THE STRUCTURE AND DYNAMICS OF EU FEDERALISM

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This article analyzes European Union (EU) politics through the lens of comparative federalism. The article assesses the contributions that rationalist and constructivist approaches can make to the analysis of EU federalism, focusing on two broad questions. First, what explains shifts in authority from the state (i.e., member states) to the federal (i.e., EU) level? Second, what explains the degree to which the federal government constrains state discretion? This article develops testable hypotheses based on the rationalist and constructivist perspectives and presents a set of initial plausibility probes. The article shows that there is considerable room for dialogue between rationalist and constructivist perspectives and together they can provide a more comprehensive explanation for the dynamics of EU federalism.

Keywords: *European Union; federalism; institutions; rationalism; constructivism.*

After years of holding a near-taboo status, the concept of federalism has forcefully reentered mainstream political debates on the future of Europe. German foreign minister Joschka Fischer's controversial May 2000 speech on Europe's federal future sparked a lively transnational debate (see also Joerges, Mény, & Weiler, 2000; "Our constitution for Europe," 2000).[1] In light of the ongoing Convention on the Future of Europe, interest in federalism is increasing, and politicians and journalists alike regularly compare the proceedings to the Philadelphia Convention of 1787. Much work remains to be done if political scientists are to contribute meaningful insights to debates over EU federalism. For too long, most EU scholars have eschewed

1. For instance, *die Zeit* and *Le Monde* cosponsored a debate on the future of Europe between Fischer and Jean-Pierre Chevénement (*Le Monde,* June 21, 2000).

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comparative analysis, instead viewing the EU as a unique, sui generis political system that can only be understood on its own terms. A handful of pioneering scholars has analyzed the EU from the perspective of comparative federalism (Capelletti, Seccombe & Weiler, 1986; Dehousse, 1992; McKay, 1999; Nicolaidis & Howse 2001; Sbragia, 1992; Scharpf, 1988; Weiler, 1991). However, there remains little systematic comparative research that might indicate how the EU's federal institutions influence the integration process or what institutional reforms might help sustain EU federalism. Surprisingly, even scholars who do view the EU as a polity in its own right (neofunctionalists, supranationalists, multilevel governance theorists) refuse to analyze the EU from a comparative federalism perspective, maintaining that such comparison is irrelevant because the EU lacks some characteristics necessary to be deemed a federal state (Marks, Hooghe, & Blank, 1996) or simply, "to avoid an argument about the precise nature of the EC polity and how it compares with other federal polities" (Sandholtz & Stone Sweet, 1998, p. 9). These scholars have thrown out the federalism baby with the statehood bath water. In doing so, they have missed out on the insights that a comparative framework could bring to the study of the EU polity and on opportunities for EU scholars to contribute to the study of federalism.

A polity can rely on federal arrangements even if it is not, and may never be, a full-fledged federal state (Cappelletti et al., 1986; Elazar, 1987). What then is federalism? For the purposes of this article, a minimalist definition suffices. Federalism is an institutional arrangement in which (a) public authority is divided between state governments and a central government, (b) each level of government has some issues on which it makes final decisions, and (c) a high federal court adjudicates disputes concerning federalism. In this sense, the EU is already a federal system (for other definitions of federalism, see Elazar, 1987, p. 12; McKay, 1999, pp. 22-35; Riker, 1964, p. 11).

This article analyzes European Union (EU) politics through the lens of comparative federalism. The article does not ask why, how, or precisely when the EU's federal system came into existence. Rather, the article focuses on two broad questions that have been of paramount interest to both scholars of the EU and of other federal systems. The first question concerns the expansion of federal powers: What explains shifts in authority from state governments (i.e., member states) to the federal government (i.e., EU institutions)? The second question concerns the degree of state discretion: In policy areas in which the federal government and state governments share political authority, what explains the degree to which the federal government constrains the discretion of state governments?

In the spirit of this special issue of *Comparative Political Studies*, this article assesses the contributions that both rationalist and constructivist

approaches can make to the analysis of EU federalism. I focus the lenses of these two theoretical perspectives on the two questions raised above, generate testable hypotheses and present an initial plausibility probe of each. On the first central question, concerning shifts in authority, I find that there is considerable room for dialogue between rationalist and constructivist perspectives: each approach has a particular domain of application and together they provide a more comprehensive explanation for shifts in authority. On the second question, concerning EU control of member state discretion, I find that the two approaches generate contradictory hypotheses and that the empirical evidence strongly supports the rationalist hypothesis.

The remainder of this article is divided into four sections. Section II presents a rationalist theoretical framework and develops a set of hypotheses regarding the dynamics of EU federalism. Section III presents a constructivist framework and a set of hypotheses based on it. Section IV presents an initial empirical plausibility probe of the hypotheses derived from the two perspectives. Section V concludes.

A RATIONALIST APPROACH TO EU FEDERALISM

This section presents a rationalist theoretical framework that enables us to address the two central questions raised above. The rationalist approach to federalism that I employ takes actor preferences as fixed and asks how the strategic pursuit of these preferences in the context of the EU's federal institutional structure leads to shifts in authority and influences the degree of state government discretion. First, I identify the central actors and institutional structures in the federal system and present a set of assumptions concerning actor preferences. Next, I develop a set of theoretical arguments and hypotheses concerning the political dynamics of federalism.

AGENTS AND STRUCTURES

The federal government seeks to maximize both the scope of its authority and its level of support among societal actors. The federal government has an institutional self-interest in increasing the range of policies that it controls. However, the federal government's preference for self-aggrandizement may be checked by its desire to maximize its level of support among societal actors. If the expansion of federal authority is likely to decrease societal actors' support for the federal government—for instance, when expansion would make the federal government particularly susceptible to blame for the

costs associated with policy implementation—then the federal government will prefer not to expand its authority.

State governments are driven by the same basic preferences as the federal government: maximizing both the scope of their competences and their level of public support. However, state governments are only concerned with winning public support in their own jurisdictions and may, therefore, pursue policies that benefit their constituents at the expense of their neighbors or the federal system as a whole. Like the federal government, state governments may be willing to surrender competence in an issue area if this promises to win increased support from societal actors.

Federal courts seek to maximize their power in terms of the scope of federal law and their legitimacy. Generally, federal courts favor the expansion of federal jurisdiction to new policy areas, because such expansion simultaneously establishes them as the ultimate arbiters of disputes in those areas (Bzdera, 1993). However, this preference may be checked by federal courts' need to maintain their legitimacy, which rests on their reputation as *authoritative* and *independent* adjudicators of disputes. To maintain their reputation for authoritativeness, federal courts must avoid sparking widespread political backlash, in forms such as evasion of court decisions, open defiance, legislative overrides, or attacks on the courts' institutional foundations (Garrett, Kelemen & Schulz, 1998; Gely & Spiller, 1992; Stone Sweet, 1999). To maintain their reputation for independence, courts must also avoid the appearance of bowing to political pressures by making legally consistent rulings that uphold the law as established in treaties, constitutions, legislation, or earlier case law (Burley & Mattli, 1993; Kelemen, 2001; Stone Sweet, 1999). Thus, although federal courts have a strong institutional self-interest to expand the scope of federal law, they will balance these incentives against their desire to maintain legitimacy as neutral, authoritative arbiters of federalism disputes.

Societal actors include individual citizens and a variety of associations such as interest groups and firms. The relevant societal actors will vary depending on the issue area in question. Societal actors have fixed, exogenously determined policy preferences. I assume that societal actors will support the transfer of policy competence to whichever level of government they believe will produce policies most suited to their preferences.

My analysis focuses on the interaction between the *horizontal* and *vertical* dimensions of federalism (Bednar, Eskridge, & Ferejohn, 2001; Bednar, Ferejohn, & Garrett, 1996; Kelemen, 2000). All federal systems provide for a vertical division of authority between state governments and the federal government and empower a high federal court to adjudicate federalism disputes

between the two levels of government. Federal systems differ, however, with regard to the horizontal fragmentation of power at the federal level. At one end of the continuum, some systems provide for extensive fragmentation, for instance, with strong bicameralism and separation of legislative and executive powers. At the other extreme, some systems concentrate power at the federal level, for example, with Westminster-style parliamentary government. The interaction between these vertical and horizontal dimensions of federal systems has a significant impact on relationships between federal governments and state governments.

HYPOTHESES

Turning to our first question, the rationalist perspective does not offer a single, parsimonious explanation for the federalization of policy; rather, it suggests that authority may be shifted from state governments to the federal government through either legislative, executive, or judicial pathways. The rationalist approach does, however, offer a parsimonious explanation of the relationship between these three major pathways to federalization. Increases in the number of veto players needed to enact federal legislation will decrease the likelihood of legislative shifts in authority to the federal level but will simultaneously increase the likelihood of judicial- and executive-led shifts (Bednar et al., 1996).

Shifts in authority to the federal level via the legislative route are most likely when both the federal government and a substantial subset of state governments favor federalization (Solnick, 1998). Because the federal government will generally support the federalization of policy, the most likely source of opposition to federalizing legislation will come from state governments. State governments will be in the best position to block unwanted federal legislation in federal systems where they are directly represented in federal legislative processes, as is the case in the EU and in Germany. However, even where state governments lack such direct representation, they remain powerful actors in the federal system, and federal institutions normally establish some channels for the representation of state interests. Thus federalizing legislation is unlikely to be enacted over the opposition of a majority of state governments. Winning legislative coalitions backing federalization are most likely to emerge either when states face collective action problems that prevent them from achieving policy goals or when they have experienced policy failures at the state level. Each of these circumstances create incentives for state governments to shift blame for policy failures and for the federal government to claim credit for stepping in to address the problems (Kelemen, in press).

Even in the absence of new federal legislation, federal executive and judicial actors may use their executive and judicial discretion to shift authority to the federal level. As noted above, both federal courts and the federal government (including its executive) have strong institutional self-interests in expanding the scope of federal power. Federal courts may interpret constitutional or statutory requirements in a manner that expands federal authority to new areas. The federal executive may implement and enforce federal laws in a manner that is stricter and more far-reaching than that envisaged by legislators (Ferejohn & Shipan, 1990; McCubbins, Noll, & Weingast, 1987, 1989; Tsebelis & Garrett, 2001).

Fragmentation of power at the federal level influences the means by which authority is transferred to the federal level. As the number of veto players or the size of the majority necessary to pass legislation increases, legislation becomes more difficult to enact (Tsebelis, 1995). Gridlock in the federal legislature will impede the passage of legislation that could expand the scope of federal powers. However, legislative gridlock increases the discretion of executive and judicial actors. Federal courts are more likely to make expansive constitutional and statutory interpretations when legislators are divided and therefore unlikely to act collectively to overturn judicial decisions or to punish courts in some other manner (Cooter & Ginsburg, 1996; Ferejohn, 1995; Moe & Caldwell, 1994; Shapiro, 1981). Similarly, the federal executive is more likely to use its discretion in implementation and enforcement to expand federal authority where legislative gridlock increases its bureaucratic discretion. Taken together, these considerations suggest the following hypothesis:

> *Rationalist Hypothesis 1 (RH1)*: Increasing fragmentation of power at the federal level decreases the ability of federal legislators to expand the scope of federal authority but increases the ability of federal courts and the federal executive to do so.

The division of authority in a given issue area does not involve a binary choice between complete state control and complete federal control. Rather, authority is often shared between the two levels of government, with the federal government playing a major role in policy making and state governments controlling most implementation (Mashaw & Rose-Ackerman, 1984; Watts, 1996). Federal and state governments often prefer such a division of authority because it allows each level of government to claim credit for policy successes and to shift blame in the event of policy failures. Moreover, federal governments will be particularly favorable to such arrangements, because delegating implementation to states allows the federal government to shift

implementation costs to the states by enacting unfunded (or underfunded) mandates (Kincaid, 1994).

When government authority is divided in this way, we can ask: How much discretion do state governments enjoy in implementing federal policy? Here we encounter the counterintuitive impact of the fragmentation of power at the federal level. Where power at the federal level is fragmented between multiple veto players, federal legislators recognize that (a) the legislation they enact is likely to prove durable and (b) courts will be insulated against easy legislative overrides and other forms of political backlash and may, therefore, be willing to play an active role in constraining discretion at the federal and state level. In this context, federal lawmakers have an incentive to draft statutes that specify in great detail the goals that executive agencies must achieve, the administrative procedures they must follow, and the deadlines they must meet as well as to provide for extensive judicial review of executive action, granting societal actors who support them access to the courts to hold the executive accountable to this statutory mandate (Horn, 1995; McCubbins, Noll, & Weingast, 1987, 1989; Moe, 1989, 1991). Federal lawmakers anticipate that a substantial amount of implementation authority will be delegated to state governments and require that in the event of delegation, state governments adhere to the same detailed, judicially enforceable statutes. Even where state governments are well represented at the federal level, they may encourage this inflexible, judicialized approach given their desire to prevent free riding (Majone, 1995). Together, these considerations suggest that in fragmented federal systems, federal legislators are likely to enlist societal actors and the federal executive to constrain state discretion through the courts.

By contrast, where political power is concentrated, as in Westminster parliamentary federations, lawmakers do not resort to a judicialization strategy. In the short run, they have no need to use the courts to control the bureaucracy as they can easily establish incentive structures and informal control mechanisms (Ramseyer & Rosenbluth, 1993). In the long run, they cannot insulate their policies against future interference in any case (Moe & Caldwell, 1994). Finally, where executive and legislative power are fused, as in parliamentary systems, courts tend to defer to the executive (Ferejohn, 1995; Shapiro, 1981). When implementation of vague, discretionary federal statutes is delegated to state governments and federal courts adopt a deferential posture, the states continue to enjoy a high degree of discretion. These interactions between the horizontal and vertical dimensions of federalism lead to the following counterintuitive hypothesis:

Rationalist Hypothesis 2 (RH2): The greater the fragmentation of power in the structure of the federal government, the more the federal government constrains the discretion of state governments in implementing federal laws.

A CONSTRUCTIVIST APPROACH TO FEDERALISM

Constructivists view the development of a political system as an ongoing process of mutual constitution or structuration, in which institutions shape the identities and preferences of actors, and actors in turn continually reshape institutions through their social interactions (Adler, 2002; Checkel, 1998; Risse, 2000). From the constructivist perspective, the rationalist analysis presented above ignores two vital aspects of politics in a federal system. First, although constructivists would agree that the actors identified above are key players in a federal system, constructivists would not be satisfied to take their preferences as exogenous and fixed. For constructivists, processes of preference change lie at the heart of politics, and constructivist analysis demands that we uncover how engagement in federal politics transforms actors' preferences and identities over time. Second, where the rationalist analysis presented above focused on formal institutional structures, constructivism takes a broader view of institutions, encompassing formal institutions, informal norms, shared systems of meaning, and routinized practices (Adler, 2002; Koslowski, 1999; March & Olsen, 1998; Risse, 2000). Norms may determine what sort of practices are "socially acceptable" for actors with particular identities in a given social context and as such, may exert as much influence over actors' behavior as formal rules (Katzenstein, 1996, pp. 5-7, 22-23; March & Olsen, 1998). Actors and informal institutions are mutually constitutive. The informal norms and routinized practices of the federal system shape actors' identities and preferences, and the actors continually reconstitute these informal institutions through processes of social interaction (Koslowski, 1999).

Turning the lens of constructivism on our first question, one would expect shifts in authority between levels of government to result from shifts in actor preferences or identities. When processes of social interaction, learning, persuasion, or identity formation lead actors in the federal system to adopt common norms and identities, or simply convince actors of the advantages of federal solutions, then shifts in policy-making authority are likely to occur. This constructivist logic may be played out in interactions among elite policy makers or among societal actors more generally.

At the elite level, ongoing interactions between state government policy makers in federal decision-making fora may encourage the development of

common policy preferences and common norms (Friedrich, 1969; Koslowski, 1999). Federal policy entrepreneurs may encourage these processes by working to persuade state officials of the advantages of federal solutions. When these social processes lead to the development of common norms, preferences, and identities, shifts in decision making to the federal level are more likely to occur. Moving to the realm of societal actors more generally, constructivist analysis suggests that engagement in federal political processes, whether through lobbying, litigating, voting, exercising rights, or simply engaging debate and democratic deliberation, may lead societal actors to develop shared norms, collective understandings, and ultimately a sense of common identity (Habermas, 1992; Koslowski, 1999; Risse, 2000; Schmitter, 2000). As these common norms and identities strengthen, societal actors will increasingly view the federal government as a legitimate locus of public authority and will be more likely to support the transfer of policy authority from the state to the federal level. Building on this logic, a plausible constructivist hypothesis regarding the transfer of authority would argue the following:

> *Constructivist Hypothesis 1 (CH1)*: Where ongoing interactions between actors in the federal system (either decision-making elites or societal actors) lead them to develop common beliefs, norms, and identities, this will increase the likelihood of shifts in policy-making authority to the EU level.

Turning to our second question, we can ask what the constructivist approach suggests regarding the degree to which the federal government constrains state government discretion. Constructivists have not explored these differences in federal systems extensively. At the risk of putting words into the mouths of constructivists, I extend the logic of constructivist arguments to explain these differences across federal systems. Beetham and Lord (1998, p. 56) pointed to a potential line of constructivist argument, suggesting that the EU may attempt to "resolve the tensions between [its] extensive policy-making role and the underlying weakness of European identity by adopting a 'light touch' in its approach to policy," for instance, by relying on flexible directives rather than regulations and by promoting mutual recognition as an alternative to outright harmonization. Applying this reasoning to federal systems more generally, one might expect that where common norms and a sense of common federal identity are strong, state government discretion would be highly constrained. In such cases, shared federal norms would pressure states to implement federal law in a uniform manner, and, if necessary, the federal government would not hesitate to impose strict, uniform requirements on state governments. By contrast, where common norms and a sense

of common federal identity are weak, the federal government would be reluctant to impose strict requirements on state governments and would instead allow state governments more discretion in the implementation of federal law.

Constructivst Hypothesis 2 (CH2): The stronger the common norms and identities in a federal system, the more the federal government constrains state government discretion.

EU FEDERALISM

THE INSTITUTIONAL STRUCTURE OF EU FEDERALISM

The structure of the EU combines vertical fragmentation of power (between EU institutions and member states) with horizontal fragmentation of power (between institutions at the EU level). In other words, it combines federalism with its own brand of separation-of-powers. Power at the EU level is divided between legislative, executive, and judicial branches. Comprehensive, detailed overviews of the EU's institutional structure are available elsewhere, (Hix, 1999), but a very brief overview will clarify the basic structure of EU federalism.

The EU has a bicameral legislature with a powerful upper chamber (the Council of Ministers) composed of representatives of member state governments and a weaker, but increasingly powerful, lower house (the European Parliament [EP]) composed of directly elected representatives. The EU has a collegial executive (the College of Commissioners) led by a president and composed of appointees. Commissioners are appointed by the upper chamber on a proportionality basis[2] and are subject to a vote of approval by the EP (Hix, 1999, p. 46; Yataganas, 2001). During its appointed term, the Commission does not rely on the confidence of the legislature to maintain office; however, the lower chamber does have the power to censure the Commission. The EU's judicial branch is headed by a supreme court, the European Court of Justice (ECJ), composed of judges selected by the member state governments. The EU has begun creating a system of lower federal courts, first with the establishment of the Court of First Instance (CFI) and, most recently, with provisions for the establishment of specialized judicial panels (Treaty of Nice, Article 225a). Member state courts are integrated into the EU's judicial system through the preliminary ruling procedure that allows them to refer

2. The 5 largest member states appoint two commissioners each, the other 10 states appoint one each.

cases to EU courts (Alter, 2001). In addition to these legislative, executive, and judicial institutions, the EU has established a number of specialist administrative bodies—including EU regulatory agencies, the ECB, and Europol—that together comprise an emerging "fourth branch" in the EU's institutional structure (Kelemen, 2002b). Given its bicameralism, separation of legislative and executive power and independent judiciary, power at the EU level is highly fragmented. In Tsebelis's (1995, 2002) terms, the EU is a polity replete with veto players; for Lijphart (1999, pp. 42-47), the EU has the characteristics of a consensus democracy.

Constructivists would not deny the importance of these formal institutions, but for constructivists, the institutional structure of EU federalism extends beyond these formal institutions to include a range of informal norms, identities and social processes.[3] An actors' sense that a particular action would violate a shared social norm or would be at odds with the actors' sense of identity may exert as strong an influence on behavior as any formal rule. Constructivists have identified a number of informal norms and social processes at work in the EU's institutional environment. For instance, Lewis (2000) has emphasized the prevalence of common norms emphasizing the value of compromise in COREPER. Joerges and Neyer (1997) have argued that norms promoting consensus seeking and deliberative problem solving prevail in the comitology system. Koslowski (1999) has argued that bargaining between member states has institutionalized "federal political relationships" typical of other federal systems, whereby interstate conflict and the pursuit of state interests is understood as a routine aspect of federal politics. Finally, constructivists might point to a number of routinized practices, such as voting in European elections, carrying a European passport, using the Euro, lobbying the EU, or invoking European rights that serve to "institutionalize" the EU (Beetham & Lord, 1998, p. 39; Stone Sweet, Sandholtz, & Fligstein, 2001).

EXPLAINING SHIFTS IN AUTHORITY

The constructivist and rationalist hypotheses presented above concerning shifts in authority between levels of government do not contradict one another, and thus are not amenable to head-to-head competitive testing. Rather, I evaluate each theory against a null hypothesis and then go on to discuss the potential for dialogue between the two approaches.

3. There is nothing about rationalist analysis that precludes it from considering the impact of informal institutions on actor behavior, but rationalist analysis of the EU has focused on formal institutions.

The constructivist argument (CH1) comes in both elite- and mass-based variants. I assess each in turn. At the level of political elites, constructivists have examined how participation in EU decision-making fora leads to changes in the identities and preferences of elite decision makers and, in turn, how these changes promote transfer of authority to the EU level. This perspective builds on arguments that go back to the pioneering research on European integration. Although Haas (1958) used a different language, he too emphasized that cooperation between experts led to the development of shared identities and increased trust that would encourage the expansion of the range of policy areas subject to community action. Friedrich (1969) pointed out that ongoing interactions between decision makers in the context of Coreper stimulated a sense of federal comity that was "the oil on the complex machinery of a federal regime" (p. 27). The findings of recent empirical studies are mixed. Some studies find that socialization processes have at best a weak influence on the preferences of elite decision makers in the EU (Egeberg, 1999; Hooghe, 1999; Hooghe & Marks, 2001). However, a number of studies of a variety of policy areas have found evidence that deliberation, communicative action, and socialization lead to changes in the interests and identities of member state agents and that these changes are critical to the Europeanization of political authority (see Checkel & Moravcsik, 2001).[4] In areas including EMU (Sandholtz, 1993; McNamara, 1998; Jabko, 1999), enlargement (Schimmelfennig, 2001), food safety (Joerges & Neyer, 1997), workplace safety (Eichener, 1992), electricity (Eising & Jabko, 2001), and transportation (Schmidt, 2000), scholars have presented convincing evidence in support of constructivist arguments. The best of this recent constructivist work moves beyond general notions that national representatives "go native" in Brussels and seeks to specify the conditions under which preference change is most likely to occur (Checkel & Moravcsik, 2001).

Evidence for the constructivist hypothesis in the broader realm of societal actors is weaker. From a constructivist perspective, we would expect that the ongoing engagement of societal actors in EU politics would lead to the routinization of EU politics (Banchoff & Smith, 1999; Stone Sweet et al., 2001) and would foster the development of a shared sense of European identity. This routinization and identity formation would in turn legitimate the EU as a level of governance and promote the further transfer of authority to the federal level. To assess this argument, we can look to data on citizens' European identities and data on lobbying and litigation activities by societal actors.

Eurobarometer data provides one source of evidence for constructivist arguments on "federal" (i.e., European) identity. Although longitudinal

4. I leave aside the significant methodological challenges to distinguishing such preference change from change in strategies based on some form of learning.

Eurobarometer data on European identity has a number of shortcomings, it does enable us to reach one clear conclusion: There has been no long-term increase in European identity among EU citizens over the past three decades (Duchesne & Frognier, 1995). Thus we cannot attribute the substantial increases in the EU's policy competences that have occurred over the past few decades to shifts in European identity among citizens. Looking to the future, an increase in European identity may be necessary to underpin further transfers in authority to the EU level. Most scholars of identity politics in the EU agree that we should not expect European identity to replace national identities and rather, that "Europeanness" may be incorporated into national identities in nuanced ways (Risse, 2001). Comparative survey data supports these arguments, indicating that mixed state/federal identities and affective attachments are the norm in federal systems (International Social Survey Programme, 1995). However, there is considerable disagreement among various strains of constructivism over both what degree of common identity is necessary to stimulate further transfer of authority to the EU level and how likely it is that a sufficient level of identity will emerge (Cederman, 2000).

Some constructivists would argue that the increasing engagement of societal actors in EU fora, for instance through lobbying and litigation, encourages the further transfer of authority to the EU level (Banchoff & Smith, 1999). The most rigorous empirical and theoretical work along these lines comes not from self-proclaimed constructivists but from institutionalist scholars who attempt to bridge rationalist and constructivist approaches to institutionalization (Stone Sweet & Sandholtz, 1998; Stone-Sweet et al., 2001). Building on a neofunctionalist tradition, these scholars examine the social processes through which actors constitute new European-level political arenas, which in turn reconstitute their identities and interests. In one such contribution, Fligstein and Stone Sweet (2001) tracked the increase in references from national courts to the ECJ and the increasing number of EU lobby groups and argue that the increase in these forms of engagement serves to institutionalize a European "political space" that shapes the context for their ongoing interactions. This research usefully calls attention to the role of positive feedback loops in the integration process, but it remains unclear that such self-reinforcing institutionalization is either necessary or sufficient to explain shifts in authority to the EU level in particular policy areas.

Few observers would dispute the general constructivist notion that the development of shared norms, spread of European identity, and the routinization of European-level political practices will encourage shifts in authority to the European level. Indeed, one could hardly expect that such changes would discourage Europeanization! However, these broad notions tell us little about when and how policy-making authority will be transferred

to the EU level in particular policy areas and how particular institutional rules influence these processes.

The rationalist hypothesis (RH1) concerning the relationship between legislative, bureaucratic, and judicial pathways to federalization finds strong empirical support in the literature on the EU. Throughout the history of the EU, the fragmentation of power at the EU level has made it necessary to assemble broad coalitions to adopt EU laws that expand the scope of EU authority. A variety of decision-making procedures have governed the relationships between the Commission, Council, and EP in the legislative process (for an overview, see Hix, 1999, pp. 84-96). Most importantly, prior to 1987, most legislation was adopted by a unanimous vote in the Council on a proposal forwarded by the Commission, with the EP playing only a consultative role. Subsequently, treaty revisions introduced new decision-making procedures, cooperation, codecision I, and codecision II, which replaced unanimous voting in the Council with qualified majority voting and granted increased powers to the EP. Under the reformed codecision procedure, the EP and the Council have essentially equal legislative power. Although the move to qualified majority voting has decreased the power of individual member states to block legislation and accelerated the EU's legislative process, the increase in power of the EP has added another layer of complexity and another veto player to the legislative process (Schulz & König, 2000). Given its preference for deeper integration, the EP is particularly likely to use its legislative power to block legislative initiatives aimed at reining in the Commission or ECJ (Tsebelis & Garrett, 2001). The crucial point is that multiple veto players participation in the EU's legislative procedures makes new legislation difficult to pass and increases the chance that existing legislation will remain in place.

The "stickiness" of legislation, and even more so of treaty provisions, has afforded the Commission and ECJ considerable discretion and allowed them to work to expand the scope of EU authority. A legion of studies, by both avowedly rationalist scholars and those taking a more historical approach, have demonstrated that legislative gridlock at the EU level promotes executive (Commission) and judicial (ECJ) discretion in the EU (Marks et al., 1996; Pierson, 1996; Pollack, 1997; Scharpf, 1988; Tsebelis & Garrett, 2001; on the ECJ specifically, see Alter, 1998; Garrett et al., 1998; Kelemen, 2001; Tallberg, 2000a; Weiler, 1991). These studies also agree that the Commission and ECJ have consistently used their discretion to promote the expansion of EU competences. Some of the most prominent EU scholars suggest that it was precisely in those periods when legislative gridlock was the greatest that the ECJ played the most powerful role as a motor of integration (Tsebelis & Garrett, 2001; Weiler, 1991). Other evidence supporting the rationalist argu-

ment (RHI) comes from studies that find that the ECJ has enjoyed a greater capacity to promote integration than the Commission due to its greater insulation from political backlash (Tallberg, 2000b).

There is considerable room for dialogue between rationalist and constructivist explanations for shifts in authority to the EU level. Shifts in authority to the federal level may occur as the result of preference change, or they may occur in the absence of preference change, simply when actors who favor federalization take advantage of opportunities that federal institutions afford them. Rationalism takes preferences as fixed, at least in the short term, and is therefore not equipped to address the processes of preference change that are central to constructivist accounts. Constructivism, on the other hand, is ill equipped to explain how strategic action in the context of particular institutional settings will influence shifts in authority to the federal level. Neither theory can readily subsume the other, and taking into account both explanations provides us with a more comprehensive understanding of processes of federalization.

MEMBER STATE DISCRETION

Shifts in policy competence to the EU level almost never result in a complete preemption by the EU (Donahue & Pollack, 2001). Rather, member states typically maintain control over policy implementation, subject to oversight by the Commission and ECJ. Observers who are skeptical of the EU's power point to the fact that member states retain control over implementation of EU law as a sign of the EU's weakness. However, the comparative federalism perspective suggests that this functional division of competence is quite typical of federal systems and suits the preferences of both federal and state governments (Watts, 1996, pp. 65-74). As in other federal polities, sharing authority allows both member states and the EU to claim credit for policy successes and to shift blame to one another for policy failures or for the cost of policies (Kelemen, in press; Majone, 1999; Smith, 2000).

Knowing that policy competence is often shared between the EU and the member states in this manner leads us to our second central question: To what degree does the EU constrain member state discretion in implementing EU law? The rationalist and constructivist hypotheses presented above generate contradictory expectations and thus lend themselves to competitive testing. The rationalist hypothesis (RH2) suggests that as a federal polity with a highly fragmented federal government, we would expect the EU to place considerable constraints on member state discretion. The constructivist hypothesis (CH2) suggests that given the relatively weak institutionalization of federal norms in the EU, we would expect EU institutions to allow member

states considerable discretion. Given that the "degree" of member state discretion is an inherently relative concept, we can best assess these competing claims by placing the EU in comparative perspective.

Unfortunately, very few studies compare policy implementation in the EU and other federal systems. Given this article's space limitations and the paucity of comparative studies, I draw primarily on my own comparative analysis of environmental regulation in the EU, United States, Canada, Australia, and Germany (Kelemen, 2000, in press). Although an empirical assessment based on one policy area can provide only a limited test, I argue that there is reason to believe that the findings are generalizable to other policy areas. Moreover, Franchino's (2001) large-*N* study of constraints on member state execution of EU policies supports the notion that the EU places relatively stringent controls on national administrations.

A comparison of patterns of environmental regulation in the EU, United States, Canada, Australia, and Germany provides strong empirical confirmation for the rationalist hypothesis, explaining aspects of EU-member state relations that contradict constructivist expectations. In the field of environmental regulation, the EU issues more detailed, inflexible laws; takes a coercive approach to enforcement; and ultimately limits the discretion of its member states far more than federal governments in well-established parliamentary federal states, such as Australia and Canada (Kelemen, 2000). In important respects, the EU even places greater constraints on member state implementation of EU law than the German federal government traditionally placed on the *Länder.* The German federal government has long relied on a combination of nonbinding guidelines and shared norms emphasizing conformity and cooperation to press the *Länder* to implement federal laws. Although many students of German policy making maintain that these normative pressures secure uniform implementation across Germany, the Commission and the ECJ have not been similarly impressed. The Commission has brought numerous infringement proceedings against Germany for implementation failures, in particular *Länder*, and the ECJ has emphasized that the German federal government cannot rely on constitutional norms of *Länder* loyalty to the federation (*bundesfreundlichen Verhalten or Bundestreue*) but must require the *Länder* to meet specific EU deadlines and requirements.[5] Of the federal systems examined in this study, only the United States clearly placed greater constraints on state discretion than the EU. In important respects, the EU's judicialized approach to limiting state discretion resembles that of the United States.

I argue that these differences in federal control of state discretion result from differences in the basic institutional structures of these polities. Follow-

5. Case 237/90 *Commission v. Germany* (1992) ECR 5973.

ing the logic of RH2, where the fragmentation of power at the federal level is greater, the federal government places greater constraints on state discretion. Fragmentation of power at the federal level is greatest in the United States and the EU, and this has influenced the approach to controlling state governments in these two polities. In the EU, the fragmentation of power between the Commission, Council, and EP, and between member states within the Council, have encouraged the enactment of legislation that often specifies in great detail goals member states must achieve, deadlines they must meet, and procedures they must follow (Prechal, 1995, pp. 15-18, 109-113; Rehbinder & Stewart, 1985). The EP favors strict enforcement of EU law, and it favors inflexible, detailed laws that both limit member state discretion and encourage the Commission to take enforcement actions (Dehousse, 1992, p. 392). Similarly, member states in the Council often favor directives and regulations that spell out legal obligations in great detail to aid Commission and ECJ enforcement action against noncompliant member states (Majone, 1995). The fragmentation of power has also insulated the ECJ against legislative overrides and other political attacks and has emboldened the ECJ to engage in aggressive judicial review of national administrations (Alter, 1998; Garrett et al., 1998; Pollack, 1997). The combination of action-forcing statutes and judicial assertiveness has encouraged the Commission to take an active role in pursuing enforcement litigation against noncompliant member states. Most recently, the Commission has started bringing cases requesting that the ECJ fine member states that fail to comply with previous ECJ rulings in infringement cases.[6] The threat of fines seems to have had a substantial impact, pressuring member states that had long resisted calls from the Commission and ECJ to come into compliance rapidly (Commission, 2000; Kelemen, in press). The EU's ability to command the administrations of member states to implement EU policies and to fine them if they fail to do so is a constraint on state discretion absent even in the United States, where the Supreme Court protects state governments against such "commandeering" (Halberstam, 2001).

Some observers might object to this analysis, pointing instead to the EU's self-proclaimed commitments to promoting a flexible, "new approach" to regulation. However, such reform efforts have had a marginal impact, and the notion that the EU allows member states considerable discretion in their implementation of EU law does not stand up in light of the comparative analysis reviewed above. Finally, using a "discretion index" modeled after Epstein and O'Halloran's, Franchino (2001, p. 174) found that EU laws con-

6. The Treaty on European Union (Maastricht Treaty) amended Article 228 (ex Article 171) to allow the ECJ to impose fines on member states that fail to comply with ECJ rulings in infringement cases.

strain member state discretion even more than U.S. laws constrain executive discretion.

Looking to the future, there is reason to believe that the EU may soon impose even greater constraints on member state discretion. The experience of other federal polities suggests that the judicialization of policy processes has the greatest impact where federal legislators and courts empower societal actors to serve as decentralized enforcers of federal law (Katz & Tarr, 1996). In the U.S. context, the legislative and judicial expansion of statutory and constitutional rights for individuals at the federal level in the 1960s led to a boom in litigation in which private parties acted as watchdogs for the federal government, pressuring federal, state, and local agencies, as well as other private parties, to enforce federal law. This 'Rights Revolution' strengthened linkages between societal actors and the federal government and empowered the federal government vis-à-vis state governments (Epp, 1998; Kagan, 1997; Kincaid, 1994; Melnick, 1996; Sunstein, 1990). Similarly, in Canada, the introduction of the Charter of Rights and Freedoms in 1982 led to a substantial expansion of federal control over the provinces (Cotler, 1996). The constitutional status of the charter insulated federal courts against political backlash for their interpretations of rights questions and thus increased the willingness of courts to play an active role in constraining government action. This stimulated a tide of interest group litigation that pressured provincial governments to protect a wide range of federal rights (Epp, 1998).

What are the prospects for a similar rights revolution in the EU? EU treaties and secondary legislation have created a number of legally enforceable rights for individuals. The EU has a powerful, independent, and expanding judicial branch, which has already shown a willingness to expand the scope of EU rights in areas such as gender equality (Cichowski, 2001). The scope of EU rights has expanded in recent years from a nearly exclusive focus on economic rights to a broader span of social and political rights (Koslowski, 1999, p. 572). As has been well documented, litigation brought by individuals via the preliminary ruling procedure to protect their rights under European law has played a vital role in expanding the EU's power vis-à-vis member state governments (Alter, 2001; Alter & Vargas, 2000; Mattli & Slaughter, 1998; Stone Sweet & Caporaso, 1998). Moreover, the doctrine of state liability, which some federal systems lack, may serve as a powerful motivator for some forms of rights litigation in the EU (Tallberg, 2000a).

Although the structure of EU federalism encourages a judicialized approach to policy enforcement, limits on the scope of EU rights, access to justice, and the absence of legal support structures in some member states inhibit societal actors from using litigation to secure their EU rights. The decision by the member state governments at Nice not to fully incorporate the

Charter of Fundamental Rights into the treaties clearly reduces the prospects for societal actors to bring rights-based litigation (de Búrca, 1995; Flynn, 1999, p. 1132). Even in the case of existing rights, opportunities to secure them through the courts are often limited. In a comparative study of rights revolutions, Epp (1999) found that an adequate legal support structure is necessary for the creation of rights to have a substantial impact. In the EU context, emerging research suggests that EU rights produce less litigation and have less impact in member states that limit access to the courts and provide little legal aid (Alter & Vargas, 2000; Caporaso & Jupille, 2001; Conant, 2001; Harlow, 1999). To date, the Commission's effort to promote harmonization of conditions for access to justice in the member states has been unsuccessful. Where courtroom doors in the member states remain closed, EU rights will have limited impact.

Finally, I must add a qualifier regarding fiscal means of constraining state discretion. Given its small budget, the EU is clearly at a disadvantage compared to other federations in its use of fiscal tools such as conditional grants. However, conditional grants do place far more pressure on state governments where conditions are judicially enforceable by private parties (Melnick, 1996). Given the institutional incentives to judicialize enforcement in the EU described above, it is quite possible that future case law or legislative requirements will empower private parties to enforce grant conditions.[7]

CONCLUSION

This article developed a set of hypotheses and presented an initial plausibility probe regarding shifts in policy competences between member states and the EU as well as the EU's control of member state discretion. Juxtaposing rationalist and constructivist hypotheses on EU federalism, I demonstrated the possibility of constructive theoretical dialogue between these two approaches along the lines suggested in the introduction to this Special Issue. First, I showed that both perspectives contribute to our understanding of shifts in authority to the EU level. Shifts in authority to the federal level can occur as the result of preference change, or they can occur simply as actors with fixed preferences exploit opportunities that federal institutions provide. Constructivism is best equipped to explain the former and rationalism the latter. Taking into account both explanations enhances our understanding of

7. To date, the ECJ has been reluctant to grant standing to private parties challenging violations of conditions attached to EU grants. See *Stichting Greenpeace Council v. Commission* Case C-321/95, April 2, 1998.

processes of federalization. Second, I showed that the rationalist perspective can better account for the EU's approach to constraining member state discretion. The two theoretical perspectives generate contradictory hypotheses concerning the politics of discretion, and the evidence supports rationalist arguments.

Both proponents and opponents of integration have long associated the federalist perspective with the normative project of moving the EU closer to some idealized model of a United States of Europe. This article makes a clear break with that tradition, taking a strictly positivist approach to the study of EU federalism and demonstrating how a theoretical lens of comparative federalism provides us with novel insights into two questions of great interest to EU scholars. A number of other areas—ranging from the development of European political parties, to the role of fiscal transfers, to questions concerning the very stability of the EU system—promise to benefit from a comparative federalism perspective. If EU scholars pursue such research, they will not only enhance our understanding of the EU, they may also make important contributions to our understanding of federalism more generally.

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