courts, such as the European Court of Human Rights. Arguably, these regimes do pose problems for a democrat. After all, one of the reasons Britain had for incorporating the ECHR was to 'domesticate' the European Convention by 'bringing rights home', as the White Paper introducing the Human Rights Act put it. However, even placing these difficulties to one side, there is a qualitative difference between the role of an international rights regime, such as the ECHR, and the aspirations postnationalists have for an EU rights-based order. The former operates at the margins. Its function is to ensure that all signatories provide political arrangements and policies that can be regarded as plausible readings of the European Convention and to protect those, such as asylum seekers or foreign nationals, who have no voice in the country's democratic system. Consequently, the ECHR employs abstract formulations compatible with widely differing

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<sup>18</sup> Eriksen and Fossum, 'Europe in Search of Legitimacy' p. 445.

<sup>19</sup> See N. Nic Shuibhne, 'The Value of Fundamental Rights' in M Aziz and S Millns (eds), *Values in the Constitution of Europe*, (Dartmouth. 2005), Ch. 8.

valuations of rights and grants a ‘margin of appreciation’ to states in many cases. The latter aims to bring into being a European public sphere based on a shared understanding of rights and so motivate agreement on a federal structure for Europe that in various ways goes beyond national allegiances and political cultures.<sup>20</sup>

As we have seen, at present no such shared understanding exists – indeed, it has been the attempt of the ECJ to give a ‘Community’ reading of certain rights that departs from their national meaning that has often been a cause of constitutional friction between it and the constitutional courts of the Member States.<sup>21</sup> That does not mean that Member States cannot participate within a common political system. However, they do so in ways that reflect rather than transcend national traditions. For example, though elections to the European Parliament occur under common rules, Member States interpret their European political rights in slightly different ways – using different variants of PR, voting on days that fit with local practices and, most importantly, mainly campaigning on domestic issues and debates about Europe under the guise of the same parties that contest national elections. European Parties are largely a post-hoc creation within the European Parliament, with a European public sphere – to the extent it exists – being found only among Euro-elites. The absence of a common language, media, political culture and the growing size of the EU all make a genuine EU public sphere unlikely.

European law and rights has been correspondingly ‘inter-national’ in character – an on-going dialogue between different national jurisprudential traditions, negotiated between the ECJ and the courts of the Member States, notwithstanding the former’s insistence on Supremacy, Direct Effect and its own competence-competence.<sup>22</sup> After all, the ECJ’s development of a rights jurisprudence came in large part as a result of rights-based challenges from national constitutional courts. The post-nationalists believe these practical compromises detract from a potential European normative consensus, risking incoherence and potentially injustice in the process. Yet, given the diversity of European views on rights, such a consensual view would be a false imposition.

Postnationalists make two responses to this sort of critique. The first rests on the role and supposed democratic credentials of constitutional courts as mechanisms for determining the view of the political community. After all, disagreements about rights exist within the Member States as well as between them. In many countries, a court resolves these disputes rather than a democratic process. However, some commentators contend this solution need not be seen as anti-democratic but rather as a way of giving effect to the underlying principles of democracy, notably the showing of equal concern and respect to all citizens, in ways that democratic procedures may not through majorities being influenced by prejudice, ignorance or vested interests. Surely, the ECJ would be acting no differently in being the authoritative interpreter of the European Charter of Fundamental Rights? It would be compensating for the inadequacy of European democratic procedures by expressing the substance of a pan-European democratic consensus.

As with the earlier comparison with other international courts, there is a difference of degree. National Courts are not nearly so insulated from democratic influences as the ECJ. They be-

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<sup>20</sup> Eriksen and Fossum, ‘Europe in Search of Legitimacy’ pp. 446-7.

<sup>21</sup> See J.H.H., Weiler, *The Constitution of Europe: ‘Do the new clothes have an emperor’ and other essays on European integration* (CUP, 1999) Ch. 3, especially the discussion of Case 44/79, *Liselotte Hauer v. Länd Rheinland-Pfalz* [1979] ECR 3,727 at pp. 108-116.

<sup>22</sup> See J. H. H. Weiler, ‘In Defence of the Status Quo: Europe’s Constitutional *Sonderweg*’ in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State*, (Cambridge University Press, 2003).

long to the domestic political system and come under a great deal of direct and indirect democratic pressure. The US Supreme Court is often portrayed as a model of how rights-based judicial review can forge unity and reinforce democratic values within a federal system. Yet, analysts of the Court have observed how throughout its history it has faced periodic democratic challenges, often shying away from federal adjudication for long periods as a result.<sup>23</sup> Few successful Court decisions can fly in the face of sustained national majorities – not least because without legislation and government action to promote and enforce them, they are likely to fall into neglect. Moreover, the main successful anti-majoritarian decisions of the US Supreme Court do not provide a particularly edifying example of the democracy promoting role of courts or their defence of weak minorities. Made during the Lochner era, these struck down some 150 pieces of labour legislation improving working hours and conditions. Only the overwhelming democratic endorsement of Roosevelt's New Deal could right these injustices. Anti-majoritarian checks can not only protect individual rights, but also favour entrenched privileges and vested interests. Litigation tends to be an expensive business, with legal avenues in the EU – as elsewhere – being disproportionately exploited by corporate bodies.<sup>24</sup> Used excessively, litigation can also stunt the evolution of democratic, collective problem solving, and divert attention to ultimately self-defeating forms of individual redress, particularly in the area of compensation and liability.<sup>25</sup> Within the EU, where the absence of a European people or public sphere makes it hard to talk of a European majority or, were it to exist, for it to exert much pressure, the dangers of a Court reinforcing rather than diminishing the EU's democratic deficit are particularly strong.

The postnationalists' second response enters here. They argue that the Charter and the Constitutional Treaty, which incorporates it and makes the ECJ the authoritative interpreter of both, can also claim a degree of procedural democratic legitimacy through being produced by a process of democratic deliberation and subjected to subsequent democratic endorsement by either a referendum or parliamentary vote in each of Member States.<sup>26</sup> Many postnationalists have set great store by the 'convention method'.<sup>27</sup> Though unelected, the conventions used to draft the Charter and Constitution were comparatively representative bodies. Unlike IGCs, they contained a majority of national and European parliamentarians alongside government and commission representatives, and consulted widely with civil society groups. As a result, the main national, supranational and transnational positions were included, along with the central ideological divisions found within each – even if some groups, notably women and ethnic minorities, were conspicuous by their relative absence. Most importantly from their advocates' point of view, decisions within the conventions were taken not by majority vote but by seeking a consensus. Deliberative democrats contend that, on matters of constitutional principle at least, this requirement should lead to participants relinquishing self-serving and partial views and converging only on those reasons and conclusions that would be acceptable to free and equal individuals. In this way, an ideal European democratic process was to give rise to the foundations for a real European democracy.

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<sup>23</sup> E.g. see N. Devins and L. Fisher, *The Democratic Constitution*, (Oxford University Press, 2004) Ch. 3.

<sup>24</sup> C. Harding, 'Who Goes to Court? An Analysis of Litigation against the European Community' (1992) 17 *European Law Review* 105.

<sup>25</sup> C. Harlow 'Francovich and the Problem of the Disobedient State' (1996) 2 *European Law Journal* 199.

<sup>26</sup> With the French 'Non' and the Dutch 'Nee', the second aspect of this claim has obviously proved false. Yet, the reactions of many academics and EU figures suggests this outcome was largely unexpected and certainly unprepared for.

<sup>27</sup> Eriksen and Fossum, 'Europe in Search of Legitimacy' p. 453.

It is one thing to regard consensus as the logical goal of democratic deliberation, another to believe it a likely or the only rational outcome. Obviously, postnationalists were all too aware of the limitations of any actual deliberative process. However, they tend to regard all differences stemming from national interests or ideological divisions as illegitimate, the product of partiality or prejudice.<sup>28</sup> Yet, their source may well be an alternative understanding of rights, freedom and equality. As we saw, the ‘burdens of judgement’ make reasonable disagreement on such matters possible. Given that innumerable seminars have not produced a consensus among philosophers on these issues, it is perhaps no surprise that the conventions failed to do so. Instead, they generated numerous compromises, with many disagreements being resolved by framing the right or clause so abstractly as to be compatible with almost any reading. In essence, the Charter – and even more the Constitution – represent not a normative consensus, but the most acceptable pragmatic solution to the practical problems currently facing EU decision making that those involved could agree to.<sup>29</sup>

Their status as a time bound compromise rather than a timeless consensus substantially weakens the claims that can be made for these documents. They reflect the best deal that elites representing different national and European interests could negotiate in present circumstances, not a move towards pan-European democracy. The subsequent referendums and parliamentary debates appear to confirm this scenario. Rather than exercises in pan-European idealism, the key issue has been whether they will ensure that on balance the country concerned benefits rather than loses from EU membership. At best, the Constitution represents a reasonable *modus vivendi* for regulating the interactions of the various *demos* within the EU. As we have seen, quite a few European citizens doubted even that.

There is a vicious circularity to the postnationalist argument. It posits an ideal democratic European consensus as both the underpinning and the potential result of a (properly constructed) real European democratic process. In other words, it makes an assumed European *demos* the pretext for attempting to bring it into existence. Any failure for this putative *demos* to emerge gets attributed to shortcomings in the current ground rules. Yet, this thesis builds its conclusions into its premises, and in practice puts the cart before the horse. Though both the normative and empirical bases for the postnational argument are questionable, the plausibility of each rests on the truth of the other. Absent any consensus, then, as I noted, disagreement standardly gets overcome through majoritarian decision making – but that assumes a *demos* of the kind postnationalists seek to do without. Indeed, given that the EU has to cope with diversity as well as disagreement, the current rules with their more consociational and Madisonian features are arguably more legitimate than majoritarian ones would be. However, whether they can claim, or need, democratic legitimacy remains at issue.

#### **IV. Public Interest Orientated Delegatory Democracy**

This position more or less forms the starting point for theorists of the public interest model of delegated democracy. They criticise many democratic theorists for applying ideal, utopian criteria to the complicated reality of the EU, noting that proposals for improving democracy must be not only philosophically coherent but pragmatically viable.<sup>30</sup> They contend it is the

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<sup>28</sup> Eriksen and Fossum, ‘Europe in Search of Legitimacy’ p. 454.

<sup>29</sup> See R Bellamy and J Schönlaue, ‘The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights’ (2004) 11 *Constellations: An International Journal of Critical and Democratic Theory* 412 and P. Magnette and K. Nicolaidis, ‘The European Convention: Bargaining in the Shadow of Rhetoric’, (2004) 27 *West European Politics* 381

<sup>30</sup> Moravcsik, ‘Is There a “Democratic Deficit”’ p. 337.

very absence of a European demos that legitimises the use by the EU of ‘non-majoritarian’ institutions.<sup>31</sup> Indeed, in many areas – particularly those that most concern the EU – they note that a subset of such non-majoritarian mechanisms, namely expert, regulatory bodies, have become standard even in otherwise majoritarian democratic systems. Yet, curiously a similar putative European consensus, this time of a technocratic kind, underlies their arguments.

Delegation, the focus here, has a different rationale to many other non-majoritarian schemes. As Majone rightly notes,<sup>32</sup> in complex, plural societies, where the dangers of factionalism and minority oppression are said to be greater, it is common to adopt mechanisms aimed at sharing, dispersing and limiting power. Given the EU is split by a number of deep cleavages, from the distinction between small and large states, to differences of language, religion and political culture, the use of such non-majoritarian mechanisms seems appropriate. As we saw, the basic rationale for majoritarian decision making is that it is a fair procedure among people who share common interests for deciding among their different judgements as to how these might be best pursued. Many of these non-majoritarian schemes share that same logic. They simply note that for some purposes certain groups’ interests may not be common, or may be viewed so differently as to make common rules for determining how they should be pursued unsuitable. Thus, the standard form of dispersing power is to devolve it to a particular locality or region. The aim here is to select the functionally or culturally appropriate majority for the issues in question. The prime strictly non-majoritarian strategies arise where there are territorially dispersed consistent minorities, making the federal/devolved option unavailable. These seek to secure either a threshold voice for a given group or a degree of proportionality in decision-making in order to protect the special interests of those concerned. By contrast, delegation - at least in the area of regulation - assumes that all concerned have common interests, but that, for one reason or another, the judgements of ordinary people or those of their chosen representatives are suspect.<sup>33</sup>

Underlying the ‘public-interest’ account is a crucial distinction between redistribution and regulation.<sup>34</sup> Redistribution is a zero-sum game. As such, it requires democratic endorsement to legitimise the transfer of resources from one group to another. However, regulation aims at improving efficiency and should be a positive-sum game where everyone gains. Such measures dominate the EU agenda and include the removal of trade-barriers to improve the functioning of the market, the promotion of food and safety standards that render us all healthier, and the correction of market failures by tackling such negative externalities as pollution. Yet, though intended to make us all better off, they prove more contentious than the advocates of delegation maintain.

As they at least partially acknowledge, the distinction between redistribution and regulation is not clear cut. Regulation aspires to secure diffuse, long-term benefits, but invariably imposes short-term costs on assignable groups and individuals, often in very specific geographical lo-

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<sup>31</sup> Majone, ‘Regulatory Legitimacy’ p. 285.

<sup>32</sup> Majone, ‘Regulatory Legitimacy’ pp. 285-7.

<sup>33</sup> Moravcsik, ‘Is There a “Democratic Deficit”’ pp. 344-46, 355-56 draws a parallel between regulation and judicial review in the area of rights. Some accounts do suggest the rationale for the judicial protection of rights is to guard against the prejudices or carelessness of voters. As I have implicitly noted in the last section, such arguments are weak. A better case follows the logic of most other non-majoritarian institutions - namely, that we need some way of protecting those who do not share sufficient common interests with the collectivity, or have special interests requiring protection, or who have no say in democratic decision making. Examples of such groups include children or asylum seekers.

<sup>34</sup> Majone, ‘Regulatory Legitimacy’ p. 294-6.

cations. Thus, many EU regulations have significant redistributive effects with identifiable winners and losers. For example, they tend to favour transnational corporations over smaller enterprises producing for the domestic market. Delegation theorists address this problem by arguing that within the EU a condition of ‘no wealth effects’ holds.<sup>35</sup> That is, the temporary, adverse effects of a regulatory outcome can be overcome by compensatory measures through the Social Fund, the European Investment Bank and other similar mechanisms. However, these ‘political’, redistributive decisions can and should be separated from the technocratic, a-political policy decision about the best means to promote aggregate welfare through enhancing efficiency.

Putting to one side the degree to which the ‘no wealth effects’ condition truly holds in the EU, the argument still remains problematic. ‘Efficiency’ can be a contested value – both in itself and more especially as a synonym for sound, mutually beneficial policies that promote the public interest. Like rights, it is subject to the ‘burdens of judgement’. Different normative considerations and conflicting empirical assessments, including over what evidence is relevant or not, can all lead to as many disagreements among experts as there are likely to be among ordinary citizens. For example, small, family run farms may produce fewer crops and at greater expense than larger farms, but they may also be more eco-friendly and preserve rural communities, minimising certain social problems in the process. The efficiency of one over the other is a normative judgement, while calculating the costs and benefits of each to come up with a ‘no wealth effects’ solution is highly problematic. Thus, not everyone will regard rural communities as worth preserving, the costs of not doing so may turn on a number of contingent factors, there will almost certainly be various unanticipated knock-on effects, while the whole chain of cause and effect may be hard to disentangle. Different social and moral theories are likely to highlight different aspects of the problem. Consequently, it is hard to think of a technical or economic decision with no discretionary elements.

Advocates of delegation have tended to respond to these concerns by contending that democracy remains inappropriate nonetheless, while the process of expert decision-making can claim certain democratic credentials. These two claims largely parallel those defending the democracy promoting properties of judicial review and constitutional rights examined in the last section: indeed, courts have come to play an increasing role as the people’s tribunes in regulatory governance.<sup>36</sup> They also prove similarly flawed. Like the equivalent rights-based arguments, they tend to overstate the parallels with the apparently analogous domestic arrangements and mischaracterise the purpose and nature of democracy. Let’s take each in turn.

Democratic accountability is deemed inappropriate because potentially it has huge transaction costs in such areas and introduces biases favouring well-organised and influential sectoral interests. Delegation at the EU level has the particular advantage of overcoming the under-representation or blocking at the national level of the interests of diffuse transnational minorities or even majorities. Moreover, the issues are claimed to be not that electorally salient for most citizens anyway. They tend to be highly technical and often arcane matters that even elected politicians are happy to delegate to experts. Politicians may also want to delegate so they can make long term commitments in contentious areas that will not be subject to the vagaries of the electoral cycle while being able to shift the blame on to others should these policies prove unpopular.<sup>37</sup>

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<sup>35</sup> Majone, ‘Regulatory Legitimacy’ p. 295.

<sup>36</sup> Majone, ‘Europe’s ‘Democratic Deficit’’, pp. 21-22.

<sup>37</sup> Majone, ‘Europe’s ‘Democratic Deficit’’, pp. 13, 16-18; Moravcsik, ‘Is There a “Democratic Deficit”’ pp. 343-48.

Though plausible enough in theory, many of these arguments prove normatively suspect and practically unfounded. For a start, shifting the possibility of being blamed for contentious policies may not only be a means of insulating long term interests against short term popular myopia or prejudice, but also a way of evading political responsibility for poor decisions. Complaints of an EU democratic deficit stem in part from the tendency of national politicians to attribute certain economic or other failings to decisions by an anonymous ‘Brussels’, without acknowledging their own part in them. Second, most political decisions involve abstruse technicalities. However, politicians generally specialise in particular areas and get used to consulting, and evaluating, the advice of a range of expert advisors. Moreover, like ordinary citizens, they tend to be especially and legitimately sensitive to the good or bad consequences of policies. Third, Moravcsik and Majone arguably overplay the domestic analogy, underestimating the ways elected politicians control non-majoritarian regulatory bodies in the Member States. The autonomy of domestic regulatory bodies is generally limited by various screening and sanctioning mechanisms that allow the political principals to control their technocratic agents. Though many formal instruments appear too costly and arduous to employ with any regularity, potentially impugning the neutrality of the agency and thereby undermining its chief asset, or risking associating the political principals with any failure, a range of less overt and informal measures arguably prove more effective. By selecting friendly yet independent experts, with no direct party or other link to government, and managing the effectiveness of the body through their hold on information or role in implementing its recommendations, politicians can shape the institutional incentives in such ways that regulators propose congenial policies.<sup>38</sup> At the EU level, the plurality of principals and the ability of the Commission to develop a complex network of overlapping agencies, all reduce this influence while introducing the dangers of conflicting forms of accountability. Meanwhile, the possibilities for regulatory capture are increased by the closeness of EU regulation to various ‘stakeholders’ – notably business and unions.<sup>39</sup> Finally, domestic regulators come under diffuse public pressure from the media and other organs of the national public sphere – a pressure that is far harder to exert at the EU level given the virtual absence of a pan-EU public sphere.

For example, the paradigm case of delegated regulatory power is often taken to be the fixing of interest rates by a central bank. Typically viewed with approval,<sup>40</sup> there is always the danger these regulators will serve the interests of the financial community rather than those of producers and consumers. Far from being pure technical exercises, such decisions have an obvious political dimension involving as they do judgements over the best balance between the risks of inflation and those of higher levels of unemployment.<sup>41</sup> As we saw, appeals to efficiency do not get us very far because the factors that might lead one to characterise one position as more ‘efficient’ than another may be partly ‘ideological’. Different economic theories tend to involve value and other judgements that favour and draw on different political perspectives. As a result, the separation of ‘policy’ from ‘politics’ is far from clear cut.

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<sup>38</sup> M. Thatcher, ‘The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe’, (2005) 18 *Governance* 347.

<sup>39</sup> D. Coen and M. Thatcher, ‘The New Governance of Markets and Non-Majoritarian Regulators’, (2005) 18 *Governance*, pp. 341-42.

<sup>40</sup> G. Majone, ‘The Credibility Crisis of Community Regulation’, (2000) 38 *Journal of Common Market Studies*, pp. 288-89.

<sup>41</sup> K. McNamara, ‘Rational Fictions: Central Bank Independence and the Social Logic of Delegation’, (2002) 25 *West European Politics* 47.

These are also decisions that ordinary citizens have a strong interest in, even if most would not claim to have a very sound knowledge of how the economy works or much of an interest in fiscal policy *per se*. Defenders of delegation sometimes write as if those worried by the EU's democratic deficit are advocating a return to ancient Greece and judging its arrangements by 'an ideal form of perfectly participatory, egalitarian, deliberative politics.' Thus, Moravcsik proclaims that 'We do not expect complex medical, legal or technical decisions to be made by direct popular vote'.<sup>42</sup> Quite – but whoever suggested we did?<sup>43</sup> By and large, we leave such decisions to professional politicians, who, operating in committees and government departments – invariably with the advice of experts, reveal themselves able to formulate very sophisticated policies in such sensitive and technical areas as taxation. As I remarked above, democratic accountability usually gets exercised post-hoc, when the 'shoe' fails to 'fit'. Citizens may be poor economists but they know when the economy lets them down. Democracy is all about giving politicians an incentive to respond to the needs of the public rather than powerful sectoral interests or fashionable economic theories.

Within the Member States, regulatory bodies tend to be embedded within a national democratic culture. Even if banks control interest rates, they can come under public scrutiny via the press and considerable indirect political pressure.<sup>44</sup> Indeed, in the UK (as in New Zealand) the inflation target is set politically, and the Governor can be held accountable if the Bank fails to meet it. The same is true of other regulatory bodies, especially those in the service sector where popular sensitivity to their actions is high. Here too, policy, as opposed to its implementation, remains firmly under political control. By contrast, such scrutiny is often limited at the EU level. The ECB is particularly insulated, being able to make legally binding regulations without involving the national or European parliaments or other EU institutions.<sup>45</sup> For the reasons explored earlier regarding the absence of an EU wide public sphere, informal pressures are also much harder to achieve for EU bodies.

Defenders of delegation attempt to rebut some of these criticisms by invoking the democratic qualities instilled of the regulatory bodies themselves. Though delegation aims to isolate the policy-making process from politics, it is said to possess many of the formal, procedural attributes of democratic decision-making. Great play has been made in recent accounts of their 'deliberative' and 'professional' qualities, whereby experts – who are normally national appointees, and so supposedly representative of various local interests – come to adopt more 'cosmopolitan' and impartial outlooks.<sup>46</sup> However, we have seen there are no reasons for believing deliberation will any more produce a consensus on 'efficiency' than on 'rights'. If any argument involves a naïve, utopian idealisation of the democratic processes, it is surely this

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<sup>42</sup> Moravcsik, 'Is There a "Democratic Deficit"', p. 344.

<sup>43</sup> The relevant article is rather short on references, but Dahl and pluralists more generally – to name but one name/group of thinkers who are mentioned, seem unlikely candidates for this sort of characterisation. Dahl does criticise 'guardianship' somewhat trenchantly, but not in the name of some utopian ideal democracy but against real, Schumpeter style, competitive party democracy of the kind most actually existing democracies aspire to for most political decision making. R. A. Dahl, *Democracy and its Critics* (Yale University Press, 1989), Ch. 4.

<sup>44</sup> See, for example, the following article from the very day I drafted this paragraph – Larry Elliott, 'Manufacturing Woe Raises Rate Pressure', *The Guardian*, 2 June 2005, p. 25.

<sup>45</sup> Moravcsik, 'In Defence of the Democratic Deficit', p. 621 does acknowledge this isolation in the ECB case as a problem, even if Majone regards it as an asset ('Regulatory Legitimacy' pp. 288-89).

<sup>46</sup> Majone, 'Regulatory Legitimacy' pp. 291-94 and 'The Credibility Crisis of Community Regulation', pp. 295-98, and see deliberative accounts of the comitology process in C. Jorges and E. Vos (eds), *EU Committees: Social Regulation, Law Politics* (Hart, 1999).

claim. Should a consensus emerge, then it probably bears witness simply to the current dominance of a particular view among the profession.<sup>47</sup> As such, this apparent consensus will reflect more the common identity of the body's members as 'experts' than a convergence of national interests. Nor should we regard the isolation of the decision from such concerns as a good thing. Experts have an unfortunate tendency to overlook issues that are legitimate worries for ordinary folk. People's everyday contact with doctors, lawyers and other professionals means they are well aware that experts can make mistakes or overlook the dilemmas facing those they are supposed to serve. Their use by politicians to bolster unpopular decisions has also resulted in their being scarcely distinguishable from their political masters. Certainly, episodes such as BSE and the French Blood scandal have somewhat tarnished technocracy in the eyes of European citizens. Of course, politicians can introduce compensatory measures post-hoc when certain groups are adversely affected. But it seems naïve to expect the national politicians likely to be held responsible for such costs to wait until the damage is done before seeking to rectify it – especially if they have to gain the consent of possibly unaffected European partners in order to do so.

It's partly to address these problems that there have been moves to make regulatory bodies more transparent and consultative. Majone, in particular, appeals to the American experience in this regard.<sup>48</sup> However, the US proves an ambiguous model, with the differences as instructive as the parallels.<sup>49</sup> The US bodies originated as creatures of the highly democratically legitimate Roosevelt Presidency as a way of overcoming some of the counter-majoritarian checks on the Federal administration. Their opening up was championed largely by a Supreme Court suspicious of technocracy and Presidential power. The aim was not to depoliticise these bodies but to ensure a greater degree of political balance within them. Unfortunately, these measures have had mixed results. The guarantees of openness and participation have been mainly used by those interest and other groups best able to organise and fund a team of counter-experts to those favoured by the regulators. Their efforts have often produced regulatory capture or expert stalemate, with specialist courts ending up making the decisions. Majone echoes certain US scholars in justifying this judicial control of the regulatory process as the most functionally appropriate means for protecting individual rights through its being 'insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism'.<sup>50</sup> Thus, an initiative that began as a majoritarian initiative for overcoming entrenched counter-majoritarian privileges and interests blocking federal initiatives has now been turned into yet another counter-majoritarian strategy, albeit one that claims to articulate a consensus on the public interest and rights. We have come full circle, with the regulatory case for delegation dove-tailing with the rights-based argument. Yet, as we saw, both the threats posed by majoritarianism and the democracy and rights promoting credentials of courts are at best contentious. Indeed, there has been something of a democratic backlash against the US agencies amid calls for more effective Presidential coordination of economic and other policies.<sup>51</sup>

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<sup>47</sup> M. Shapiro, "'Deliberative', 'Independent' Technocracy v. Democratic Politics: Will the Globe Echo the EU?", IILJ Working Paper 2004/5 (Global Administrative Law Series), pp. 9-10.

<sup>48</sup> Majone, 'The Credibility Crisis of Community Regulation', pp. 293-5.

<sup>49</sup> Shapiro, "'Deliberative', 'Independent' Technocracy v. Democratic Politics', pp. 5-6.

<sup>50</sup> J. Choper, *Judicial Review in the National Political Process*, (University of Chicago Press, 1980), p. 68 cited in Majone, 'Europe's 'Democratic Deficit'', p. 22.

<sup>51</sup> Shapiro, "'Deliberative', 'Independent' Technocracy v. Democratic Politics', p. 13.

Similar moves within the EU are likely to encounter parallel problems. The White Paper on Governance has been seen as an attempt to open up the technocratic process and boost its democratic credentials by insisting on not only greater openness but also consultation and participation.<sup>52</sup> However, despite the rhetoric about involving the ‘general public’, the main proposals for consultation refer to ‘civil society organisations’, ‘interested parties’, ‘partners’ and ‘stakeholders’.<sup>53</sup> There is a single, ritually pious, reference to the importance of European political parties and none at all to their rather more substantial national counterparts. Although the White Paper recognises the dangers of consulting what are often self-selecting and unaccountable bodies, the proposals it offers for overcoming the resulting biases are largely superficial. Therefore, this policy still risks favouring well funded groups whose interests may well be at variance with that of the public at large. None of these groups need be particularly democratic themselves and involve the citizens they allegedly speak for in their decisions. This weakness is even truer of most consumer and public interest organisations than of certain producer groups. After all, unions at least have a degree of internal democracy. Worse, the ability of many NGOs to criticise regulatory proposals is often constrained by their reliance on EU funds, itself a sign of their low levels of membership<sup>54</sup>. The Commission claims to be able exercise a general supervisory role, yet unlike elected national executives this too is a technocratic body. The ECJ has also been invoked as being able to ensure due process, yet this will either be purely formal or lead the Court into seeking to second guess the substantive conclusions of democracy. In fact, Americanisation has gone less far than delegatory theorists imagined, with the European Parliament playing an increasing part in overseeing comitology. However, if delegatory theorists are right in believing that the cleavage structure of the Union makes an EU demos unworkable, then the EP’s involvement will likewise involve a democratic deficit. In whichever case, the aspiration to substitute technocracy for democracy seems empirically and normatively questionable.

## V. Conclusion

Both the rights-based and the public-interest arguments attempt to overcome the weaknesses of democratic legitimacy within the EU by positing an EU consensus that can be arrived at by a ‘non-political’ democratic procedure. At the same time, they tend to mischaracterise the nature and effects of the forms of majoritarian democratic accountability found in most of the Member States. Since neither their alternatives nor their criticisms appear that convincing, the standard versions of the EU’s democratic deficit retain their force. If an EU demos can be said to exist, then a move should be made towards enhancing the role played by directly elected majoritarian decision-making bodies within the EU. If, as seems more likely, an EU demos and public sphere remain absent with little immediate prospect of being established, then means need to be found for enhancing the democratic accountability of EU decision-makers within the established democracies of the Member States.<sup>55</sup> Either way, the current limitations of EU democracy place democratic limits on what the EU should do - even in the name of rights or the public interest.

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<sup>52</sup> *European Governance*, pp. 11-19.

<sup>53</sup> *European Governance*, pp. 11, 14, 15, 17, 21.

<sup>54</sup> A. Warleigh, ‘“Europeanizing” Civil Society: NGOs as Agents of Political Socialisation’ (2001) 39 *Journal of Common Market Studies* 619.

<sup>55</sup> I have explored this issue in Richard Bellamy ‘Between Past and Future: The Democratic Limits of EU Citizenship’ in R. Bellamy, D. Castiglione and J. Shaw (eds) *Making European Citizens: Civic Inclusion in a Transnational Context*, Palgrave, 2006.