FEDERAL GOVERNANCE
IN THE EUROPEAN UNION

by

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ABSTRACT

Since the signing of the Treaty of Paris in 1951, the European Union has emerged from a limited economic confederation to a supranational federal polity. There is, however, little work based in federal theory that seeks to understand the European Union as a federation nor the process by which that was achieved. Federal theory gives us two means of understanding federal government – federalism as techne and as telos. Federalism as techne informs us of the institutions and structures involved in federal governance. Federalism as telos provides the ideas, norms and values of federalism. Thus it is possible to speak of the federal idea (telos) and the institutions that embody it (techne).

The process of federalisation of the European Union has seen the separation of these strands. Federal ideas do not necessarily lead to federal governance regimes; federal governance outcomes are not necessarily based on federal ideas. The European Union has adopted, over time, federal governance structures due to pragmatic concerns with institutional efficiency, bargain implementation, defection from agreement, and the equality of member states. The institutions created by the member states have themselves contributed to the federalisation process. Rarely has the federalisation process moved forward due to a belief in the value of federation itself.

This thesis proposes the use of historical institutionalism to access both strands of federalism. By applying historical institutionalist methodology to the federalisation process it is possible to ascertain the role of federal ideas, the reasons for adopting federal governance mechanisms and the effect of those mechanisms on future institutional development and actor preferences. In short, we will be able to understand the interaction between federalism as telos and federalism as techne and how that has produced the supranational federation of the European Union from its beginnings as the European Coal and Steel Community.
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This work is dedicated to Michael, Joshua and Niamh.
ACRONYMS AND ABBREVIATIONS

*acquis communautaire*

The body of Union treaties, legislation and policy which has developed since the establishment of the ECSC

*acquis politique*

The body of decisions and policies developed under European Political Cooperation (post-1970)

**ACs**  Autonomous Communities (Spain)

**Bull–EC**  Bulletin of the European Communities

**Benelux**  Customs union between Belgium, Netherlands and Luxembourg

**CAP**  Common Agricultural Policy

**CCP**  Common Commercial Policy

**CFSP**  Common Foreign and Security Policy

**CGP**  Commisariat General du Plan

**CoR**  Committee of the Regions

**Coreper**  Committee of Permanent Representative

**CSCE**  Conference on Security and Cooperation in Europe

**CTE**  Constitutional Treaty for Europe

**DG**  Directorate-General

**EAGGF**  European Agricultural Guarantee and Guidance Fund

**EC**  European Community

**ecu**  European currency unit

**ECB**  European Central Bank

**Ecofin**  Council of Economic and Finance Ministers

**ECR**  European Court Reports

**ECSC**  European Coal and Steel Community
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tr>
<td>EDC</td>
<td>European Defence Community</td>
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<tr>
<td>EEB</td>
<td>European Environmental Bureau</td>
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<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>EESC</td>
<td>European Economic and Social Committee</td>
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<tr>
<td>EIB</td>
<td>European Investment Bank</td>
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<tr>
<td>EMI</td>
<td>European Monetary Institute</td>
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<tr>
<td>EMS</td>
<td>European Monetary System</td>
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<tr>
<td>EMU</td>
<td>Economic and Monetary Union</td>
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<td>EP/PE</td>
<td>European Parliament</td>
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<tr>
<td>EPC</td>
<td>European Political Community (1951-1954)</td>
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<td>EPC</td>
<td>European Political Cooperation (post 1970)</td>
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<td>EPU</td>
<td>European Political Union</td>
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<td>ERDF</td>
<td>European Regional Development Fund</td>
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<td>ERM</td>
<td>Exchange Rate Mechanism</td>
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<td>ESCB</td>
<td>European System of Central Banks</td>
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<td>ESDP</td>
<td>European Security and Defence Policy</td>
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<td>ESF</td>
<td>European Social Fund</td>
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<td>Espirit</td>
<td>European Strategic Program for Research and Development in Information Technology</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>Euratom</td>
<td>European Atomic Energy Community</td>
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<tr>
<td>euro</td>
<td>European currency unit (post-1992)</td>
</tr>
<tr>
<td>IGC</td>
<td>Intergovernmental Conference</td>
</tr>
<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
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<tr>
<td>MCR</td>
<td>Merger Control Regulation</td>
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<tr>
<td>MEP</td>
<td>Member of European Affairs</td>
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<tr>
<td>OEEC</td>
<td>Organisation for European Economic Cooperation</td>
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<tr>
<td>Abbreviation</td>
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<td>OJ</td>
<td>Official Journal of the European Communities</td>
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<tr>
<td>QMV</td>
<td>Qualified majority voting</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>SIM</td>
<td>Single Internal Market</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<td>UEF</td>
<td>Union of European Federalists</td>
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<td>WEU</td>
<td>Western European Union</td>
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**Note on terms**

The Treaty on European Union (1993) established the European Union, an entity which enclosed the European Community, Common Foreign and Security Policy, and Cooperation in Justice and Home Affairs. This thesis uses the term ‘European Union’ or ‘Union’ when referring generically to all of these communities and policies and to the period following the ratification of the Treaty on European Union. Otherwise, it adopts historically appropriate terms: the ECSC in the period 1951–57; the EEC in the period 1957–65; and the European Community or simply ‘the Community’ after 1965 when the Merger Treaty, which merged the institutions of the three Communities, came into effect. When quoting other authors, that author’s preferred terminology is used.
DECLARATION

This is to certify that:

1. The thesis comprises only my original work;

2. Due acknowledgement has been made in the text to all other material used;

3. The thesis is less than 100,000 words in length, exclusive of tables, maps, bibliographies, appendices and footnotes.

Signature:
The European architecture we set up was the produce of the tension between the radical vision of the federalists and pragmatic approach of the statesmen. Without that tension nothing would have been attained: the federalists’ vision would have remained a utopia, and the essentially conservative pragmatism of the statesmen would have led nowhere.

Altiero Spinelli, 1987

The nature of the European Union as a federation strikes at the core of contemporary federalism – the federal idea, its form and function. Though member states of the European Union may share an idea of European integration, the idea of European federation is not shared by all; the form of European federation is still emerging and a matter of contention for those who study it; the function of European federation diverges from the norm of managing democracy within a diverse population. The European federation remains an enigma within federal theory.

Federal theory needs to account for the development of the European Union (the Union) in the absence of a common ideal of European federation, its ad hoc and incremental process of institutional formation and development and its lack of a popular constitutive foundation. Federal theory is a salient model for the analysis of the politics of the Union but its explanatory power has not yet been fully exploited. In order to achieve a nuanced federal analysis of the supranational Union, we must first understand the basis of the national form of federation. By doing so, the essential elements of the idea, form and function of federalism will be crystallised and their connection to the Union clarified. The way is then clear for the development of a robust account of the Union as federation.
This thesis identifies the obstacles to the placement of the Union in federal theory and resolves these difficulties by developing a refined theoretical framework. It then operationalises this framework with an analysis of the federalisation of the Union. There are two ‘faces’ of federalism that complement and reinforce each other – telos and techne. Federalism as techne informs us of the institutions and structures involved in federal governance. Federalism as telos provides the ideas, norms and values of federation. In examples of national federal government, techne and telos are entwined and expressed through its purpose, sovereignty and structure. The United States of America and Belgium are particularly striking examples of this.

The process of federalisation of the Union has seen the separation of these strands. Federal ideas have not necessarily led to federal governance; federal governance outcomes are not necessarily based on federal ideas. A particularly challenging aspect of the federalisation of the Union is that institutional change has been incremental and federation has been achieved without an overarching political teleology. Instead, the Union has adopted over time federal governance structures due to pragmatic concerns with institutional efficiency, bargain implementation, defection from agreement, and the equality of member states. Rarely has the federalisation process moved forward due to a belief in the value of federation itself.

Unsurprisingly, this separation of techne and telos has been mirrored in the federal study of the Union and is to the detriment of a comprehensive and persuasive account of federalism in the Union. This study entwines federal techne and telos to provide an account of the development of the Union as a federal polity, from its roots in post-war reconstruction and realignment of international relations to the attempt at a Constitutional Treaty for Europe. It examines the intersection of comparative politics and international relations in the study of the Union so as to accurately plot the capacity and limitations of federal theory in this case. It analyses the
sovereign basis of the Union, its ideas and values, the role of democracy and the development of a federal governance structure over time.

The location of the Union at the intersection of comparative politics and international relations has been attractive and difficult for federal theorists. The spectrum of federal arrangements, from confederation to federation, offers an amazing array of models. Selecting the appropriate model means recognising the implications for understanding member state sovereignty, whether one considers the Union to be international or supranational, and how the internal political relationships may consequently be described. Historically, federal literature on the Union has moved from international relations (confederation) to comparative politics (federation). This reflects the shift from an early focus on the arrangement of post-war regional relationships to a contemporary concern with the conduct and management of internal political relationships. This study proposes to label the Union a federation based on its governance structures and internal political relationships, and to build this analysis on the foundation of a premodern Althusian concept of shared sovereignty that recognises the fact of concomitant sovereignty of the Union and its constituent members. Such a premodern view of sovereignty demands a reconsideration of the relationship between federation and democracy. This study argues that the conflation of democracy and federation is a contemporary development, is not intrinsic to the nature of a federal relationship and has hindered the theorisation of the Union as a federation.

Once the external boundary of the Union is in place, the two elements of federalism, techne and telos, are brought together to analyse its internal space. This is achieved through the use of historical institutionalism, a middle range theory used in comparative politics and which is a strand of new institutionalism. Through the application of historical institutional methodology to the federalisation process, we will be able to ascertain the role of federal ideas, the reasons for adopting federal governance
mechanisms, and the effect of those mechanisms on future institutional development and actor preferences. In short, we will be able to understand the interaction between federalism as techne and as telos and how that has produced the supranational federation of the Union.

Recent developments in the Union, such as enlargement to Central and Eastern Europe and the attempt at a constitution, indicate the necessity of understanding a complex regional polity seeking to define itself and its relationship with its citizens. The use of federalism to model and understand the Union is not new; what is new in this study is its comprehensive approach to analysing the basis of the Union as a supranational federation (sovereignty), the impact of the idea of federalism (telos) and the development over time of federal institutions (techne). Federal theory is refined and made more robust, and is used to subtle effect in the analysis of one of the world's largest polities.

There are also practical implications for an understanding of the particular nature of the Union as a supranational federation. Policy analysis, development and implementation can become more insightful and appropriate when based on a sophisticated model of federal rules, institutions and relations. Ideas about grand institutional design and democracy also change when we think about sovereignty differently and consider a federalisation process marked by elite leadership rather than popular demand.

Method and structure

This study is divided into two parts; the first establishes the federal nature of the Union and outlines the theoretical framework necessary to understand its origins and development. The second part operationalises this framework by examining the major institutions of the Union during the three phases of their development: 1945-1969, 1970-1989 and 1990-2005.
The institutions studied are: the Commission (earlier known as the High Authority), Council of Ministers, European Parliament (earlier known as the European Assembly), Court of Justice, and the European Council. Analysis will focus on the following aspects: founding structure, ideas and values; maturing ideas, norms and values; and (con)federal structure. This exercise is founded on analysis of primary and secondary source material. The major resources for this analysis are the public and working documents of the Union, diplomatic correspondence, pamphlets, judgements of the Court of Justice and national courts of the member states, as well as some use of contemporary journalistic accounts. Each nominated period will conclude with an analysis of the federal structure of the Union as a whole. In this way, the analysis is broken down and reintegrated spatially (across institutions) and temporally (over time).

This study has chosen to confine itself to institutional formation and development so as to provide a firm foundation for future exploration of federalism and what it means for the Union and its citizens.

**Part A – The European Union as Federation**

*Part A* (Chapters Two-Four) compares the European Union with seven domestic federations, reviews the current state of the literature on federalism and the Union and proposes the theoretical framework for analysing the Union. The comparative exercise demonstrates the validity of labelling the Union a federation and highlights certain features that require detailed attention – sovereignty, democracy and federal vision. The review of the federal principle of government considers the spectrum of federal arrangements and the placement of the Union along this spectrum. It discusses sovereignty, democracy and federalisation in the Union in the light of such classification and the treatment of the Union in federal literature. It concludes with a description of the theoretical framework appropriate to the Union.
Chapter Two contains a comparison between the current structure of the Union and contemporary domestic federations – Australia, Belgium, Canada, Germany, Spain, Switzerland and the United States of America. It compares federalising processes, institutional structures and the division of competencies in each federation. It argues that the Union can be classified as a federation despite its unique characteristics. The comparative exercise identifies three issues that must be addressed before a theoretical account of the Union as a federation can proceed: sovereignty, democracy and the absence of a shared and consistent vision of a federal Europe.

Chapter Three discusses the federal principle of government and its expression in confederation and federation. Refinements of the definitions of confederation and federation are put forward to allow alternative interpretations of sovereignty and democracy without damaging the integrity of federal theory. This is followed by a brief review of the place of the Union in the literature of comparative politics and international relations. It argues that the location of the Union at the intersection of comparative politics and international relations is suited to the multi-level governance focus of federal theory, although ambivalence about the boundary between national and supranational governance has complicated efforts to apply federal theory to the Union. This leads to an analysis of the federal literature on the Union and the development of two schools of thought which reflect the Union’s own separation of federalism as techne and telos.

Chapter Four describes the model of federation appropriate to the Union and its federalisation process. It reviews the place of democracy and sovereignty in this form of government and argues that understanding sovereignty in a federation is not restricted to Bodinian ideals of indivisible sovereignty and can be viewed instead through the prism of Althusius’ premodern shared sovereignty. In modern federal arrangements, the understanding of sovereignty shapes the view of democracy. This chapter also argues that
democracy should not be considered a defining characteristic of federation. It hypothesises that the Union was initially established as a confederation in response to a collective action dilemma. It was based explicitly on shared sovereignty and its governance structures were shaped according to the demands of repeated collective action and its concerns with institutional efficiency, bargain implementation, defection from agreement, and the equality of member states. It then describes the use of historical institutionalism to analyse the federalisation process and the methodology employed in Chapters Four, Five and Six to test the federalisation hypotheses.

**Part B – The Federalisation of the European Union**

*Part B* (Chapters Five-Seven) covers the three previously identified phases of federalisation: 1945-1969, 1970-1995, and 1996-2005. Each chapter traces the political development of the Union and the place of federal ideas in that development. Each concludes with an integrated assessment of the federalisation process during that period. *Part B* focuses on the relationship between ideas and institutions, the prompts for institutional change and understanding why institutional forms emerged as they did.

*Chapter Five* begins with an assessment of the initial institutional conditions of the Union, covering the period 1945-1969. It assesses the post-war debates on the form of European economic and political cooperation that ranged from limited functional integration to a United States of Europe. It analyses the Schuman Declaration and the Treaty establishing the European Coal and Steel Community, defining it as a confederal agreement. The operationalisation of the ECSC is covered and the manner in which that experience and the political developments of the 1950s led to a re-working of the framework for integration in the Treaty establishing the European Economic Community. It argues that the 1950s and 1960s saw continued debate on the political idea of Europe and the gradual and heavily contested formation of the identity and rules of the European Community. The form,
pace and content of European integration was not settled until the late 1960s and after battles over the Fouchet Plan, de Gaulle’s idea of Europe des Patries, the implementation of the Treaties and the Luxembourg Compromise.

Chapter Six covers the period from 1970-1989. Institutional change during the period 1970-1984 was subsystemic, informal and mainly fostered by the jurisprudence of the Court of Justice and the pursuit of endogenously formed preferences by the institutions of the Community. Policy change was slow and incremental as a result of decisions made in the late 1960s. Between 1985 and 1989 the Community initiated a campaign of institutional reform and policy expansion, as seen in the Single Internal Market project and the Single European Act (1987) intended to facilitate that project. The informal federalisation of the 1970s gave way over time to a more formal process as the limits of informality were realised.

Chapter Seven analyses the period from 1990-2005 and the series of institutional reforms that were fuelled by the end of the Cold War and enlargement. Changes to the governance regime became formal and systemic and involved a significant redevelopment of the institutional structure to incorporate policies and cooperation in the areas of foreign policy and security, and justice and home affairs. This period saw the negotiation of three treaties: Treaty on European Union (1992), Amsterdam (1997) and Nice (2003). It also covers the Treaty establishing a Constitution for Europe (2004, not yet ratified) and the concern this demonstrated for the legitimacy of the Union and the role of democracy in an élite-driven governance structure. In assessing the contemporary Union as a federation, the particular focus is on the implications of shared sovereignty for intergovernmental relations and the construction of democracy in the Union.
In the Conclusion, the utility of describing the European Union as a supranational federation is argued. The term supranational federation is used deliberately, since this thesis also argues that a federal European Union will not resemble nation-state federations in all respects. Its structure and the federal relationships it embodies will be conditioned by the fact that its component units are nation-states who may allow restrictions on the exercise of their sovereignty but will not allow its extinguishment.
PART A

THE EUROPEAN UNION

AS FEDERATION
THE EUROPEAN UNION AND FEDERAL STATES COMPARED

The Union, as it stands with the ratification of the Treaty of Nice (2003), is a supranational federation. It is not formally designated a federal system through constitutional statement nor is there a consensus among its member states that it is a federation. This does not prevent a comparison between the Union and other federal systems from revealing a startling degree of similarity. In its structure and operation the Union is more akin to a federation than it is to a confederation or international organisation.

What follows is by no means an exhaustive comparison; its purpose is to outline the basic structural arrangements that characterise federations and place this next to the Union as it stands now. In discussing the functioning of federal systems, restrictions to the examples of a few federal states will be made for reasons of space and clarity. Reference will instead be made to a small group of federations whose experiences tell us much about the nature of federal government. This chapter will compare the Union with the modern federations of Australia, Belgium, Canada, Germany, Spain, Switzerland and the United States of America. There is no intention to assess whether each case is ‘more or less’ federal than an idealised standard but rather to uncover the core elements of federation and to consider the purposes of differing federal arrangements across countries. The case of Spain will be considered even though it is not fully federalised. Its democratisation process since the death of Franco has been accompanied by a recognition of distinct regional identities, a process that is of particular interest in this context. Similarly, Belgium’s federalisation through a series of constitutional reforms in the late 1980s and early 1990s will be examined.
Since the object of this exercise is to outline the broad features of federations, this comparative review makes no claim of exhaustive examination of each case. Certain features of some federations will hold our attention because they are designed to cater for unique situations such as extreme ethnic or religious cleavages or economic disparity. In this way we may highlight the advantages of federal government in some situations. We begin with a brief overview of each of the federations under discussion, noting the process by which each federation was formed, and then deal with the institutional structures of federations such as constitutions and the judicial system and moving on to representative assemblies. The division of competences is also considered as a demonstration of the peculiarities of each system. In conclusion, the validity of the Union as federation is stated while the difficulties it poses for federal theory are identified.

Federalising process

This overview of the means by which the federations under study were established will focus on Belgium and Spain since neither has followed the traditional path to federation. Both have devolved from unitary states and have reached their present state through gradual reform involving cross-party support, intergovernmental bargaining and small scale agreements. The facts of establishment of the remaining federations are presented in brief.

What emerges from this review is the existence of two types of federalising process. Type I refers to formulation of the whole federal polity from a single, popular constitutive document. It appears that this is more likely to be the experience of societies marked by political and/or social homogeneity and which share a broad set of common beliefs. Type II refers to a gradual and incremental federalisation process that tends to be an elite- and institution-driven process. The constitutional document and associated federal institutions emerge over time; the federalisation of society and its institutions may be the subject of veto from its citizens at multiple points.
Belgium, when it gained its independence from the Kingdom of the Netherlands in 1830, was organised as a unitary state that did not recognise any distinction between the French (Wallonia) and Flemish (Flanders) language groups and accepted French as the language of law and government. Throughout its history, agitation by Flemish groups and later responses by French-speaking organisations has seen the gradual federalisation of the Belgian state beginning with the incremental adoption of language laws which progressed to the adoption of territorial unilingualism and finally to full federalisation in the early 1990s (Hooghe 1991; Murphy 1995). Pressure for significant institutional reform, rather than continual amendment of the language laws, did not build until the 1960s and in 1970 Belgium adopted the first of a series of four sets of reform over the next 25 years (1980, 1988-89 and 1993). The federalisation process began in earnest at this time, though not without some argument since the subject of devolution or federalisation was complicated by political cleavages along class and religious lines (Hooghe 1991).

By 1988 the political climate in Belgium had changed considerably, to the extent where a complete federalisation of the unitary state became acceptable to the majority of Belgians. The most powerful propulsion towards a federal state came from a long-running language crisis in the Voeren/Fourrons district, along the linguistic border. In an attempt to resolve this and the larger issues regarding the Flemish and Walloon communities, Prime Minister Jean-Luc Dahaene established a coalition cabinet and initiated extensive federal reform in 1988. The 1988 reform eventually took place in two phases: 1988-89 and 1993. The first phase transformed Belgium into a semi-federation and the final phase completed the transition from unitary to federal state. This reform formalised the system of dual subnational government which involved communities and regions. From 1993 the Belgian federal state comprised the federal government, the three Regions of Flanders, Wallonia and Brussels and the
language Communities of Flemish-, French-, and German-speakers. The country was further divided into ten provinces and 589 communes. It is important to note that the non-territorial languages Communities are the consociational overlay to the territorial politics of federal government. The final phase of reform involved final adjustment to state structure, division of competencies and constitutional amendment. The constitution was amended to reflect the new state structure and Article 1 declared that Belgium was a federal state (Beaufays 1988; Hooghe 1991).

A number of options were favoured by various political parties in the process of democratising Spain in the post-Franco era: retention of the centralised unitary state; confederation; or a decentralised unitary state (with varying degrees of regional autonomy). When finally adopted, the 1978 Spanish constitution did not establish a federal state but it did recognise the historic and strong identities of its regions and provided for the regionalisation of the country. It stated in Article 2 that

The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and solidarity amongst them.

The Constitution established a three-tier system of government that incorporated the central government and ‘municipalities, provinces, and any autonomous communities’ all of which would enjoy self-government for the protection of their interests. Autonomy was not automatic and would be the result of bilateral negotiations which were intended to reflect the particular status and interests of the applicant province (or group of provinces). Under Article 151 the regions of Catalonia, the Basque Country, Galicia and Andalucia, were the first to reach the status of Autonomous Communities (ACs). Pre-autonomy statutes were drawn up and approved by all the other regions before the final national statute of autonomy for
each region was approved by the parliament, the Cortes. A different and slower approach was taken for the remaining thirteen, as provided for in Article 143. Navarre and Madrid were granted particular arrangements by virtue of their designation as special status regions while the remaining eleven achieved autonomy by 1983 (Agranoff 1996; Elazar & Jerusalem Centre 1991). The level of self-government varies considerably between ACs in a process that Robert Agranoff has described as an ‘asymmetric form of diffused federal construction’ (Agranoff 1996: 388).

The modern Swiss state was established with the constitution of 1848, an agreement that put in place the closest ties between the cantons. It followed the Sonderbund, a brief civil war between the Catholic and Protestant cantons over state reforms and was the culmination of a 600-year history of confederation. Switzerland maintains the independence of its cantons through a highly decentralised federation and through the unique patterns of consociational democracy that incorporates the non-territorially defined social and political cleavages (such as linguistic and religious groups) into the federal system (Baker 1993). Given its long experience of confederation prior to the establishment of the federation and its emphasis on managing diverse communities, Switzerland can be regarded as an example of a Type II federalising process.

The remaining nation-state federations under discussion established themselves as federations by more conventional means through a single constitutive act. The federated United States of America (USA) emerged in 1787 from their experience of the Articles of Confederation and the Federalist Papers, published in defence of the new constitution, described and defended the new form of republican federation. The circumstances surrounding the origins of the USA and the significance of the American federation is discussed at greater length in Chapter Three.

The Canadian federation was established in 1867 though the extent and type of federation has remained the subject of contention. The adoption of
federation in Canada recognised the distinctiveness of the French and British cultures, though the implementation of a Westminster-style parliamentary system seemed to place a unitary state vision alongside this. The Australian federation, established in 1901, followed the Canadian example in that it combined a Westminster parliamentary system with federation. Culturally homogenous and with established self-government in each of the colonies, the arguments for federation centred on the issue of free trade. The German federation was born out of the devastation of the Third Reich and the federal form of government was devised under the supervision of the Allies. It was not an innovation: Germany had previously experienced some form of federation with the Zollverein and Confederation of the nineteenth century. The Russian occupation of eastern Germany and the Allies’ desire to avoid Prussian domination of the federation led to the creation of ahistorical Länder and they have come to play a highly formal and important role in development and implementation of federal policy (Watts 1996).

The European Union has developed over a number of years since its foundation as the European Coal and Steel Community as a limited agreement confederation in the Treaty of Paris (1951). Its most significant institutional development and reforms have taken place through treaty negotiations and the Treaty of Nice (2003) is the latest instalment in that process. The Treaty of Nice set the stage for the expansion of the Union’s membership while the earlier Treaty of Amsterdam (1999) refined institutional changes and policies begun with the Treaty on European Union (1992). As with the Single European Act (1987) and the Treaty on European Union, the Treaty of Amsterdam confirmed practices which had developed since the last treaty and set the agenda for the next inter-bargaining period. These cycles of institutional reform have seen an extension of the area of agreement and of increased delegation of national authority to the supranational authority, marking progress from limited
confederation to a federal system. Contrary to the experience of the other federations, the federalisation of the Union has not been subject to universal popular ratification. The use of referenda to ratify these treaties is dependent on domestic requirements of member states for treaty approval. In contrast to the explicit federalisation of the federations under discussion, the Union’s experience has been one of implicit federalisation.

Belgium and Spain offer the most intriguing path to federation with their experience of ongoing negotiation and agreement. Commenting on the Spanish method of federalisation, Agranoff notes that ‘these actions demonstrate that federal arrangements can be built through a series of smaller agreements, followed by supporting governmental actions’ (Agranoff 1996: 393). This incremental devolution from unitary to federal state is fascinating for the parallels which may be drawn with the European integration process. The recognition of common interests, the lack of initial agreement on final state structure, the commitment to long term negotiation and building on previous agreements all have their echo at the European level. With successive treaties the Union has federalised implicitly. A federal outcome was not an explicit part of the final bargain but federative structures and processes were put in place for a number of reasons: institutional efficiency (delegation of some legislative and regulatory authority to Union institutions), enforcing bargains (the Commission’s role in implementation of Union law safeguarding the Treaties), sanctioning defections from agreements (the role of the Court of Justice) and ensuring the relative equality of member states (vote weighting arrangements in all institutions). These features and their development are discussed in greater detail in Part B.

As indicated at the beginning of this Chapter, this comparative exercise indicates two paths to federation. Type I can be regarded as a kind of constitutional ‘big bang’ which sees the development and promulgation of a constitutional document from which the federal polity emerges intact.
Federal Governance in the European Union

Although discussion and debate may take some time (for example, the Constitutional Conventions preceding the establishment of the Australian federation) there is recognition of an end point. It is expected that the institutional framework will remain relatively stable for an extended period and that demands for formal renegotiation of the agreement will be rare. This has been the experience of the United States, Canada, Australia and Germany. In contrast, type II is an incremental federalisation process where the federation is formed from a series of negotiated constitutional agreements, the cumulative effect of which produces a federal polity. This has been the experience of Belgium, Spain, Switzerland and the European Union.

It would appear that the basis for the federalisation processes lies in the extent of homogeneity among the communities seeking to federalise. Those that possess deep societal cleavages seem to demand a Type II federalisation process that slowly and formally incorporates the communities and their citizens into the larger polity. By increasing the number of veto points (stages in the political process where it is possible for each community to deny or substantially alter the content of the federal bargain), it may be that trust and confidence in the final federal polity is achieved. In sum, the formal incremental process itself is a source of legitimacy for the federation.

Such a process does not seem necessary in communities where debate and conflict over the form of federation is not mediated by deep societal cleavages (particularly ethnicity and religion). In a Type I process, the strength of pre-existing bonds, whether cultural, political or historical, may produce a far broader set of common beliefs about politics and identity. Consequently, this may reduce the potential for conflict over the form of federation. It is more likely that a one-off agreement will satisfy and continue to satisfy the federalised communities.

A Type II process is an élite- and institution-driven process characterised by bargaining and cooperation. We expect that the role of élites is as an
interface, representing their communities to the (emerging) federation and the (emerging) federation to their communities. Once the federalisation process has been agreed, we expect that elite preferences for their group’s involvement in federalisation will remain relatively stable over that process. Institutions ratify and implement agreements negotiated by elites but we do not expect their role to remain static since federalisation occurs within a living, established polity and is itself a process of institutional change. Institutions may find their role and saliency changing over time according to the rule and institutional changes brought about by federalisation.

There are two milestones in the federalisation process: i) the incorporation of citizens into the formal political relationship and ii) the establishment of an institutional framework to implement and enforce that incorporation. In the federalisation of homogenous Type I communities it is likely that these two elements will occur simultaneously. In the federalisation of heterogenous Type II communities, the formal incorporation of citizens into a federal political relationship may occur at any time during the gradual establishment of the federal institutional framework. In Belgium, it took place at the end of the federalisation process. In the case of Spain, it has occurred at different points in time for different communities. The place of citizens of the European Union has slowly emerged, beginning as a nominal, economic and delegated citizenship and acquiring the legal and political characteristics of citizenship with the development of the case law of the Union and increased opportunity for formal political participation in the decisions and mechanisms of government.

**Institutional structures**

Unsurprisingly, the basic institutional features of federation repeat across cases with variation confined to the expression of national political culture. Each federation has a constitution, provides for judicial review or interpretation of that document, has a federal bicameral legislature and, within the constitution, provides for the division of competencies between
the federal and constituent governments. Country by country variation reveals itself in the precise arrangements for constitutional amendment, in the provision of proportional representation of ethnic or linguistic minorities, the extent to which the division of competencies clarifies the responsibilities of each government and whether it is legislative or administrative in nature, and in the pattern of intergovernmental relationships which overlay and permeate this institutional structure. It is in these variations that political culture plays an important role and where the conflict management possibilities of federalism may be fully realised.

The constitution is the primary document of the polity. Its provisions articulate the federal relationship and the mechanisms through which that relationship will be maintained. As a written compact between federated states it is the supreme authority in case of dispute between those states. In giving shape to the federal system, the constitution will invariably define the division of competencies between levels of government, the type of representative assembly, court system (including constitutional interpretation), citizenship and the means for constitutional amendment. The constitution may either give detailed and strict rules for the governance and maintenance of the federal system or provide a framework, allowing the federal partners to negotiate and develop the federal relationship. Constitutional interpretation and adjudication is a function reserved for an independent judicial institution (Duchacek 1987). With the exception of Germany, Spain and Belgium which have their own Constitutional Courts, the role of judicial review and adjudication has been combined with the role of final appellate court in other federations. Appointments to such courts may be made either by the federal government (as is the case in Australia, Canada, the United States and the Union), or by the federal assembly (Belgium, Germany, Switzerland).

Since it forms the basis of federation, the procedures whereby the constitution is amended and interpreted have important implications for the
development of the federal system. It is held that amendment of the
document should, at least, require the consent of a majority (simple or
qualified) of units in the federation. In some cases, the consent of citizens is
required through the use of popular referenda. Amendment to the
Australian and Swiss constitutions requires a ‘double majority’: a majority of
electors voting in a majority of States and a majority overall. Referendum
proposals are put forward by the federal government but must be accepted
by both Houses of Parliament. In the case of the United States, approval of
amendments relating to the distribution of competencies and integrity of
constituent units requires a special majority in both the House of
Representatives and the Senate, together with a special majority in the
legislatures of the constituent units. The German constitution may be
amended by a two-thirds majority in both Houses of Parliament, though
this does not apply to articles dealing with rights of the citizen, the federal
structure and democratic status of the state.

Prior to the patriation of the Canadian constitution in 1982, all amendments
were enacted by the Parliament of the United Kingdom. With the adoption
of the Constitution Act of 1982, a domestic amendment procedure was
adopted which applies different procedures to different sections of the
constitution and which formalises the role of the provinces in constitutional
amendment. General constitutional amendment requires the assent of two-
thirds of the provincial legislatures comprising at least half of the population
and the federal Parliament. Note has been taken of the particular tensions in
the Canadian polity by subjecting certain provisions of the constitution to
amendment procedures which recognise the position of minority groups or
provincial interests. Acutely sensitive subjects, such as the status of the
French and English languages and references to the monarchy, require a
more demanding approval process while changes which affect only the
interests of one or a few provinces require only their approval and that of
Belgium has engineered a complicated amendment process that reflects the delicate balance of not only federal-state relations but also intrastate relations. Belgium does not involve the regions or communities in the amendment process but does require a special election on the issue, special majorities in each federal house and, in areas dealing with the distribution of competencies or the Court d’Arbitrage, special legislation supported by a majority of each of the two major linguistic groups in parliament. The Spanish constitution may be amended on the initiative of the government, the Congreso de Diputados or the Senado, and provision is made for an assembly of the ACs to initiate amendment. Ratification is a complicated procedure and may be by a three-fifths majority of the members of both houses, or where they disagree, by an absolute majority in the Senado and two-thirds in the Congreso. If one-tenth of either house requests it, this may be followed by referendum. A total revision of the constitution or a partial revision of specific portions is subject to more rigid rules and must be put to a referendum.

The Court of Justice functions as a constitutional court, though the European Union does not possess a constitution in the same manner as the federations just mentioned. There is no single document, popularly ratified, which outlines the institutions of the Union, divides competencies between levels of government and bestows rights on the citizens. The Treaties that are the foundation of the Union — Rome, Paris, Single European Act, the Treaty on European Union, Amsterdam and Nice — are considered by the Court of Justice to form the Union’s constitutional charter. In Parti Ecologiste Les Verts v. European Parliament, the Court first indicated this view:

The EEC is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures
adopted by them are in conformity with the basic constitutional charter, the Treaty. (Case 294/83 [1986] ECR 1339).

This view was reinforced by a later Opinion on the Draft Agreement on a European Economic Area.

The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on a rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. (Opinion 1/91 [1991] ECR I-6084)

The legal standing of the Treaties as the constitutional base of the Union is now clear, even if this was not the original intention of the member states. This constitution may only be amended with the agreement of all member states and must be ratified by all member states according to domestic procedures applying to international treaties. Such procedures may or may not involve popular referenda. The Treaty on European Union was submitted to a turbulent ratification process being initially rejected by the Danes (later accepted after opt-outs were offered), narrowly passed in France, subject to constitutional challenge in the German constitutional court and lengthy debate in the British House of Commons. Much less controversial in its subject matter, the Treaty of Amsterdam met with little opposition within member states. The Treaty of Nice was rejected by Irish voters but completed the ratification process in February 2003 after a second Irish referendum proved successful.

Bicameral legislatures are a feature of federations as they allow for popular representation in the lower house and the representation of states, usually
on a proportional basis, in the upper house. Except in the case of the United States where there is the separation of the legislature and the executive, the government is formed from the lower house. Local conditions will affect the extent to which the upper house performs as a states’ house, representing the views and preferences of the states (Watts 1999, Agranoff 1996). In Germany, the composition of the Bundesrat and its role in decision making ensures that the Länder are fully involved in federal decision making. The Bundesrat consists of delegates from each of the Länder governments with the number of delegates determined by population. Each Land is guaranteed at least three representatives. Delegates from each Land may only cast a bloc vote under direction of their Land government. It can initiate legislation and must approve all legislation directly related to Länder responsibilities. It has a suspensive veto on federal exclusive competencies (consisting of 40% of federal legislation) that may be overridden by Bundestag majority and an absolute veto on concurrent competencies with mediation committees.

The Australian case presents the other extreme in that although Senators are elected on a state basis, they usually stand on a party political basis and tend to represent those interests rather than those of their home state. Seventy-six Senators are elected under a system of proportional representation, with twelve Senators for each state and two each for the Northern Territory and the Australian Capital Territory. The Australian Senate has developed as a House of Review rather than as a House of the States. The Senate may reject legislation approved by the House of Representatives and, if it rejects the same piece twice, this may be used by the government as a trigger for the dissolution of both Houses and the calling of elections. In a departure from the norm, and reflecting its Westminster heritage, the members of the Canadian Senate are not elected but appointed by the federal government with the number of senators apportioned to each province on the basis of population. This is a matter of ongoing debate in Canada, where there have
been calls for a ‘triple E’ Senate: elected, effective and equal (Lusztig 1995: 35). In both Australia and Canada the Senate is forbidden to amend or initiate money bills, in order to protect the government formed in the lower house, although they have the ability to veto such legislation (Watts 1999; Wheare 1963).

As with the Australian system, the legislative branch of the United States government is the Congress, which is composed of the Senate and the House of Representatives. Two Senators represent each state while in the House of Representatives members are apportioned by state according to population. American Samoa, the District of Columbia, Guam and the Virgin Islands each have one non-voting representative and Puerto Rico has one ‘resident commissioner’. The Senate may initiate legislation, except revenue bills, and may reject or amend any legislation from the House of Representatives. It must ratify by a two-thirds majority any treaties signed by the President. Presidential appointment must be confirmed by the Senate which also has the power to remove the President when sitting as a high court of impeachment. The Senate may initiate any legislation with the exception of money bills and may amend or reject any legislation originating from the House of Representatives. The absence of any members of the executive frees the Senate to act purely in the states’ interests but the practice of party politics has undermined this. The Spanish Cortes is composed of the Congreso de Diputados, where the government is formed and which has a varying membership from 300–400 deputies, and the Senado which combines popular and territorial representation. Each province is represented by four Senators, while Gran Canerife, Majorca and Tenerife have three representatives each and other islands have one. They are supplemented by 208 directly elected Senators, apportioned according to population (Elazar & Jerusalem Centre 1991).

In the Belgian legislature, the Senate is a combination of directly elected representatives, indirectly elected and co-opted members and has a variable
representation specified for each unit. It has equal competence with the House of Representatives on some matters but in others the House of Representative has over-riding powers. In Switzerland, the Nationrat (lower house) is composed of 200 directly elected members and the Standerat (upper house) has a membership of 46. In the Standerat, each full canton has two representatives while half cantons have one representative each. The executive, the Bundesrat, is a collegiate body elected by the federal legislature, composed of seven councillors among whom the President rotates on an annual basis. Tradition has it that the Bundesrat encompasses the four major political parties, representing an overwhelming majority in the federal legislature (Watts 1999).

The structure of the Union does not permit the easy labelling of its institutions as ‘executive’ or ‘legislative’. The European Council, composed of the heads of state or government, is not involved in the day-to-day running of the Union and instead provides the larger political and economic vision of the Union. Emerging out of ad hoc summity during the 1970s, the European Council has settled into a role of resolving tough political issues (such as the British budgetary impasse in the early 1980s) and authorising large-scale Union projects such as intergovernmental conferences and the accession of new member states. The Council of the European Union (formerly known as the Council of Ministers), members of which are ministers in their home states, is the main legislative and decision-making body in the Union. It is curious in that it is not a permanent body of ministers: the Council of the EU meets in 9 different configurations:

- General Affairs and External Relations;
- Economic and Financial Affairs;
- Competitiveness;
- Cooperation in the fields of Justice and Home Affairs;
- Employment, Social Policy, Health and Consumer Affairs;
- Transport, Telecommunications and Energy;
In its work, the Council is supported by the Committee of Permanent Representatives (Coreper), the Special Committee on Agriculture, and the General Secretariat (Commission 2006). These bodies are authorised to make certain regulatory and technical decisions and do so on a routine basis; sensitive legislative proposals are sent ‘upwards’ to the Council for resolution at a ministerial level.

The Council is primarily a legislative body, deciding upon proposals put forward by the Commission. Decision making is normally through qualified majority voting (QMV), though simple majority voting and unanimity remain for some restricted areas. Under the QMV system in its most recent incarnation (Treaty of Nice), the votes of each member state are weighted and a qualified majority exists with 73% of the vote (or 170 of 232 votes). This is restricted by the requirement that these votes be cast by at least a majority of member states, or by two-thirds of member states in other instances. Furthermore, a member state may demand verification that the qualified majority comprises at least 62% of the total population of the Union.

From 2005 until such time as membership of the Union expands to 27, this will increase the power of the five largest member states (Germany, France, UK, Italy & Spain) The requirement that the number of votes cast represents a majority of member states and at least 62% of the Union’s population means that a decision by qualified majority vote cannot be made without the support of all of the five largest member states (Germany, France, UK, Italy & Spain). In a Union of 27 member states, the qualified majority becomes 75% or 258 votes; the number of votes required for a two-thirds majority is at least 258 but in reality this becomes 308 (the size of a minimum winning coalition) (Commission 2006). The previous voting
situation, with its numerous possibilities for minimum winning coalitions, will not re-emerge as the new voting conditions will restrict the number of minimum winning coalitions and increase their size. This will act as a brake on the influence of smaller member states as the 21 smaller member states (those with 14 or fewer votes) could constitute a two-thirds or even qualified majority in raw numbers but still fall 83 votes short of the required 258.

Constitutionally, the Council cannot initiate legislative proposals itself and can only act on the proposed legislation put forward by the Commission. It can prompt the Commission into drafting legislation through a variety of means. Article 152 provides some latitude: ‘The Council may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals’ (Article 152, EEC Treaty). Some requests made under this article can be so precise as to restrict the Commission’s options and has become a form of *de facto* legislative initiative. Furthermore, the Council may adopt opinions, resolutions, agreements and recommendations that are not legal texts but which place pressure on the Commission to draft proposals addressing those issues.

The Commission is usually styled as the public service of the Union, though this label obscures its role in policy initiation and in the legislative process. It is headed by 25 Commissioners, each of whom is nominated by a member state, and the President of the Commission is nominated by the member states acting in accord. The nominations for President and members of the Commission are subject to a vote of approval by the European Parliament (EP) and are appointed for renewable five year terms. The post of President is politically sensitive and the President can have a significant impact on the policy direction of the Union. Each Commissioner is given a portfolio and all decisions are taken collegially. The Commission bureaucracy is divided into 26 Directorates-General and nine special units providing support. The
Commission is officially charged to ‘ensure that the provisions of this Treaty and the measures taken by the institutions…are applied; formulate recommendations or deliver opinion on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary’ (Article 155, EEC Treaty). It has thus garnered for itself the titles of ‘guardian of the Treaties’ and, particularly in the first decades of the Union, the ‘motor of integration’. Its main functions are legislative proposals (on its own initiative or at the request of the Council or the European Parliament) and the implementation and enforcement of Union policy (Commission 2006). The Commission plays a key mediation role between the Council and European Parliament (EP) in the legislative process.

The EP has 732 members directly elected from national constituencies, though Members of the European Parliament (MEPs) take their seats in transnational party groupings. MEPs for each member state are accorded on a population basis varying from 99 for Germany and 5 for Malta. EP involvement in the legislative process varies across policy areas and takes the form of assent, cooperation or codecision. Since the institutional reforms of the 1990s, the EP has had its role in the legislative process considerably expanded. The codecision procedure, now regarded as the standard legislative procedure, makes the EP a co-legislator with the Council of Ministers. The Economic and Social Committee (ESC) and the Committee of the Regions are consultative bodies only and the Commission and the Council in certain policy areas (EP 2006; ESC 2006; CoR 2006) must seek their advice on draft legislation.

The normal legislative procedure requires the Council to decide on a Commission proposal after receiving the advice of the Economic and Social Committee, the EP and, in some cases, the Committee of the Regions. Depending on the legislative procedure required by the Treaties, the Council may be sole legislator (consultation) or co-legislator with the EP (co-decision). The co-decision procedure, which is described in Article 252,
may be a complex and lengthy procedure depending on the extent of agreement between the Council and the EP. The cooperation procedure, as outlined in Article 189c, involves the EP and encourages the EP to adopt a conciliatory position since complete rejection of the Council’s position pushes the EP completely out of the legislative process. To maintain its input the EP has to accept at least some part of the Council’s proposals. The following diagram illustrates this procedure and their options:
Figure 2.1: Article 252, Consolidated version of the Treaty establishing the European Community: co-decision procedure

The consultation procedure simply requires the EP, the Committee of the Regions or the Economic and Social Committee to express an opinion which may or may not be incorporated into the Council’s final decision. The assent procedure requires the EP’s assent before certain Council decisions can come into force. This has been used to effect with international agreements as the EP has insisted on certain amendments being made before it assents. This is not a veto as such but suspends the agreement until such time as the EP assents. These legislative procedures have different effects depending on the voting system adopted in the Council. Where co-decision is coupled with qualified majority voting it most approximates the legislative process in federal government. Co-decision with unanimity places pressure on the EP to take into account the preferences of the member states as fully as possible. Should the EP force the issue without so doing, it would deadlock the legislation creating the possibility of no agreement at all. Cooperation curtails the EP’s role but its opinion does carry weight and the Commission is usually under pressure to mediate with the Council to incorporate that opinion into the final decision. Consultation obviously requires the least from the EP and the shortening list of legislation subject to this procedure since the enactment of the SEA has been welcomed as a sign of increased democracy. The assent procedure does grant the EP a limited negative power. The following table indicates the scope of co-decision procedure as outlined in the Treaty of Nice. Articles that are shaded indicate that although codecision with the EP applies, the Council acts unanimously.

Table 2.1: Scope of co-decision procedure, Treaty of Nice: Article 251

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<td>Antidiscrimination - incentive measures</td>
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<td>Art. 40</td>
<td>Free movement of workers (+ consultation with Economic &amp; Social Committee (ESC))</td>
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<td><em>Idem</em>, if national legislation is amended.</td>
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<td>Art. 149(4)</td>
<td>Education – incentive measures (+ consultation with ESC and COR)</td>
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<td>European political parties – regulations &amp; funding</td>
</tr>
<tr>
<td>Art. 255(2)</td>
<td>Access to institution documents</td>
</tr>
<tr>
<td>Art. 280(4)</td>
<td>Prevention of, and fight against fraud</td>
</tr>
<tr>
<td>Art. 285(1)</td>
<td>Statistics</td>
</tr>
<tr>
<td>Art. 286(2)</td>
<td>Independent supervisory body for monitoring the protection of personal data</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 52</td>
<td>Service liberalisation</td>
</tr>
<tr>
<td>Art. 81</td>
<td>Competition rules (concerted practices)</td>
</tr>
<tr>
<td>Art. 82</td>
<td>Competition rules (abuse of a dominant position)</td>
</tr>
<tr>
<td>Art. 93</td>
<td>Tax harmonisation (indirect taxation)</td>
</tr>
</tbody>
</table>
The European Union and Federal States Compared

Table 2.3: Scope of assent procedure

<table>
<thead>
<tr>
<th>Art. 133 (3)</th>
<th>Commercial policy (Art. 300)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 133 (6)</td>
<td>Transport (Art. 300)</td>
</tr>
<tr>
<td>Art. 133 (7)</td>
<td>Intellectual property (Art. 300)</td>
</tr>
<tr>
<td>Art. 161</td>
<td>Cohesion &amp; Structural Funds (+ consultation with ESC and CoR)</td>
</tr>
<tr>
<td></td>
<td>QMV is possible after 1 January 2007</td>
</tr>
</tbody>
</table>


The EP’s role in the legislative process is not entirely equivalent to that of the Council, though the extension of the co-decision procedure to most areas of Union activity has increased the stature of the EP in relation to the Council of Ministers. The EP is still only consulted in the areas of police and judicial cooperation in criminal matters, employment (guidelines for national policy), immigration and asylum, and social security. Its assent must be sought before the Council suspends the rights of member states due to serious and persistent breaches of principles upheld by the Union (rule of law, liberty, democracy, and respect for human rights) and before states accede to the Union. The EP has no involvement in the development of the Common Foreign and Security Policy. Together the Council of Ministers and the EP do operate as a bicameral legislature though its democratic legitimacy is impaired by the Council’s distance from direct accountability.

Were the Union in the mould of domestic federations, final decision making would be contained within the popularly elected EP rather than the Council. The Council combines executive and legislative roles, though this is not unusual. Notwithstanding, this assessment of the EP and the Council as a bicameral legislature is a fair and reasonable one.

The most obvious difference between the Union’s arrangement and that which prevails in domestic federations is that the executive is formed not from the directly elected parliament but from member states’ representatives. In terms of federation there exists a basic federal structure.
in the Court of Justice, the bicameral legislative relationship between the EP and the Council and the representation of the federal government in the shape of the Commission. What complicates the picture from a federal perspective is the dual role of the Council, in that it is the representation of state’s interests in the legislative process but simultaneously acts as the executive for the Union. It bears responsibility as an institution of the Union to act consistently according to the *acquis communautaire* and to further the development of the Union by honouring the bargains struck during treaty negotiations. It is also undeniably a force for member state interests and the voices heard within the Council are those of national interests. This situation is not necessarily antithetical to federation. The federal executive is usually drawn from a federal base, i.e. federation-wide elections. The executive thus chosen is responsible for the articulation of a federal vision and implementation of policy in the federal or national interest. Being drawn from the governments of member states, the Council has no such federal or Union-wide interest to represent and very little incentive to consider Union interests over their state interests. However, the practice of decision making within the Union suggests a co-executive between the Commission and Council, with the former balancing the Council’s tensions over member state preferences. The Commission’s functions of legislative and policy initiation, of the enforcement of Union decisions and the implementation of Union legislation make it more than a neutral public service. It exercises an executive function in conjunction with the Council which is differentiated by its concern with the interests of the Union as a whole.

The web of inter-institutional relationships serves to ensure the Council works within the Union and to prevent it from consistently hampering the progress of the Union. The variation in member state preferences and the bargaining which accompanies Council decisions may encourage analysts to view the results as lowest common denominator agreements but this fails to
consider the pro-Union, pro-federal attitudes of some member states over some issues and which may mitigate against minimalist decision making. There is also the incontestable fact that the defence of national interest within the Council has been gradually eroded by the member states themselves with the Luxembourg Compromise falling into disuse and the move from unanimity to QMV across most areas. The Council of Ministers ensures a central role for member states but those same states have participated in strengthening federal decision making procedures. It highlights one of the most difficult issues in theorising the Union: the coexistence of national and Union interest in the same institutions. This is why a federalising, constitutive process is persuasive when analysing the development of the Union. It is able to explain through the recursive nature of the inter-institutional relationships the learning process which gradually leads member states to adopt more efficient and effective federal processes. Unanimity in Council decision making was a workable, though restrictive, process in a smaller and less authoritative Community in the late 1960s and 1970s; its limited vision did not suit a larger and more ambitious Union and member states have, on their own initiative and at the prompting of other institutions, slowly discarded these methods.

The unusual co-executive formed by the Council with the Commission may not meet the usual standards of a balance in federal-state governance found in domestic systems but is an inevitable part of this supranational system. It is to be expected that much of the political will and direction for the Union will emanate from the member states through the Council of Ministers and the European Council but when balanced by a strong and effective Commission there is an articulation and implementation of a Union will and policy. In terms of a direct comparison with a federation, this system seems to be close to the German system. The close involvement of Länder in the federal legislative system gives them a particularly strong voice in the framing and implementation of federal legislation. The need for the federal
government to consult extensively with the Länder, and to take into account their preferences, has given rise to a system of *Politikverflechtung* (joint decision-making) that Fritz Scharpf has already compared to decision-making in the Council (1988). This meshing of federal and state politics at the executive level is the most arresting feature of the Union. The role of the Commission and its explicit agenda to ensure the application of the treaties and the objectives contained therein creates an institution that represents the Union as greater than the sum of its parts. An independent Union identity and interests are put forth as separate from the identity and interests of member states. This is the nucleus of a federal relationship.

**Division of competencies**

We expect that a division of competences will reveal the extent of centralisation or decentralisation within a federation, the extent to which states are autonomous and to indicate where there is functional overlap between state and federal governments. It fleshes out the bare bones of institutional structure and, barring any constitutional strictures, divisions of competence may be more amenable to change through intergovernmental negotiations and trade-offs over the life of the federation. The primary reason it is included here is so that the sharing of functions and competencies in domestic federations may be compared to the current state of the Union. One of the distinctions made between confederation and federation is that confederations are more limited in their concerns and do not involve themselves with internal affairs. Confederations order external relations between nations while federations order internal affairs between territorially based groups. The division of competences is one means of marking this boundary and will prove useful in answering the question of whether the European Union is federal or confederal.

The first table is taken from Ronald Watts (1996) and indicates the constitutionally allocated competencies of seven domestic federations included in this comparative study. Not all federations have all possible
public policies defined in their constitution; for example, Spain is the only federation presented that has a constitutionally defined allocation of authority for environment policy. Where no information is provided, the power has not been constitutionally allocated.

Table 2.4 Division of competencies in 7 domestic federations

<table>
<thead>
<tr>
<th>BASIC FEATURES</th>
<th>United States</th>
<th>Switzerland</th>
<th>Canada</th>
<th>Australia</th>
<th>Germany</th>
<th>Spain</th>
<th>Belgium</th>
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<tbody>
<tr>
<td>Residual powers</td>
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<td>S</td>
<td>S</td>
<td>F</td>
<td>F</td>
<td>S</td>
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<tr>
<td>Enumeration of State powers</td>
<td>NO</td>
<td>NO</td>
<td>YES</td>
<td>NO</td>
<td>YES</td>
<td>YES</td>
<td>YES a</td>
</tr>
<tr>
<td>Delegation of legislative authority</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>YES</td>
<td>NO</td>
<td>YES</td>
<td>NO</td>
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<table>
<thead>
<tr>
<th>SCOPE OF POWERS</th>
<th>Finance &amp; fiscal relations</th>
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<th></th>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Customs/Excise</td>
<td>F/C</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
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<td>C</td>
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<td>Corporate tax</td>
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<td>F</td>
<td>FS</td>
<td>C</td>
<td>C</td>
<td>F</td>
<td>C</td>
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<tr>
<td>Personal income tax</td>
<td>C</td>
<td>FS</td>
<td>FS</td>
<td>C</td>
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<tr>
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<td>F</td>
<td>FS</td>
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<tr>
<td>Other tax</td>
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<td>F</td>
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<tr>
<td>Equalisation</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>FS</td>
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</tbody>
</table>

| Debt & Borrowing  |                            |                   |                   |                   |                   |                   |                   |
| Public debt of fed. | F                       | F                 | F                 | F                 | F                 | F                 | F                 |
| Foreign borrowing | FS                          | FS                | FS                | C                 | FS                | FS                | FS                |
| Domestic borrowing | FS                         | FS                | FS                | C                 | FS                | FS                | FS                |

<table>
<thead>
<tr>
<th>International Relations</th>
<th>Conduct of foreign policy</th>
<th>Defence</th>
<th>Treaty implementation</th>
<th>Citizenship</th>
<th>Immigration (inter federation)</th>
<th>Immigration (inter regions)</th>
<th>Functioning Of Economic Union</th>
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</thead>
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<tr>
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<td>Fs</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>C Fs</td>
<td>C F</td>
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<td>F</td>
<td>FS</td>
<td>FS</td>
<td>F C Fs</td>
<td>C F</td>
<td>External trade</td>
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<tr>
<td></td>
<td>F</td>
<td>F</td>
<td>F C</td>
<td>F</td>
<td>C F</td>
<td>F S</td>
<td>Interstate trade</td>
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<td>F S</td>
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<td>S F</td>
<td>F    Sc</td>
<td>Insurance</td>
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<tr>
<th>Transportation &amp; Communication</th>
<th>Roads &amp; bridges</th>
<th>Transport</th>
<th>Telecommunications</th>
<th>Postal Services</th>
<th>Broadcasting</th>
<th>Agriculture</th>
<th>Fisheries</th>
<th>Mineral resources</th>
<th>Nuclear energy</th>
<th>Environment</th>
<th>Total Affairs</th>
<th>Primary &amp; secondary</th>
<th>Post-secondary</th>
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<td>F C</td>
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</tbody>
</table>

53
Federal Governance in the European Union

| Vocational training | - | - | - | S | - | F\textsuperscript{FS} c |
| Research & development | FS | C\textsuperscript{†} | - | FS | C\textsuperscript{†} | FS F\textsuperscript{FS}c |
| Health services | SF | S | - | FS | C\textsuperscript{†} | FS* S\textsuperscript{Sc} |
| Hospitals | S | C\textsuperscript{†} | SF | S | C\textsuperscript{†} | S Sc |
| Public health | FS | C\textsuperscript{†} | S | C | C\textsuperscript{†} | F | F |

<table>
<thead>
<tr>
<th>Labour &amp; Social Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unemployment</td>
</tr>
<tr>
<td>Income security</td>
</tr>
<tr>
<td>Social services</td>
</tr>
<tr>
<td>Pensions</td>
</tr>
<tr>
<td>Occupational health &amp; safety</td>
</tr>
</tbody>
</table>

**LEGEND:**

\textbf{F} federal power
\textbf{S} state power - canton/ provincial/ Länd/
autonomous community/ region/ member state
\textbf{C} concurrent power (federal paramountcy except where Cs which denotes state paramountcy)
\textbf{M} municipal power
\textbf{a} asymmetrical application of powers
\textbf{c} community power (Belgium)
\textbf{†} federal legislation administered by states

Note: use of upper or lower case ‘F’ or ‘S’ indicates the relative strength of those powers. In this context, concurrency (C) describes the power of both levels of government to act; preemptive powers may apply.

The following table traces the formal allocation of competencies to the Union with each Treaty, and is thus similar to the constitutional allocation of competencies in the previous table:

**Table 2.5: Division of competencies in the EU, 1951-2003**

<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BASIC FEATURES</strong></td>
</tr>
<tr>
<td>Residual powers</td>
</tr>
<tr>
<td>Enumeration of State powers</td>
</tr>
<tr>
<td>Delegation of legislative authority</td>
</tr>
<tr>
<td><strong>SCOPE OF POWERS</strong></td>
</tr>
<tr>
<td>Customs/Excise</td>
</tr>
<tr>
<td>Corporate tax</td>
</tr>
<tr>
<td>Personal income tax</td>
</tr>
<tr>
<td>Sales tax</td>
</tr>
<tr>
<td>Other tax</td>
</tr>
<tr>
<td>Equalisation</td>
</tr>
<tr>
<td><strong>Debt &amp; Borrowing</strong></td>
</tr>
<tr>
<td>Public debt of fed.</td>
</tr>
<tr>
<td>Foreign borrowing</td>
</tr>
<tr>
<td>Domestic borrowing</td>
</tr>
<tr>
<td><strong>International Relations</strong></td>
</tr>
<tr>
<td>Conduct of foreign policy</td>
</tr>
<tr>
<td>Defence</td>
</tr>
<tr>
<td>Treaty implementation</td>
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<tr>
<td>Citizenship</td>
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</table>

54
The European Union and Federal States Compared

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<th></th>
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</thead>
<tbody>
<tr>
<td>Immigration (into fed)</td>
<td>S</td>
<td>S</td>
<td>S</td>
<td>S</td>
<td>S</td>
<td>S</td>
</tr>
<tr>
<td>Immigration (b/w regions)</td>
<td>S</td>
<td>C</td>
<td>C</td>
<td>F</td>
<td>F†</td>
<td>F</td>
</tr>
<tr>
<td>Trade &amp; commerce</td>
<td>C</td>
<td>F†</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
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<tr>
<td>External trade</td>
<td>C</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>Interstate trade</td>
<td>C</td>
<td>F†</td>
<td>F</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>Intrastate trade</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
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<tr>
<td>Currency</td>
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<td>S</td>
<td>C</td>
<td>F</td>
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<tr>
<td>Banking</td>
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<td>Cs</td>
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<tr>
<td>Bankruptcy</td>
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<td>Cs</td>
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<td>Cs</td>
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<td>Cs</td>
</tr>
</tbody>
</table>

**Transportation & Communication**

| Roads & bridges               | S           | S          | S          | S                   | S                | Cs          |
| Transport                      | S           | Cs         | Cs         | Cs                  | Cs               | C           |
| Telecommunications             | S           | S          | C          | C                   | C                | C           |
| Postal Services               | S           | S          | S          | S                   | S                | S           |
| Broadcasting                  | S           | S          | S          | S                   | S                | Cs          |

**Agriculture & Resources**

| Agriculture                    | S           | F†         | F          | F                   | F                | F           |
| Fisheries                      | S           | F†         | F          | F                   | F                | F           |
| Mineral resources              | S           | S          | S          | S                   | S                | S           |
| Nuclear energy                 | S           | Cs         | Cs         | Cs                  | Cs               | Cs          |
| Environment                    | S           | S          | Cs         | C                   | C                | C           |

**Social Affairs**

| Primary & secondary            | S           | S          | S          | S                   | S                | S           |
| Post-secondary                 | S           | S          | S          | Cs                  | Cs               | Cs          |
| Vocational training            | S           | Cs         | Cs         | Cs                  | Cs               | C           |
| Research & development         | S           | S          | Cs         | Cs                  | Cs               | C           |
| Health services                | S           | S          | S          | S                   | S                | S           |
| Hospitals                      | S           | S          | S          | S                   | S                | S           |

**Labour & Social Services**

| Economic & social cohesion     | S           | S          | Cs         | Cs                  | Cs               | Cs          |
| Unemployment                   | S           | S          | Cs         | Cs                  | Cs               | Cs          |
| Income security                | S           | S          | S          | S                   | S                | S           |
| Social services                | S           | S          | S          | S                   | S                | S           |
| Pensions                       | S           | Cs         | Cs         | Cs                  | Cs               | Cs          |
| Occupational health & safety   | S           | Cs         | Cs         | Cs                  | Cs               | Cs          |

**LEGEND:**

- **F** federal power
- **S** state power - canton/ provincial/ Länd/
  autonomous community/ region/ member state
- **C** concurrent power (federal paramountcy except
  where Cs which denotes state paramountcy)
- **M** municipal power
- **a** asymmetrical application of powers
- **e** community power (Belgium)
- **f** federal legislation administered by states
- **†** subject to review by the Court of Justice
- **P** subject to provisions for Economic & Monetary Union
- (†) subject to review by the Court of Justice

Note use of upper or lower case ‘F’ or ‘S’ indicates the relative strength of those powers. In this context, concurrency (C) describes the power of both levels of government to act; pre-emptive powers may apply.

1 With the exception of the United Kingdom and Ireland who have not accepted the Schengen acquis covering movement between member states.

* With the exception of those member states who have not joined the euro zone.
As is expected, federal competencies dominate in the financial and economic areas since a primary benefit of federation is to establish a common legal and economic framework for the conduct of business. Likewise, international relations are largely the preserve of the federal government though some provision may be made for state involvement in implementation and assent of treaties. The areas most conducive to state involvement are infrastructure, public services such as education and health, and natural resources. The degree of concurrency in each federation tends to be a reflection of the accommodation of socio-political cleavages. Belgium, Germany and Switzerland make extensive use of this arrangement, though it takes different forms. Germany relies heavily on Land administration of federal laws in concurrent areas and the relative ease with which Land matters can be transferred to the federal arena does undermine the autonomy of the Länder. Switzerland’s use of concurrent competencies in the area of social policy is a response to the intense religious or linguistic identification in various cantons and localities. The correlation between these identities and locality is so specific that it allows relatively easy incorporation into the federal structure. Belgium is a rather extreme example of a concurrent system with almost all policy areas, including foreign and domestic borrowing, subject to multiple governance. Australia is a concurrent system; the United States and Canada formally tend to a clear demarcation between federal and state levels though informal practices such as federal financing can do much to blur the lines.

In comparison to the other federations, the Union leaves a many policy areas to the member states particularly in the areas of transportation and communication, international relations and social affairs. However, it is important to note that Union policy in one area can have a significant impact on member states’ ability to act in another. While the provision of public services such as roads and bridges, railways, air, telecommunications, postal services and broadcasting remain the preserve of member states,
Union competition policy restricting state aids and forcing the opening of tenders to trans-Union competition does constrain member state policy making to some extent. Social policy is the primary concern of member states but the implications of the Single Internal Market have meant that the Union has stepped in to legislate on such matters as the portability of benefits and employment conditions, occupational health and safety, equal opportunities for women and men and the protection of elderly, juvenile and disabled persons to prevent market distortion and exploitation. The Court of Justice’s interpretations of Union pre-eminence has also restricted member states’ capability to act in some fields.

Economic and monetary union (EMU), a process which began in 1990 and moved into its final phase on 1 January 1999, has had a significant impact on the competencies of the member states. The Treaty on European Union established a three step process for the implementation of EMU. Stage One began in 1990 and involved liberalisation of capital movements and restrictions on the provision of overdraft facilities by central banks to public authorities and their privileged access to financial institutions. During this phase the Council assessed the progress made by member states toward economic and monetary convergence. Stage Two began on 1 January 1994 requiring member states to make significant progress toward the convergence of their economic policies. Non-binding rules on public financing were introduced and the Commission began the monitoring of public finances. The European Monetary Institute (EMI) was established as the forerunner to the European Central Bank (ECB) in order to facilitate the coordination of monetary policies and prepare for the single currency. On 1 January 1999, Stage Three began with the introduction of the single currency (the euro). The adoption of the euro is dependent on each member state reaching a level of convergence as measured against the criteria laid down in the Article 109j of the TEU: price stability, governmental finances, exchange rates and long-term interest rates.
Belgium, Germany, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal and Finland entered Stage Three on 1 January 1999. The United Kingdom, Sweden and Denmark did not, due to sovereignty considerations, nor did Greece because it did not meet the convergence criteria at that time. In June 2000, Greece was acknowledged as having met the criteria for membership of EMU and this membership became effective on 1 January 2001. The newest member states – Poland, Hungary, Czech Republic, Slovenia, Latvia, Lithuania and Estonia – have not yet met convergence criteria. On 1 January 2002, euro notes and coins were introduced alongside national notes and coins, with the latter being gradually withdrawn. With the completion of EMU, the Union will resemble domestic federations in its arrangements for currency, banking, economic, financial and monetary policy.

The Union is not typically federal in the areas of policing and international relations. However, the extent of its competencies in these areas has grown markedly in the last ten years and has reached the point where it may be described as concurrent. Union competency in policing is ‘cooperation in justice and home affairs’ and its targets are preventing and combating crime (in particular terrorism), trafficking in persons and offences against children, illicit drug and arms trafficking, corruption and fraud. These types of crimes are noticeably cross-border in their nature and police cooperation between member states is restricted to operational measures, training and the exchange of information through Europol. Judicial cooperation covers extradition, preventing conflicts of jurisdiction and ‘progressively’ adopting minimum rules relating to the ‘constituent elements of criminal acts and to penalties in the field of organised crime, terrorism and illicit drug trafficking’ (Article K.3, Amsterdam). Any decision making in this area is restricted to the Council and takes the form of common positions, framework decisions (for the approximation of laws and regulations), decision and conventions. None of these require Commission or EP involvement and all require
unanimity in the Council. The Court of Justice has limited competence to review decisions made under this title.

The Common Foreign and Security Policy (CFSP) grew out of European Political Cooperation and gained legal foundation in the TEU (Title V). Its decision making processes and instruments were refined in the Treaty of Amsterdam; the Treaty of Nice did not introduce new changes to CFSP. In the TEU, the five main principles of CFSP were outlined:

• to safeguard the common values and fundamental interests of the Union;

• to strengthen the security of the Union;

• to preserve peace and strengthen international security;

• to promote international cooperation; and

• to develop democracy and the rule of law, including human rights.

These could be pursued through joint actions and common positions. CFSP is regarded as a separate ‘pillar’ in the institutional framework of the Union since its operation is distinctly intergovernmental. The Commission’s role includes the right to submit legislative proposals and budget execution while the EP may put questions and recommendations to the Council but is not involved in decision making. The Treaty of Amsterdam amended Title V to allow QMV in two areas – for decisions applying a common strategy defined by the European Council and for any decisions implementing a joint action or common position already adopted by the Council. The Secretary-General of the Council is also the High Representative for CFSP and coordinates the work of the Council in this area and is the external ‘face’ of CFSP. Since Amsterdam, there is now a troika system to manage the implementation of CFSP and this involves the Minister for Foreign Affairs of the member states currently holding the Presidency, the High Representative and the Commissioner for External Affairs. Where necessary, the Foreign Minister of the next member state to hold the
Presidency may also be involved. The policy planning and early warning unit of the CFSP seeks to overcome the difficulties experienced in the first years of CFSP where lack of information and coordination between the member states undermined the coherency and effectiveness of the CFSP.

In the field of CFSP, the European Council holds responsibility for the development of principles, general guidelines and common strategies. The Council will take the decisions for defining and implementing the CFSP according to the guidelines set down by the European Council (Article J.3, Amsterdam). The Council may adopt joint actions (requiring operational action by the Union), common positions (defining the Union approach to a particular matter) or common strategies (common strategy specifies the objectives, duration, and means to be made available by the Union and member states). Joint actions will commit the member states ‘in the positions they adopt and in the conduct of their activity’ while common positions will demand conformity of the member states’ national policies and will be upheld in international fora. Operational capability will be supplied by the Western European Union (WEU), though the WEU has had some of its operational function transferred to the Union. The European Security and Defence Policy (ESDP) focuses on military and civilian crisis management (the ‘Petersburg tasks’), taking over from the WEU in this area. Conflict prevention is the third task of ESDP and is primarily a planning and coordination task carried out by the Commission. The objectives of this task are:

- to make more systematic and coordinated use of the Community’s instruments;
- to identify and combat causes of conflict;
- to improve the capacity to react to nascent conflicts; and
- to promote international cooperation in this area.

As a part of its work in this area, the Commission has developed a rapid reaction mechanism which deploys aid in situations which do not meet
criteria set out by the Union’s Humanitarian Aid Office. It is under this mechanism that Union aid in Afghanistan operates (Commission 2006).

The provisions concerning CFSP do not dictate in which situations joint actions or common positions should be adopted: in the face of disagreement there is no compulsion to act in concert. Neither does the CFSP demand pre-eminence in the field and member states remain free to develop their own foreign and defence policies. The Commission is fully associated with work undertaken in CFSP, both the Commission and the EP are to be kept informed of discussions under CFSP and the EP is to be consulted in the case of decisions and framework decisions. Given the concurrent competency held by the Union and its member states, the Union does meet the criteria applied to federations with regard to control of foreign policy even though the form of that control may differ to national federations.

It is also important to note that the Union also has instruments that are redistributional in nature and complement member state activity in the economic development of poorer regions. The European Social Fund (ESF), the European Regional Development Fund (ERDF), the Cohesion Fund, the Guidance Section of the European Agricultural Guidance and Guarantee Fund and the Financial Instrument for Fisheries Guidance form the Union’s Structural Funds. Article 130a of the SEA declared that ‘the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular…reducing disparities between the various regions and the backwardness of the least-favoured regions.’ The Structural Funds are targeted at developing backward regions and rural areas, converting declining industrial regions, long-term unemployment, integrating young people into the job market and adjusting agricultural structures.

The Cohesion Fund is targeted specifically at the poorest member states, and in the funding period 2007-2013 transition arrangements will be in
place as the traditional poorest countries (Portugal, Spain, Greece and Ireland) are replaced by new members from Central and Eastern Europe. Funds are concentrated in the area of greatest need, usually put into medium-term programmes and based on the principles of partnership (programmes are developed and implemented through the Commission, national governments and sub-national bodies) and additionality (co-financing of programmes between the Union and national governments).

For the five year period 2007-2013, the Commission has proposed spending of €336.1 billion (nearly one-third of the Union’s budget) and the consolidation of the financial instruments of the Structural Funds into the European Regional Development Fund, the European Social Fund and the Cohesion Fund.

The now classic description of the Union is that of a temple: the three pillars of the CFSP, cooperation in justice and home affairs, and the European Committee, itself encompassing the ECSC, EEC and Euratom. Over and above this, the entablature of the Union binds all three pillars. Under this formula CFSP and justice and home affairs cooperation remain areas for intergovernmental cooperation in the European Council and Council of Ministers and largely ‘outside’ normal Community legislative procedures and Court of Justice jurisdiction. This may encourage a view of the Union as simply confederal but this is not justified given the extent of federalisation in other policy areas. The economic and monetary policies of member states are already shaped by membership in the Union and completion of EMU will complete the process of economic federation. Initiatives through the ESF and ERDF are equalisation measures intended to stabilise the economic development of the Union while policy making in agriculture, fisheries, internal and external trade, and competition is wholly made at the Union level. There is significant Union involvement in transport, research and development, vocational training, environment, regional policy, labour and immigration. Concurrently, member states’
identities, interests and integrity are protected and member states remain an important source of policy for their citizens.

Conclusion

Despite its particularities, the Union can be designated a federal system. Its gradual federalising process is in contrast to the formation of the American, Canadian, Swiss, Australian and German federations but is in keeping with the gradual accretion of federal governance identified in Belgium and Spain. The institutional structures of federation are present in the Union. It has a court which interprets the Union’s constitutive documents and which seeks to maintain the balance of the federal bargain. The Union has a federal bicameral legislature (EP and Council of Ministers) and a co-executive that together represents the federation and its member (Council of Ministers and Commission). Examination of the division of competencies illustrates the degree of shared competence between the Union and its members. The arrangements for CFSP and for ESDP indicate that sovereignty is a matter of ongoing negotiation within this federation.

Certain intergovernmental features of the Union are strong such as political and judicial cooperation and the CFSP. The institutional structure enables the member states to determine how and in which areas the federation will function over time. This is exemplified in the ‘Schengen acquis’ in which common rules regarding immigration in the Union have been adopted by all member states with the exception of the United Kingdom and Ireland. It is legitimate to include the Union in a comparison with other federations given the extent of its competence and its institutional structure.

Equally, it is important to study the differences between the Union and other contemporary federations. The Union lacks an agreed federal teleology in its federalising process. Instead, this process has been only tangentially influenced by the federal idea and is fuelled primarily by the need of member states to resolve their collective action dilemmas. It does
not have a popular, constitutive document. Direct, participatory democracy in the Union is severely limited as a consequence of its confederal origins and the emphasis on an élite-driven federalising process. There is no clear statement regarding the sovereignty of the Union. Placing the Union within a federal theoretical framework is still possible and legitimate. It will require attention to three issues: sovereignty, democracy and the absence of a shared and consistent vision of a federal Europe.
THE EUROPEAN UNION IN FEDERAL LITERATURE

In order to prepare the foundation for the full incorporation of the Union into federal theory, this chapter discusses the federal principle of government from confederation to federation through a survey of premodern and modern literature. It reviews the treatment of the Union in federal literature, noting the shift from an international relations perspective to that of comparative politics and the role of a federal vision for Europe. It argues that there are two faces of federalism, both of which are crucial for a complete understanding of the purpose and structure of any federal system. One is federalism as telos which emphasises the role of ideas and federal ideology; the other is federalism as techne which emphasises the mechanisms of federal government. These are discussed in the context of the Union where it is argued that as the federal idea is largely separated from the federal form of the Union, so it is in the federal literature on the Union. As a result of this review of federal literature and the Union, it is evident that some refinement of federal theory is necessary in order to exploit fully its explanatory power.

The federal principle of government

A clearer understanding of the federal principle of government can be obtained by first considering the confederal principle. By uncovering the similarities and differences between federation and confederation we are able to discuss with greater clarity the applicability of federation and federal-type arrangements to the Union. Confederation is considered the older political form, largely superseded by the form of federation first seen in the establishment of the United States of America. The invention of federation as an internal, domestic form of confederation left the term confederation
to denote purely international forms of association. It is the point of difference between these two that is of particular interest in this section.

**CONFEDERATION**

Max Frenkel has given consideration to the distinction between federations and confederations through a process of elimination, defining those governmental structures which are federal-type arrangements but cannot be classified as federations. A federation is

An entity composed of territorially defined groups each of which enjoys relatively high autonomy and which, together, participate in an ordered and permanent way in the formation of the central entity’s will. (Frenkel 1986: 55)

This definition is based on the assumption that the component units are largely ‘self-organised and self-managed’. On the other hand, a confederation exists when

An entity composed of states, i.e. of territorial governments independent under the law of nations which, together, participate in an ordered and permanent way in the formation of the central entity’s will. (Frenkel 1986: 62)

Confederations are not complete unions and are restricted to a few common tasks. An international treaty only establishes a confederation or a union when some kind of common decision making is institutionalised i.e. when a joint body composed of all signatories to the treaty is invested with some degree of decision-making authority. Frenkel cites the United Nations as an example of such a confederation. He does concede that in some cases this institutionalisation may be quite extensive and that the common tasks assigned to such a confederation can assume such importance that the ‘new entity is treated not unlike a state in international relations’ (Frenkel 1986: 63). The (then) European Community is cited as a case in point.
To further distinguish between a federation and confederation, Frenkel states that the major difference lies in the legal basis of the union, the relationship between central authorities and the citizens and the status of the member states in international law. A confederation is treaty-based and between states. The treaty remains the basis of the union’s activities, the amendment of which is by unanimity of members and those members retain (in principle) a right to secede. In contrast, a federation has as its basis a constitution that is the expression of a public will independent of a treaty maker’s will. The constitution may be amended according to its own provisions and the members have (in principle) no right to secede. Further, in a confederation, the subjects of directives by the confederation are the member states and not their citizens and the enforcement of those decisions is the responsibility of member states. In a federation the situation differs in that the decisions and laws of the central entity are directly binding on the citizens. Frenkel adds that the criterion most used to distinguish between a federation and confederation is the status of member states under international law. A union is a confederation if, after union, member states remain independent according to international law (Frenkel 1986: 63-8).

Murray Forsyth’s work on confederations as they occur in history and in the twentieth century is most instructive in its analysis of the development and nature of these unions. In making his initial clarification about the type of federal union in which he is interested, Forsyth states clearly that

We will be concerned...not with federal government as a mode of organizing a state but with federal government as a type of government founded upon a feodus or treaty between states. It is the process by which a number of separate states raise themselves by contract to the threshold of being one state, rather than the organization that exists once this threshold has been crossed. (Forsyth 1981: 2-3)
Forsyth argues that there are two spectra of federal government: one is the arrangements between nation states (which may range from loose association agreements to extensive cooperation) and the other covers the mode of internal organisation of a nation-state. The first spectrum is commonly referred to as confederation and the latter as federation. Forsyth includes in his analysis the Swiss Confederations (approx. 13th century – 1789; 1815–48); the United Provinces of the Netherlands (1579–1795); the American Confederation (1781–1789). Also included but differentiated from these are confederations largely based on defence and security, or defence, security and welfare, are the two modern unions concerned ‘almost exclusively’ with welfare: the German Zollverein of the nineteenth century and the EC. The latter two he argues represent economic union, which is a ‘subspecies of the genus confederation’. Economic union is motivated by welfare rather than the traditional motivations of defence and security, and prompted by the industrial and technological developments in the nineteenth and twentieth centuries which have increased significantly the amount of transnational exchanges and transactions (Forsyth 1981: 5-6).

To further clarify the distinction between federal government as a mode of internal state organisation and confederal government as a mode of ordering relations between states, Forsyth offers the spectra of ‘federal union’ and ‘federal state’. The former is the spectrum between interstate and intrastate relations while the latter is the spectrum between the unitary state and federal union. Confederations represent an intermediary stage in the spectrum of federal union:

In making such a union, individual states place themselves within a totality which has its own distinct representation, its own external policy and its own internal policy. (Forsyth 1981: 7)

This does not imply a federal state since the federal union is a union of states in a body politic, not a union of individuals in a body politic.
Relations between members of a union of states are necessarily interstate since each member of the union retains national sovereignty, both in its relations with sovereign states outside of the union and those within the union. Confederations are more binding and permanent than interstate organisations (‘essentially standing agencies at the disposal of states’) and are entities capable of making laws for their members and ensuring a ‘profound locking together of states…as regards the exercise of fundamental powers’ (Forsyth 1981: 14-5).

Forsyth regards the EC as an economic confederation, which is

The transformation by mutual agreement of external trade into internal trade. A group of states form an ‘enclosure’ which unites previously external markets and simultaneously imposes a common external and internal market on the ‘new totality’, governed by a common authority. (Forsyth 1981: 173)

The EC, through the European Economic Community, creates this common external policy and provides for the internal economic policies of each member state to become a matter of common concern and action. Its confederal form is reinforced by its treaty base and the position of member states in the Council of Ministers vis-à-vis the ‘unusual’ and independent Commission. The authority of the confederal agreement is maintained by a confederal court which is restricted by the scope of the treaty and acts alongside the law-making powers of member states (Forsyth 1981: 184-6).

Forsyth describes the European Parliament as an institution that makes the new confederation as ‘doubly democratic’: made between democratic countries and itself adhering to democratic principles. He notes the problems associated with democracy and confederation. To the extent that a confederal congress of states cannot decide upon laws if it is constrained by national parliaments, a confederation is anti-democratic. There is, however, a limit on the extent to which a confederation can be democratic
and this problem arises from the inherent character of a confederation which is made up of communities whose sense of community is restricted to certain fields; and does not form part of their total political identity (Forsyth 1981: 186). This remote relationship between citizens and the confederation is a block to the development of complete democracy but is part of the nature of confederations.

Confederation is therefore marked by the limited cooperation of nation states, usually in areas of external policy — defence, security and trade. A common body is established to implement the bargain and secure against defection from the agreement. The confederation recognises a political relationship between its members — nation-states — but does not have any relationship with the citizens of those states since it has not been granted authority to make laws for them. It is for these reasons that confederation is accepted by many international relations theorists as a pragmatic form of international cooperation. It introduces a limited and enforceable agreement without jeopardising the internal political authority of each of the contracting parties. It is generally accepted that the form of the confederation is under the control of its members, with its authority and institutional capacity dictated by the common interests of its members. The step from confederation to federation occurs when citizens of states enter the formal political relationship.

**Federation**

Modern attempts to define federation range from a statement of the federal principle to a list of features particular to federations; from legalistic interpretations to a broader statement of the elements of political covenant. All writers agree that federations combine shared rule with territorially based self-rule and that the authority of each government, whether federal or state, is constitutionally derived and guaranteed. Whilst some elements are subject to ongoing debate about their importance to the maintenance of a federal system, there is general agreement on the arrangements necessary
to establish and facilitate the federal relationship. These arrangements are aimed at sustaining the identities and policies of the constituent units concurrently with the development of the federal polity. Variation in federal arrangements can be attributed to the particularities of each case, where the maintenance of the federal relationship may require emphasis on particular aspects in order to maintain balance and equity. In seeking to define federations, a distinction must be made at this point between the terms ‘federalism’ and ‘federation’. It is a distinction between the principles (federalism) and structure (federation) of federal government. Thus federalism is the body of work concerned with the concepts underpinning the federal structure and the extent to which the federal idea may act as an ideology and as a mobilisational call for social or political change (King 1982: 17-68). Federation refers to the structure of federal government or federal-type arrangements, including the legal and institutional framework that supports such arrangements.

The following discussion focuses on defining federal systems and the principles on which they are based. It begins with Johannes Althusius’ premodern philosophy of federative government and then contrasts this with the contemporary federation of the United States of America. Althusius’ work emphasised communal sovereignty and presents a view of nested federations. The American federal system, considered the archetypal modern system, offers a remarkably different view based primarily on its innovative conjunction of democratic and republican government. These two examples provide quite different ways of thinking about federalism – from communal identity to individual representation – and these differences are pursued in the discussion of modern literature on federalism and federation that follows.

The first systematic exposition of federative government was made in Johannes Althusius’ *Politica Methodice Digesta*, first published in 1603 and revised in 1614. Althusius’ understanding of politics was that it
Is the art of associating men for the purpose of establishing, cultivating and conserving social life among them...The subject matter of politics is therefore association (*consociato*), in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life. (Carney 1965: 12)

In every aspect of life, people are brought together by need to survive in ‘body and soul’ and this natural tendency finds expression in efficient units or types of ‘symbiotic life’ in both public and private life. Being of the opinion that private life informs the public life and that it is the primary association without which others would not arise nor endure, Althusius begins his analysis with the family as an association which provides advantages and responsibilities for its members. Althusius proceeds to consideration of the collegium or guild, thence to cities and finally to the province. Each symbiotic relationship is based on agreement between individuals to share resources, and to aid each other for communal benefit and right (*jus*). The rights which are shared among the covenanters are the advantages and responsibilities which arise from the symbiotic relationship (Carney 1965: 19-27).

The concept of *jus* is important to Althusius since it becomes a cornerstone for his understanding of sovereignty. He states that the common right of the collegium is shared ‘when they live, are ruled, and are obligated in their collegium by the same rights and laws (*jus et leges*), and are even punished for proper cause’ (Carney 1965: 31). All members of the collegium (or family, city or province) are subject to the same laws regardless of their position within that association. Each of these associations constitutes the realm which itself possesses a right, the *jus regni*, also known as the right of sovereignty. Contrary to the prevailing political doctrine at the time which adhered to the Bodinian doctrine of indivisible and supreme sovereignty,
Althusius asserted that sovereignty resided in the commonwealth, in the body of the people, and not in the person of supreme ruler. He argued that:

This right of the realm...does not belong to individual members but to all members joined together and to the entire associated body of the realm. For as universal association can be constituted not by one member but by all the members together, so the right is said to be the property not of individual members but of the member jointly...Whence it follows that the use and ownership of this right belong neither to one person nor to individual members but to the members of the realm jointly. (Carney 1965: 65)

This sovereignty principle is firmly grounded in Althusius’ notion of society as a complex web of interdependent relationships where the common right (jus commune) is agreed to by all and its administration is granted to agreed members of each association.

As Carl Friedrich has argued in a preface to the work of Althusius,

The key to this concept of federalism is that on all levels the union is composed of the units of the preceding lower level. Thus...the members of a state are neither individual persons nor families but are politically organized collectivities...it is merely the outward form, the institutionalized framework of an existential communal reality. (Carney 1965: x)

The Althusian federation does not require a direct relationship between individuals and the state but rests on the cumulative agreement of its constituent units. A series of covenants are made which bind the communities into a symbiotic relationship, an understanding of political relationships which stems from Althusius’ Protestant Reformation covenant.
theology (Hueglin 1997, Baker 2000). Althusius also makes a clear distinction between this type of federation (or complete confederation) and confederation (partial confederation). In the former, where extension may be by force or request, the foreign realm is completely co-opted into the original confederation to the extent that its citizens are fully admitted into the ‘right and communion of the realm by a communicating [sharing] of its fundamental laws and right of sovereignty’. A partial confederation is where the foreign realms preserve their right of sovereignty and a treaty is made between them for the purposes of ‘mutual defence…extending trust among themselves, and for holding common friends and enemies, with a sharing of expenses’ (Carney 1965: 84).

The next extended discussion of federalism as a form of domestic government came in the Federalist Papers, written during the campaign for the ratification of the constitution of the United States of America in the state of New York. Written during 1787–88, the essays by Alexander Hamilton, John Jay and James Madison defended the constitution as a solution to a unique political situation. The Articles of Confederation, signed twelve years earlier, were now considered to be insufficient for the purposes of national government. The Constitution, in reforming the American political state, sought to reconcile the liberty of the individual with the liberty of the state. Confederation clearly protected the states’ interests but how to provide national government capable of defending foreign interests, protecting trade and commerce and ensuring a viable national economy? Civil, or republican, government held attraction for its practices, which protected individual liberty:

The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the
people in the legislature by deputies of their own election.
(Federalist Paper No. 9)

The solution was to create a ‘confederate republic’, which combined the aspects of both national government (where the primary political relationship is between the state and individuals) and federal government (where the primary political relationship is between sovereign states). The United States of America that emerged from the Philadelphia convention of 1787 embodied this dual relationship in a complex series of checks and balances which recognised the political authority of individuals and of states.

The genius of the constitution lay in its combination of representative democracy with the practice of federal government. The political philosophy of John Locke was a particular influence on the thought of the Founding Fathers. Locke conceived man’s state of nature as a state of equality one with another; government was formed when men agreed that a common law should be put in place as arbiter of their disputes (Locke 1764; Goldwin 1972). Thus we have the basis of republican government wherein the form of government is chosen by its citizens. This the Founding Fathers proposed to do yet they confronted the limitations of contemporary definitions of democracy as the direct involvement of all citizens in decision making through regular assemblies and voting. It was considered to suffer some considerable drawbacks: it was not suitable for a large territory because of the inability of the populace to conveniently assemble at regular intervals and that unchecked democracy could bring about the tyranny of the majority. The federalists sought to ameliorate these difficulties by establishing a confederate republic: a confederacy that obviously recognised the role of the states in a national polity and was itself a republic that acknowledged the sovereignty of the people. The distinction between a democracy and a republic was made thus:

First, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the
greater number of citizens, and greater sphere of country, over which the latter may be extended. (Kramnick, 1987: 59)

This was crucial: a stable national government could be elected by the citizens, one which would be able to competently cover the vast territory of the union and still be responsive to the wishes of the electors. It created a political relationship between the citizens and the national governments while leaving intact an established relationship between citizens and their state.

The American federation modified the Althusian concept by adding a strong individualistic element to the federal structure. It identified the modern federation with democracy and by creating a new tier of government in the nation-state it emphasised sub-national identity. This too was a modification of the Althusian concept which promoted replication of core political and religious values from the primary association, the family, through to the realm as a whole. Althusius demanded an ethnic and religious homogeneity similar to that required by the emerging Westphalian nation-state but expressed it in the politics of consensus and complex interdependence. The establishment of the American federation, through a popularly ratified constitution, underlined the political relationship between federal government and the people and raised that as an equivalent to the relationship between federal and state governments.

The modern literature on federalism tends towards two views of federal systems: one emphasises the structure of federal government while the other emphasises the purpose of federal government. That is, one emphasises federalism as techne and the other, federalism as telos. From the techne literature we learn a great deal about the appropriate bases and structures of federal systems and the legal and political procedures which will sustain them. This literature tends to legalism and formal institutionalism but is particularly strong in raising issues of effective
governance. From the telos literature, we gain an understanding of the reasons why communities or states decide to federalise and how federal governance can maintain unity with diversity. The telos literature tends to focus on the evolution of federal governance and provides insights into the changing forms of federations and the needs of the communities which choose to federalise.

Kenneth Wheare, Ivo Duchacek and William Riker are classic examples of the federalism as techne literature. Each rigorously defines federation and its elements and does so in a comparative context. Kenneth Wheare chooses to begin by defining what he terms the ‘federal principle’ which is what federal constitutions and governments seek to implement. The ‘federal principle’ is the division of powers between a general government and regional governments, coordinate and independent in their spheres, both directly acting on the people. Wheare further states that the method of achieving the division of power does not make the federal principle; it is whether or not those powers are divided between coordinate, independent authorities (Wheare 1963: 10-12).

Wheare describes three elements as being essential to the efficient and proper functioning of a federation. First, there must be a written and supreme constitution. It is this document which details the responsibilities and duties of the signatories and can be referred to as the supreme authority in case of dispute. Secondly, the power to amend the constitution should not be confined exclusively to either the general or regional governments, at least for those parts of the constitution concerned with the status or powers of those governments. Finally, that part of the judicial system concerned with constitutional review and/or interpretation should be ideally independent, though Wheare notes that technically dependent courts have demonstrated considerable impartiality in ‘true’ federations such as Australia, the USA, Canada and Switzerland (Wheare 1963: 35). Wheare regards concurrent competence as inessential, although he strongly
recommends the separation of powers and a bicameral system with equal representation of states in the upper house of the general legislature. Significantly, Wheare is of the opinion that the existence of a right to secede or to expel unilaterally may be consistent with federal government (not the federal principle) but not necessarily with good federal government.

Wheare is most concerned with maintaining a balance between the general and regional governments, ensuring that neither one has the ability to dominate the federation. Such balance is constitutionally defined and maintained through limitations on constitutional amendment and interpretation. Wheare advocates a clear demarcation of powers between federal and state governments, though he does note that concurrent competence may be necessary in some circumstances (Wheare 1963: 75–80). Wheare does not allocate appropriate competences to each level which leaves open the possibility that a federation may have a clear division of power but one which inappropriately diminishes one level of government, leading to an imbalance in the federal relationship.

Ivo Duchacek is comprehensive in his attempt to define a federation. He begins by noting that there are two essential features of federalism. The first is that ‘political authority is territorially divided between two autonomous sets of separate jurisdictions, one national and the other provincial, which both operate directly upon the people’. The second feature is ‘the existence of a single, indivisible yet composite federal nation is simultaneously asserted’ (Duchacek 1987: 192). These observations are followed by a working definition:

By a federal system we mean a constitutional division of power between one general government (that is to have authority over the entire national territory) and a series of subnational governments (that individually have their own independent authority) of their own territories, whose sum
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total represents almost the whole national territory.
(Duchacek 1987: 194)

Duchacek asserts the covenantal basis of federation but emphasises
governmental structure as the defining moment of a federation. His ten
yardsticks measure the balance of the federation between the national
government and the provincial governments and concern central authority
control over diplomacy and defence; immunity against secession; the
independent exercise of central authority free from state restraint;
constitutional amendment; protection of state identity; equal representation
of states in a bicameral system with a role for states in ‘executive and
judiciary rule implementation’; separate court systems to adjudicate on state
and federal law; a constitutional court; the extent and significance of
retained state powers; and the unambiguous territorial division of authority
(Duchacek 1987: 207–8).

The first yardstick (diplomacy and defence) examines the role of the
national government in providing clear national leadership and definition of
national interests. It presumes that a national government capable of
undertaking diplomacy and defence is also able to articulate internally a
shared identity and purpose. The second yardstick (immunity against
secession) has a similar purpose in that it seeks to anchor the federal polity
in the certainty that the federal arrangement cannot be undone through the
behaviour of a renegade group. It can also be interpreted as emphasising the
importance of cooperative relationships between the federal partners. The
remainder of the yardsticks are concerned with the clarity and conduct of
the federal partners, in relation to themselves as government and to the
citizens. Popular sovereignty, upon which the federal division of sovereignty
is based, must be respected in the ability of each government to legislate
directly for its community without interference. The federal bargain must be
constitutionally protected and interpretation by an independent umpire is
desirable in order to guarantee the balance contained in the political system.
The political authority and identity of the constituent states must be unambiguous and whilst they cannot be on par with the federal government, they must remain strong in the federal relationship (Duchacek 1987: 207–75).

William Riker’s analysis of federation has been largely concerned with the operation of federal institutions and less focused on its associative, or covenantal, facets. In 1964, he defined modern centralist federations as composing two levels of government, each retaining autonomy in at least one area of action, and with some guarantee of that autonomy (Riker 1964: 11). Riker has consistently argued that there are only two conditions of the federal bargain: the expansion condition (i.e. those offering the federal bargain) and the military condition (i.e. those accepting the federal bargain). Consequently, federations have only been successful where the amalgamation of separate governments into a federation was motivated by the desire to prevent foreign war (1964: 12-13; 1970: 240).

Federation is not maintained through administration (the division of competencies), as this changes over time with varying trends of centralisation and decentralisation over different policy areas. Instead, it is maintained through a balance of power between the central and constitutive governments, where neither party can completely ‘overawe’ the other or have its will completely overturned by the other (1964: 49-87). Ultimately, the federal bargain is maintained by ‘the popular sentiment of loyalty to (different levels of) government’, and by the operation of the political institutions according to the constitution which has detailed the terms and conditions of the federal bargain. The division of competencies reflects the state of the federal bargain rather than contributing to its maintenance (1964: 110). Riker also disagreed with the two ‘fallacies’ about the origins of federalism. The first was the ideological fallacy; the belief that ‘federal forms are adopted as a devise to guarantee freedom.’ This represented the confusion between the guarantee of provincial autonomy with the notion of
a free society. Riker maintained that this led to the error that associates federation with freedom or a non-dictatorial regime, a notion disproved by the federations of the Soviet Union and Mexico (1964: 13-14). The second fallacy was the reductionist fallacy; the belief that ‘federalism is a response to certain social conditions that create some sense of common interest’ (1964: 15). Riker argued that this failed to observe the actual, political condition which propelled politicians to the federal bargain, that is, the desire to avoid a foreign war (1964:15-16).

As to the normative question of whether federation should be maintained, Riker dismisses the ‘theoretical’ arguments of freedom and the high cost of uniformity as ultimately irrelevant: ‘One does not decide on the merits of federalism by an examination of federalism in the abstract, but rather on its actual meaning for particular societies’ (1964: 153). Consequently, the question becomes: ‘what minority is allowed by the federal device to impose its rule on the majority?’ Approval or disapproval of these minority values requires the approval or disapproval of the federal bargain (1964: 152-153).

In his later writing, Riker placed a greater emphasis on the nature of the federal bargain itself, arguing that

Federation is a bargain about government, a bargain based…on simple trust itself…the special covenant of a federation is necessarily something continuously advantageous to all parties. When all are known to benefit, then each can reasonably rely on the others to keep the agreement. This is enforcement by rational mutual confidence in each other. (1993: 508)

This adds a further condition to the maintenance of the federal bargain as was originally outlined in 1964. Though he remained cautious about the ‘freedom generating’ effects of federalism, Riker came to argue that federalism does promote individual freedom. It is able to do this when the
‘central government denies omnipotence’ and guarantees, and allows in practice, provincial autonomy. Under these conditions, society as a whole is not zero-sum; and it is in that way that federalism protects individual freedoms (1993: 512-513).

Throughout his writing, Riker maintained the necessity of the expansion and military conditions for federating. On this assumption, Riker saw no reason for the continuance of the European federation (the European Union) in the absence of the Cold War. He argued that

> It is not clear what can be gained by federation, except perhaps a European autarchy that shuts out Asiatic and American trade goods from the European market…this is…a perverse goal more harmful to Europeans than anyone else…In any event, the success or failure of the move to federalize Europe will be a good test of the validity of this argument about the nature of federalism.’ (1993: 513).

Riker’s work is interesting for its adherence to the distinction between the practice of federalism and its normative supports (freedom, democracy) but it is less helpful in the discussion of multiethnic federations, despite his later acceptance of the role of federalism in promoting individual freedom.

Carl Friedrich and Dan Elazar adhere to the structures of federalism that we see analysed in Wheare, Duchacek and Riker, though their emphasis is placed on federal behaviour and norms. They support Althusius’ concern for relationships between communities though they are modern in their placement of the individual in federal structures. Carl Friedrich understands federalism and federation as a continuum of federations that begins with a league or federation of states and ends with the federal system, understood to be the internal governing pattern of a nation-state. It is further shaped by an awareness of the continuing flux within federations and the importance
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of federal behaviour. Federalism seeks to combine unity with disunity and thus

...the form of political organization suited to communities where this territorially diversified pattern of objectives, interests, and traditions can be effectively implemented by joint efforts in the pursuit of common objectives and interests and the cultivation of common traditions.

(Friedrich 1950: 190)

Friedrich observes that all federal structures, whether formed by or among governments, possess a charter or agreement containing three organisational elements: an assembly of representatives from constituent members who create and then maintain the charter; some type of executive organ which carries out the decisions of this assembly; and an arbitral or judicial body whose task it is to interpret the charter and arbitrate in cases of dispute between constituent members (Friedrich 1950: 191). These elements develop a slightly different character where a federal system (a nation-state whose internal organisation is federative) is concerned. The representative assembly incorporates the local governments as ‘if they were equal, or nearly so’; the local governments must also play a role in selecting the executive or ‘conducting the executive work for the whole’. The nature of the judicial body remains the same (Friedrich 1950: 107–8). Friedrich does not devote much attention to the division of powers, assuming that the concerns of each level of government is determined by the original spatial or territorial division of power, decided by the fact of federation (Friedrich 1950: 220–1).

Friedrich is at pains to avoid a static view of federations and argues forcefully that

Federalism is also and perhaps primarily the process of federalizing a political community...the process by which a number of separate political communities enter into
arrangements for working out solutions, adopting joint policies, and making join decisions on joint problems, and, conversely, also the process by which a unitary political community becomes differentiated into a federally organized whole. (Friedrich 1950: 7)

Modern federations, that is to say those which are based upon the American model of federation, differ from the older European models, which stressed a ‘community of communities’. Friedrich describes the framers of the American constitution as giving voice to an ‘unprecedented concept of federalism’ which recognised that each citizen belonged to two communities, state and national, and that each community should be recognised and provided with their own government and that the states should play a distinct role in federal government (Friedrich 1950: 17). Friedrich returns to a European and particularly covenantal understanding in order to emphasise federation as the recognition of common interests between diverse communities and as an evolving relationship.

Dan Elazar has a similar covenantal concern and his focus is on federation as a system of conflict resolution and political integration. Thus, Elazar prefers the use of ‘federal principles’ from which federal arrangements are derived. It is worth quoting at some length in order to observe Elazar’s concern with the role of political culture and relationships in federal systems:

Federalism involves the linking of individuals, groups, and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties. As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy making and administration by right, while
the activities of the common government are conducted in such a way as to maintain their respective integrities. (Elazar 1987: 5–6)

For Elazar, the essence of federalism is covenantal politics and the arrangement of a system of government which recognises complex relationships at all levels: individual, communal and polity. Whilst acknowledging ‘wide functional differences’ between federations, Elazar notes three essential operational principles that are present in successful federations: a written constitution, non-centralisation and territorial division of power. Other characteristics that may play a part in maintaining federation are direct lines of communication between the public and both general and constituent governments; a balance between constituent governments in terms of population and wealth or geography or balanced numerically in their inequalities; and that both the general and constituent governments have their own relatively complete set of governing institutions, including courts (Elazar 1987: 157–86).

In discussing the (then) EC and federalism, Elazar differentiates between Madisonian and Althusian federalism. As has already been highlighted, Althusius emphasises the association of communities into a federation whereas Madisonian federalism is ‘based on the idea that polities are comprised first and foremost of individuals’ (Elazar 1989: 4). Elazar argues that

The founders of the European Community developed a new-style confederation, avoiding the problematics of establishing a single, overarching general government in favour of a number of single and multi-purpose authorities serving its member states. These are gradually linking them together through common institutions, emphasizing administrative and judicial institutions with clearly limited spheres of competence over more comprehensive legislative
ones. The more grandiose and comprehensive idea of a United States of Europe was set aside...in favour of a more original invention design to fit European realities (Elazar 1989: 3-4).

Elazar is reluctant to name the EC as a federation due to its lack of a central government. Elazar is also clear that the covenental nature of federalism is also republican; that sovereignty resides in the people and that the creation of a federation is also the creation of a democracy (Elazar 1989: 26-29). This may contribute to his reluctance in naming the EC as federation since it lacks a republican base and therefore remains a confederation until such time as the European peoples elect to place the *jus regni* of their association into a federal and republican government.

From these definitions it is apparent that the essential character of a federation is derived from the constitutional division of political authority between an overarching federal polity and territorially defined communities within that polity. These communities may be differentiated through language, ethnicity, religion or class but there exists concomitantly a loyalty to the federal polity as a whole. The federal system of government rests on a constitutional foundation that defines the institutional checks and balances, ensuring that the integrity of each community and the federal polity is maintained. These checks and balances serve to protect the political rights of each community to self-expression and self-rule. The structural basis of a federation is strengthened by the adoption of governmental processes that embody the federal idea of covenental politics. Federation departs from confederation in the act of dividing political authority: confederations do not possess political authority in the internal affairs of its member states and it can be said that it does not have an existence independent of the states which comprise it. Put simply, a federation is greater than the sum of its parts whereas a confederation will always be constrained by its members.
The European Union in federal literature

From the preceding discussion, it becomes clear that the European Union can be analysed within a broad federal framework. It is underpinned by treaties that divide power between territorially defined units (the member states) and the Union leading to the internalisation of previously external affairs of member states and there is a direct political relationship between the Union and citizens of the member states. There is a long history of federal analysis of the Union in all its forms. Some of the literature has sought to define an ideological or moral imperative for European federation; some has sought to define the ideal form of European federation; and others have adopted a comparative federal approach in order to explain aspects of the structure and operation of the Union.

Historically, federalism (as it has appeared in the literature on the Union) was viewed as an idealistic international relations (IR) approach in that it promoted a federal Europe as a means of conflict management and peaceful cooperation among nations in the task of post World War Two reconstruction. Certainly this idea was strong enough to exert considerable influence over the institutional design of the Union’s forerunner, the European Coal and Steel Community founded in 1951. Scholarly work of the era recommended federation as appropriate for Western European integration but did not develop a federal theory of integration (Friedrich 1955, Haas 1958, Macmahon 1955). Federalism was discussed largely in terms of its ‘influence’ and ‘ideology’ rather than as a theoretical explanation of the integration process (Burgess 1989, 1993, 2000). The institutional development of the Union since 1987 with the Single European Act, implementation of the internal market programme and the treaty revisions in the TEU (1992), Amsterdam (1999) and Nice (2002) sparked a renewed interest in federalism and the Union. Adopting a comparative approach, most scholars now concentrate on the ‘internal’ politics of the Union, on its decision making processes and on policy implementation (Scharpf 1988,
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Sbragia 1992, McKay 2005, Obinger et al 2005). The focus has shifted from the IR dimensions of federalism — its management of interstate cooperation whilst maintaining state sovereignty — to its domestic dimensions and the way in which federalism places institutional constraints on actors in the policy and decision making processes.

When surveying the literature on federalism and the Union, it is essential to bear in mind that it is not a discrete body of scholarly opinion and interpretation which has its aim the analysis of federal integration. It is far more disparate, ranging from those who write with a strong ideological view to those who wish to analyse some particular aspect of the Union from a (quasi)federal perspective. As with the broader federal literature, it can be divided between those writers whose emphasis is federation as telos (an end in itself) and those who regard it as techne (a technical tool). In the former, the ideological case for a federal Europe based in the Union is the foremost consideration. It is characterised by discussions of an ideal type of federation and the extent to which the Union does or does not fit this type. Within the latter (federation as techne), there are two broad approaches to federalism and the Union: either adopting the Union as a principal focus for debate about the nature of federalism and federal structures or a debate on comparative federalism which considers briefly the ‘problem’ of the Union.

Those scholars whose principal interest is the Union itself have largely adopted an atemporal argument where the contemporary nature of the Union is analysed and compared to an ideal federal Union that does not consider federal governance over time. In the second approach, scholars whose interest lies principally in traditional federal arrangements and their operation and development have not come to agreement on the placement of the Union in a typology of such arrangements. The Union can be a transnational union, a modern confederation or a federal-type arrangement. These labels, in the absence of a systematic examination of the Union and
its development, do not clarify but are more indicative of confusion or uncertainty.

There are a number of reasons why neither school of federalism, telos or techne, has been able to develop a theory of European federalisation. The most important of these reasons can be attributed to the nature of federations themselves. Since the telos literature links democracy with federation, it clings tenaciously to the popular constitutive act as the only legitimate means of creating a European federation. The idea of incremental progress toward a supranational federation, with that progress determined by governments and institutions, is completely at odds with this basic philosophy. The techne literature, on the other hand, does not generally defend an *a priori* argument for a constitutive assembly to establish a European federation. It is, however, tied by the assumption that federal theory has limited capacity to explain the Union because the Union involves international, not national, governance. The *sui generis* nature of the Union poses a challenge which has not successfully been met by the federal literature.

**Federalism as telos**

Within the telos school, the most consistent proponent of a federal Europe was Altiero Spinelli. A member of the Italian Resistance, he was co-author with Ernesto Rossi of the *Ventotene Manifesto*, a spirited call for the construction of a European federation at the conclusion of the Second World War. He was a vigorous campaigner for public congresses during the 1950s and 1960s to begin the process of a constitutive assembly. He later became a Commissioner in the European Commission, resigning his position when direct elections for the European Parliament were announced and he was subsequently elected a Member of the European Parliament in 1979. Under his initiative, the Committee for Institutional Affairs was formed and a Draft Treaty establishing the European Union (1984) was prepared. His influence on the debate surrounding a federal
Europe has been profound. The Manifesto was published in 1943 and written two years earlier during a term of imprisonment and radicalised the argument for a European federation that had gained currency both in continental Europe and Great Britain during the inter-war period. The Manifesto declared that,

With propaganda and action…the foundation must be built now for a movement that knows how to mobilize all the forces for the birth of the new organism which will be the grandest creation, and the newest, that has occurred in Europe for centuries; in order to constitute a steady federal State, that will have at its disposal a European armed service instead of national armies; that will break decisively economic autarkies, the backbone of totalitarian regimes; that will have sufficient means to see that its deliberations for the maintenance of common order are executed in the individual federal states, while each State will retain the autonomy it needs for a plastic [sic] articulation and development of political life according to the particular characteristics of the various peoples. (Spinelli and Rossi 1942: 20)

Spinelli and Rossi argued that only a federal European state could soften international disagreement by internalising it and offering a new range of solutions based on cooperative rather than conflictual relationships. This federation was based on the assumption that it would create true freedom and democracy for citizens by breaking the connection between capitalism and the nation state (Spinelli and Rossi 1942: 15–19). It also implicitly presumed the advantages of a federation in representing different ethnic groups within a larger European government.

The arguments and expectations expressed by Spinelli and Rossi were echoed throughout the federalist movement that sprang up in the aftermath
of the war. A brief review of the federal arguments for a united, federal Europe demonstrates three clear views on the topic which may be termed as follows: Atlanticist, Third Force and functional federalism. The Atlanticists advocated a European union strongly linked to the United States through the Marshall Plan but remaining politically independent of that nation and the Soviet Union. Third Force arguments called for a union that would stand between the United States and the Soviet Union as a mediating influence, a bridge between the two superpowers in a time of hostile peace. The proponents of functional federalism were less overtly political, preferring to advocate pragmatic economic measures and limited political regulation to establish a union of European nations. All of these arguments had in common a desire for a federal arrangement, convinced it was the only means of achieving their objectives.

Michael Burgess has made a contemporary contribution to the debate by arguing that federalism as political ideology exists ‘in the precise sense that it reflects values and beliefs which recommend specific forms of federation’ (Burgess 1993: 112). He argues that there is a continuous and complex interaction between the ‘fact of federation’ and federalism. The ‘fact’ or existence of a federation means that changes to the federation over time can be expected to be reflected in the ideology supporting that federation. To this extent, federal ideology is not a claim to a universal good, an a priori argument that federalism promotes, and federation realises, democracy and freedom for all citizens. For Burgess, ‘federal ideology…springs from an elite-mass perception of shared interests and benefits which promise to be permanent gains resulting from federation.’ (Burgess 1993: 108) There is no moral imperative to federalism, simply the recognition by all parties that the federal goal is ‘good for its own sake’ because it is convenient and ‘structures, promotes and preserves these shared interests.’ (Burgess 1993: 108-9) In Burgess’ assessment, the ‘piecemeal, incremental construction of the EC’ is an example of federalism as political ideology. The EC has
‘palpable federal elements’ and he argues that there are powerful influences that formally and informally exert pressure on the EC. Such pressures are felt through the Commission, the European Parliament and external organisations such as the European Union of Federalists (UEF), the Federal Trust and the European Movement.

This assessment of the European federalist movement is problematic for two reasons: it presumes a direct, causal relationship between the federalism of organisations such as the UEF etc, and the ‘federal element’ of the Union; and it ignores the universalist premise which underlies those movements who directly correlate federalism with freedom and democracy. Without denying the lobbying role of these groups, there is no evidence which supports the general view that they have had a ‘powerful influence’ on, and are significantly responsible for, federal integration in the Union. Although Burgess has identified the recursive nature of institutional change, his explanation does not recognise the difference between federation as techne or telos.

**Federalism as Techne**

The literature which regards federalism as techne covers both legal and political perspectives and some observations on the peculiarities of each is necessary. To begin with the legal perspective, it is no longer controversial to state that the Union has a federal legal order. The principles of direct effect and supremacy of Union law together with the relationship between the Court of Justice and the national courts of the member states are evidence enough. Rather, the debate among legal scholars refers to issues such as the ‘constitutionalising’ of the Treaties, or the role of the Court of Justice in the integration process. With regard to this debate, it has been argued that what is of concern is ‘the day to day implementation of Community law, the incorporation of directives, the compliance with Community law, the obedience to the judicial system’ (Cappelletti, Seccombe et al 1985). The legal debate has reached consensus on the basic
issue of the type of legal order and has moved onto consideration of the consequences of that order.

This certainty and non-controversiality does not cross over into political science. A survey of recent works demonstrates the increasing acceptance of federal systems as a valid reference and comparison point when analysing the governance of the Union but this does not correspond with a general agreement among all scholars studying the Union that it represents a federal system. Since political scientists are concerned with the nature of governance in the Union and the nature of relationships between the member states and the institutions of the Union, the debate is marked by disagreement over intergovernmentalism, supranationalism and the role of structure and agency. To argue that the Union is a federal system is to argue for a set of supranational relationships and to support a particular view of member state and institutional relationships which is simply one view among many contested views.

The political science literature, as mentioned above, is marked largely by two approaches: that of a classification, comparative approach and that which adopts a federal model in order to explain or contest some aspect of the Union. There is little consensus within the ‘classification’ literature in regard to the Union, no doubt due to its ambiguous nature as a polity. Both Max Frenkel (1986) and Ivo Duchacek (1987) have classed the (then) EC as confederal, although Frenkel cryptically added that the institutionalisation may be so extensive that the EC could be treated as a federal state. As discussed in the previous chapter, Daniel Elazar also refers to the EC as a confederation, though Elazar’s handbook of federal, confederal and autonomy arrangements (1991) refers to the ‘1992 step toward confederation’ (i.e. the completion of the single market) and it concludes with the assessment that tension over the future shape of the EC ‘is likely to resolve itself as something well short of a United States of Europe but well beyond an EFTA-like…cooperation of fully sovereign states.’ (Elazar 1991:
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Ronald Watts has also speculated on the nature of the Union, noting that:

Other political systems outside the general category of federal systems may incorporate some federal arrangements because political leaders and nation-builders are less bound by notions of theoretical purity than by the pragmatic search for workable political arrangements. Such consideration may also lead to hybrids such as the European Union which, although originally a purely confederal arrangement, has in recent years been moving towards incorporating some features of a federation. (Watts 1996: 7)

It demonstrates that federal scholars recognise something familiar in the structure and operation of the Union, something that is more than confederal but less than federal, and made all the more confusing by the likelihood of further integration. To leave the Union outside of theory or lying on the edges as simply a hybrid is an entirely unsatisfactory manner of dealing with one of the most important developments in post-war European politics.

The second approach, that of adopting a federal model as a tool of analysis, is becoming more and more frequent, particularly since the institutional reforms brought in by the treaties of the 1990s and the draft Constitutional Treaty for Europe. Fritz Scharpf, in seeking to understand the state of EC decision making in the late 1980s, found the source of his explanation in the German experience of interlocking politics (Politikverflechtung). The American model of decision making was rejected as unsuitable and Scharpf argued that the German model was more acceptable due to ‘institutional arrangements [that] are sufficiently similar to suggest that the difficulties of European integration might be illuminated by reference to some of the problems of German federalism’ (Scharpf 1988: 244). The article is not concerned with a comparative federal analysis in itself but uses this as a
method of further investigating issues of governance within the Union. It is an acknowledgement that the Union has developed federal decision and rule making processes that necessarily demand a federal frame of reference.

Other analyses are more explicit in arguing the similarities between the Union and federal states. Joseph Weiler argues that the legal relationship between the Union and its member states ‘render[s] that relationship indistinguishable from analogous relationships in constitutional federal states’ (Weiler 1992: 2403–83). Weiler later contrasts this legal definition of the Union as federation with a political definition of the Union as confederation that may move to federation. This reflects the ambiguity of Weiler’s use of the term ‘nonunitary polity’ when referring to the Union. In conclusion, Weiler ponders the desirability of a federation for the Union, noting two views of the Union, the unitarian and communitarian. The former he describes as the expectation that 1951 (the founding of the European Coal & Steel Community) was the starting point of a process of tighter economic integration resulting in full political union ‘in some version of a federal United States of Europe’ (Weiler 1992: 2479). The latter view, he argues, is premised on limiting sovereignty in selected but growing number of areas, emphasising interdependence rather than unity. It does not require a negation of the state and instead ‘indicate[s] a different type of intercourse among the actors belonging to it, a type of self-limitation in their self-perception, or redefined self-interest and, hence, redefined policy goals’ (Weiler 1992: 2481). The communitarian view recognises the sovereignty of the member states and works within its constraints rather than seeking to abolish them. The unitarian view, Weiler argues, would simply replace the excessive statism it abhors with a superstate, a centralised European federation. Weiler assumes that a federal Union would necessarily be centralised and that it could not exist without first demanding the negation of member state sovereignty. This ‘extreme’ view works against itself by polarising opinion on the future of the Union and is unlikely to succeed
because of its contentious preconditions. The substance of Weiler's argument regarding centralisation and sovereignty admits the validity of only a certain type of federal arrangement and does not concede the possibility of novel arrangements which accept member state sovereignty in some form whilst institutionalising federal relationships.

Alberta Sbragia’s work has also noted the ambiguity and ‘peculiarity’ of the Union, which is neither international organisation nor nation-state. Acknowledging that the Union is unlikely to become a federation ‘as conventionally defined’, Sbragia goes on to ask: ‘Is it possible to ‘federalize’ the Community significantly while retaining a key policy-making role for national governments?’ (Sbragia 1992: 256). It questions the assumptions held by many federalists — whether those politically active in support for a federal union, or scholars — that a federal Union will necessarily replicate the structures and institutions of nation-state federations. In Sbragia's view the treaty basis of the Union and its territorial dimension have a particular impact on the Union and have implications for the federalisation of the Union. The treaty basis of the Union has given control over the development of the Union to its member states and not to a sovereign independent institution. The type of territorial representation adopted in the Union is institutional and élite and not electoral, reflecting the member states’ desire to enter into common arrangements without forfeiting their ability to control those arrangements and the integration process. It renders problematic the notions of democracy traditionally associated with federal states. These conditions, Sbragia argues, encourage an innovative understanding of how the federal principle can be institutionally defined (Sbragia 1992: 271–89). Her conclusion is that ‘the insistence on the representation of territorially defined governments, in fact, will lead to a reconceptualisation of federalism, representation, and the functions of government’ (Sbragia 1992: 291). In contrast to Weiler, Sbragia sees greater
opportunity for recasting federal theory in the light of the experience of the Union.

Recent work on the subject of territory and governance is of particular interest for federal scholars, even though such work may contest the suitability of federal governance as a solution. Jan Zielonka (2001: 507-36) argues that geographic enlargement will not necessarily result in a neat overlap between functional and geographic borders. What is more likely to emerge, he argues, are fuzzy borders where ‘we need to accept that the new European order is neither anarchy or hierarchy, that its organizational map is multi-layered and not state-centric, that governance is less a matter of engineering than gardening’ (Zielonka 2001: 530). This critique is applied to federal versions of a Westphalian Eurostate and Zielonka proposes an adjusted neo-medieval European empire with its soft borders, diversified citizenship types, multiple cultural identities and divided sovereignties rather than a Westphalian super state. Zielonka’s discussion alerts us to the unique demands of an integrating supranational community and reminds us that federation alone will not avert economic and political alienation between the core and periphery. The power and governance relationships between states and citizens must be carefully regarded so that governance structures support internal diversity and state legitimacy.

Virginie Mamadouh’s work (2001: 420-436) comes from the field of political geography and addresses the question of whether the EU possesses state territoriality (either in the form of an international organisation or a federal state) or a new form of territoriality which needs to be acknowledged as a new form of governance. Classifying state territoriality as ‘a form of behaviour that uses bounded space to control activities’, Mamadouh notes the territorial fixity and exclusivity of modern states and its two artefacts – state borders and capital cities (Mamadouh 2001: 421-22). Analysing European integration process, Mamadouh argues for the variability of the EU’s borders and its transformative impact on internal and
external borders of the member states in a manner that differs from usual state borders:

The EU does not delimitate its own borders; it relies instead on existing state borders that it transforms in the process of integration. It is important to underline that the creation of internal and external border does not re-establish state borders at a higher scale, by turning external borders into new states borders while internal borders are degraded into second order domestic borders. (Mamadouh 2001: 428)

Mamadouh’s interpretation of the role of the capital city and analysis of its operation in the EU describe a dispersal of capital city functions (command centre, national showcase and cultural arena) throughout the territory of the EU that is not replicated in any other state (Mamadouh 2001: 423, 428-33). Mamadouh therefore argues that the EU does not represent state territoriality but an emerging new form of political governance. This is no surprise to political scientists but the political geographer’s focus on the role of territory in ‘perception, identification, representation and iconography’ is a valuable adjunct to political analyses of the territorial expressions of power and governance. As is usually the case in federal writing on the EU, the end federal state of the EU is expected to resemble a Westphalian state with fixed borders, governance hierarchy and state impermeability (geographic, economic and political). Work such as that by Mamadouh and Zielonka is a strong indication to federal scholars that attention must be paid to making federal theory responsive to the particular circumstances of the EU rather than expecting the EU to conform to the current federal typology.

Some work on confederalism in the Union has emerged from authors dealing with the territorial institutions of the Union, the European Council and the Council of Ministers. Simon Bulmer speaks of ‘cooperative confederalism’ which is characterised by the desire to find collective polity solutions in those areas where individual action is less effective. The
confederal nature of the Union is confirmed by the fact of ‘governance without government’ and its cooperative nature derives from the support (explicit or implicit) for developing the Union as a federation (Bulmer 1996: 22-24). The role of the European Council and the Council of Ministers is to ‘manage the competing dynamics of cooperative confederalism and territorialism that characterise the EU’ (Bulmer 1996: 40). Cooperative confederalism is used to analyse a particular aspect of the Union but is intentionally limited so as to avoid the contestability of federal terminology. Interestingly, Bulmer accepts the value of those federal concepts but proposes the use of new institutionalism as a way around the inevitable confederal/federal debate.

Emil Kirchner’s work on decision-making in the Union takes a similar argument though the phrase used is ‘cooperative federalism’ (Kirchner 1992). However a reading of his work suggests that his use of the term ‘federalism’ is closer to Bulmer’s use of ‘confederalism’. Kirchner places decision-making in the Union along a spectrum ranging from intergovernmentalism to cooperative federalism. He defines the latter as signifying certain situations in which national governments and supranational institutions to an advanced degree in joint tasks, joint sharing of competences and responsibilities, and problem solving exercises (Kirchner 1992: 12). Cooperative (con)federalism is about studying a subset of decision making procedures in the Union. Its focus on élite decision making obscures the interaction of Union, national and subnational officials and institutions at lower levels. Constrained cooperative federalism, which operates with a restricted set of tools from the federal theory toolkit, has a limited theoretical range.

Latterly, Hosli and Börzel (2004) also argue that the Union ‘shares most features of what is usually defined as a federal system’, although they note that it lacks two significant features of a federal polity in that the member states remain ‘masters of the treaties’ and that the Union has ‘no real tax-
and-spend powers’. What these features represent is the autonomy of the federal polity in relation to its member states. This is certainly an issue of balance in the federal-state political relationship but it is not sufficient to weaken the identification of the Union as a federal polity. Hosli and Börzel refer to the lack of the ‘essential element of democratic control’ in the EU; as argued earlier, a democratic federation in the mould of contemporary domestic federations may be ideal, but democracy is not a precondition for federation.

Andreas Føllesdal (2005) has discussed the merits of the draft Constitutional Treaty for Europe (CTE) in the context of an appropriate federal balance for the union. In a well-considered application of federal political thought, Føllesdal examines four aspects of federal balance – between member states and the Union (division of competences), among Union institutions (distribution of powers), member states within Union institutions (political and economic balance between member states) and dual assurance and loyalty (of citizens towards member states and the Union). Each of these questions is addressed from the viewpoint of Madisonian federalism and the place of the individual within federal government. This approach arises from Føllesdal’s concern with the conflict in federal states between political and fiscal equality, and political autonomy (Føllesdal 2001).

Lori Thorlakson’s reflection on constitutional design for the EU has focused on the safeguards against ‘authority migration’ that were contained in the CTE and the insights provided by comparative federalism (Thorlakson 2006). The discussion of subsidiarity, competences and judicial review is located very effectively in the methodology of comparative federalism. However, the status of the Union is not directly addressed, with Thorlakson raising her research question thus:

The transformation of the European Union from a co-operative enterprise of Member States jointly exercising
power, towards a legitimated political community at the Union level has raised the important question of how to create and maintain an allocation of political authority between the Member States and the Union (Thorlakson 2006: 139).

As with Føllesdal, solutions are offered based on assumptions of the Union’s federal nature and on comparisons with national federal systems but without acknowledging either the supranationality of the Union or the impact of its élite and incremental federalisation process. Føllesdal and Thorlakson offer challenging and insightful arguments about the institutional structure of the Union but their solutions cannot be assessed without a debate on the nature of the Union as federation.

Andreas Auer (2005) has recently and specifically addressed the question of whether the Union is a federation. As a legal and constitutional scholar, Auer places his discussion within a constitutionalist framework. Auer concludes that the Union does satisfy all the criteria for a federal system. His preferred legal description, ‘multinational federal type construction’, also illustrates the common uncertainty of whether the supranational Union which lacks a popularly acclaimed constitution can simply be labelled a federation.

**Conclusion**

There is a general reluctance among federal scholars to label, without qualification, the European Union as federal. The continuing sovereignty of member states and their status in international law after joining the Union is the most prominent concern for many scholars (Wheare, Frenkel, Weiler, and Duchacek). Such state sovereignty is argued to be incompatible with the sovereignty of the federal state. A further problem highlighted by almost every scholar is the lack of a direct political relationship between central authorities and citizens symbolised by a constitution (Wheare, Frenkel,
Elazar, and Forsyth). This constitutive relationship is seen as crucial in legitimising the federal state and its involvement in the ‘internal affairs’ of states.

Some scholars offer a different way of thinking about federalism and federation with the scope to include the Union. Friedrich has less of a problem with the Union since he accepts a continuum of federations which range from a federation of states to a federal system and that each of these arrangements possess a charter with each of the following three elements: an assembly of representatives who create and maintain the charter; an executive organ which carries out the decisions of the assembly; and an arbitral or judicial body to interpret the charter and arbitrate in case of dispute. The characteristics of each of these elements will vary along the continuum but each variation remains a federation. If we return to a pre-modern understanding of federalism, Althusius’ ‘community of communities’ offers an intriguing line of questioning with regard to the Union, particularly with his understanding of sovereignty.

Comparative federal analyses of the Union have become more common in the last five years, to the extent that many accept the EU as an emerging federal state. In these cases, attention turns to the most appropriate and effective means of organising EU federal governance. Democracy and policy competencies are particular concerns while institutional structure and its impact on the balance of the federal relationship has received some attention. What does remain absent from these works is a consideration of the federalisation of the EU; there is also a reluctance to test the theoretical elasticity of federalism and instead a reliance on making the EU fit federal theory.

Federal theory is not so constrained that it cannot analyse the Union in any meaningful way but it does require a re-examination of its fundamental definitions and concepts such as sovereignty and democracy. The above discussion of confederal and federal theory encourages such an exercise.
The use of federal terms and models in European integration literature is helpful and encouraging but there is considerable room left for development. There is room for a theory of supranational federation but it must be done with care.
Chapter Four

THE EUROPEAN UNION AS A SUPRANATIONAL FEDERATION

This chapter identifies sovereignty, democracy and the federalising process as the most difficult aspects of the Union to accommodate within federal theory. It puts forward refined definitions of confederation and federation that respect the integrity of federalism while being able to encompass the Union. It argues for an Althusian concept of shared sovereignty and for the removal of democracy from the list of characteristics which define a federation. It then argues that the Union’s federalising process needs to be understood primarily as a response to collective action dilemmas, an iterative process that can be understood through the use of historical institutionalist methodology. In this way, the Union can be fully integrated into federal theory without compromising the integrity of the theory.

The first section defines confederation and federation in order to encompass the Union and examines the consequences this has for our understanding of sovereignty and democracy in the Union. It also discusses the nature of the Union’s federalisation process and how this differs from the federal norm. The second section describes the Union as a supranational federation. It proposes the use of the Althusian model of federation for the Union in order to describe the set of federal relationships that accommodates member state sovereignty, tri-level federal governance (regional, national and supranational) and the role of democracy within the Union. It argues that the Union was first established as a confederation in response to a collective action dilemma and that federalisation from that point was an élite and institution driven process.
The third section focuses on the methodological tools required to test this model. Federal theory is unable to capture that process and needs to be supplemented by historical institutionalism, a variant of new institutionalism, in order to understand the Union’s federalisation over time in a contested political space. The final section outlines the methodology used in the remaining chapters to test the federalisation hypotheses and analyse the development of the Union as a federation over time.

A supranational model of federation

To discuss the Union in terms of federation we must go back to the definitions and strip them back to isolate the inherent difference between confederation and federation. While the dilution of definitions, types and other tools of classification should not be sought, neither is it desirable that the Union remains outside of federal theory. The prevailing argument from federal scholars is that a constitution is necessary to establish a federation. What is actually being said is that a democratic (i.e. popular) constitutive act is necessary to establish a democratic federation. It has already been noted that Eurofederalists have some difficulty accepting the Union, as it presently stands, as a federation. This problem derives primarily from their conflation of the terms ‘federation’ and ‘democracy’. A democracy cannot be established without a popular constitutive act; therefore a federation cannot be established except by a popular constitutive act. It has also been noted that many political scientists feel constrained by the fact that the Union is a treaty organisation and that treaties are only made between fully sovereign nation states. Confederations are unions of fully sovereign states established by treaties whereas a federation is established between groups of individuals and sovereign states. According to this logic, the Union is therefore a confederation. These assumptions cannot be accepted as valid when considering the Union; it operates as a federation and our questions must be directed at understanding how it can do so given these constraints.
The following definitions are derived from the discussion of confederation and federation in the previous chapter:

A *confederation* is the concrete expression of a written commitment made by sovereign states to cooperate in certain limited fields. They have established a common body to implement and enforce these commitments.

A *federation* is the concrete expression of a written commitment made by a group of sovereign states who form together to transfer a degree of their sovereignty to a common body who now represents, internally and externally, the totality of those states. This common body is charged with the implementation and enforcement of the written commitment. The degree of sovereignty transfer is such that the federation establishes a political relationship with the citizens of the states, which sits alongside the citizen’s political relationship with the states.

According to these definitions, the difference between a confederation and a federation is the degree of sovereignty transfer — enough to establish a political relationship between citizens and the body established to implement and enforce the written commitments. It does not determine the nature of participating states before or after the act of federation and it contains no *a priori* arguments about the place of democracy. The decision to transfer such a degree of sovereignty that a political relationship is established between the new entity and the citizens of the constituent states may or may not be made through democratic, popular means. It makes no assumptions about which competencies may be transferred from the states to the new entity and how this affects the status of constituent states. It does include all the elements of federation: a common agreement enforced and implemented by a common body; a federal relationship between
citizens and the common body; and the retention of the territorial and political integrity of the constituent states.

The Union does operate as a federation and this is not limited by the fact that member states retain their status as nation states in international law. It is clearly far more than a confederation in its extensive competencies and the legally established rights of individuals under Union law. Its legal order is unquestionably federal and its institutional structure acknowledges the integrity of member states to act within their own territory while asserting simultaneously a Union identity and territory. There is no conceptual overreach in stating that the Union is a federation.

**Sovereignty**

It is necessary to consider the type of federation the Union may represent and, importantly, how sovereignty and democracy may be accounted for in a supranational federation. This thesis argues that the modern Union is similar to a premodern model of federation rather than modern federations. As was discussed in Chapter Two, Johannes Althusius conceived of federation as a *consociatio consociationum*, a community of communities. It is an accumulation of polities that, in its original application, covered the personal, professional and public lives of its members. With the contemporary organisation of political life and in the context of the Union, we might propose that the Union is an accumulation of local, regional and national identities.

Sovereignty can be seen as a simple case of who has it and who does not – ‘locate’ sovereignty and the difference between a confederation and federation is clear. It is acknowledged that the location and interpretation of sovereignty has a profound impact on the structure of political relationships within a polity. The retention of sovereignty by constituent states appears antithetical to a federal polity. The assumption is that constituent state sovereignty interferes with and undermines a direct political relationship.
between the federal government and citizens. This view adopts the Bodinian understanding of indivisible sovereignty in which it seems that sovereignty is a parcel that is passed from one polity to another, with one ‘losing’ and the other ‘gaining’ the attribute of sovereignty. Using this view of sovereignty and identifying its locations as a primary test of confederation or federation blocks any consideration of the Union as a federation. Under this argument, the Union cannot be a federation until such time as the member states revoke their sovereignty and invest it solely in the Union.

In order to consider the Union within the full scope of federal theory and to describe the practice of sovereignty in the Union, it is necessary to adopt a concept of sovereignty that is cumulative rather than singular. Sovereignty needs to be understood as a quality that resides with the members of the polity who may, in a sovereign decision, expand and share that sovereignty with another polity. The conception of sovereignty contained within the Althusian model is particularly apt for the Union. Within this *consociatio consociationum*, each polity retains its sovereignty since Althusius invested sovereignty within the people as a whole. The *jus regni* (sovereignty) is the joint property of the members of each *consociatio* and its use and ownership belongs to the members jointly. It renders the indivisibility of sovereignty a moot point since it may be used and allocated as its members see fit. That is, it is the sovereign decision of the commonwealth to allocate political authority according to the needs and desires of its members.

The agreement or consent of each *consociatio* accumulates in each succeeding *consociatio* until the final *consociatio consociationum* is formed. In applying this concept of sovereignty to the Union, we interpret the member states’ decision to invest sovereignty in the Union as itself a sovereign decision to allocate political authority to the new body. It does not interfere with the exercise of sovereign power within their own polity since they have created a new polity within which they are able to exercise sovereign power. It is
now the Union, rather than the individual state, that represents the final *consociatio consociationum*.

**Democracy**

The Althusian model also separates democracy from federalism. The genius of the American federalists was to twin the confederal polity with republican government to give us the modern democratic federation. Its influence has been so strong as to embed in federal theory the conflation of federalism with democracy. As discussed in Chapter Two, this has been the source of difficulty for some scholars and Eurofederalists when applying federal concepts or practices to the Union – the lack of a popular, constitutive act has been a stumbling block for many. We need to recall that the Union began as a confederation, an élite-driven bargain, with no agreement or certainty that it would develop into a federation. Democratic processes were not part of the initial design and, until recent years, featured only marginally in bargains and treaty negotiations. This underscores the separateness of federalism and democracy – federalisation of the Union has not meant its concomitant democratisation. If we uncouple democracy from federalism, however, then it is possible to conceive of the Union as a federation and then to explore the shape of democracy within the Union more easily and creatively.

In order to come to a different understanding of the relationship between federalism and democracy, we need to understand how rule-making works in a *consociatio consociationum*. What we see is a layering of authoritative decision-making. Since sovereignty is shared across communities, each is legitimately engaged in rule-making in its sphere of activity. In the case of the Union, this decision-making is taking place at a regional, national and supranational level. For a *consociatio consociationum* to work, each *consociatio* must mutually respect and recognise each other’s rule-making. This emphasis on separate rule-making and legitimacy opens up the possibility of varying types of legitimate rule-making practices across each *consociatio*, at any level. What
counts as legitimate in such a *consociatio consociationum* will depend on which rules are being made, by which process and at which level. The demand for democratic rule-making may vary between *consociatio*: a fully democratic rule-making process may not be demanded or feasible at every level. There is what might be termed site-specific democratic legitimacy.

This model of federation has implications for the political federal relationship. It suggests an accumulation of identity, loyalty and political participation – the interaction of multiple *demoi* to create the *consociatio consociationum*. The relationship between the federation (the Union) and citizens has two aspects to it. Firstly, it is mediated through the member states through the implementation and enforcement of decisions made by the federation. Secondly, there is a direct relationship between the federation (the Union) and citizens in the form of a federal legal order and limited direct involvement in the political process (such as direct elections to the European Parliament). Democracy in the Union is made as much by the Union as by the member states. The Union experience indicates that as the member states constructed the political and legal order of the Union over time, they have not added a Union dimension to their accumulated loyalties and identities. As the Union was engaged in the process of its own self-creation, it did not have the capacity to generate a Union identity and foster loyalty, primarily due to the policy areas in which it functioned.

The adoption of democratic processes in the EU will have to come as conscious efforts, major changes brought about by the member states and supported by the institutions. The institutions are not, of themselves, capable of bringing about democratic change – they simply lack the legitimacy to do so. Even the EP, as the sole directly elected institution, lacks the popular support and the institutional influence to bring about large-scale change. The manner of the development of the Constitutional Treaty for Europe contained the seeds of its downfall. No matter how well intentioned, a document produced by a constitutional convention wholly
made up of indirectly elected representatives and selected non-government organisations, with the final shape of it decided by bargaining between heads of state and government, could only ever be a treaty and not a popularly acclaimed and supported constitutional document in which citizens could see their own demos.

If it is accepted that a European demos does not yet exist, the answers to EU democracy must be found in the multiple demoi upon which it is based. The Althusian model of federation offers scope for creative solutions to democracy in the EU. It allows room for the EU to consider the implementation of democratic processes appropriate to its policy areas. That is, it is possible to consider function-specific democracy based on transnational, functional demoi as suggested by Kohler-Koch (1999), while Nicolaidis has also considered the possibility of multiple locations for EU democracy (2004). There are more conventional possibilities based on the territorially defined consociatio (regions, member states and the EU). This could take the form of changing EU processes to increase the role of national and regional legislatures, or modifying internal regional and national arrangements for the development of EU policies and strategies.

The Althusian model of federation, notwithstanding its premodern roots, is able to capture the complexity and reality of the Union as federation. The accumulation and sharing of sovereignty reflects the relationships between units of the federation. It does not make a priori assumptions about the place of democracy, enabling a critique of democracy in the Union and the exploration of different forms of democratic processes.

**Understanding institutional origins and change**

Federal theory is inadequate for the task of analysing this federalisation of the Union and testing these hypotheses. Analysis of federalisation from within a federal theoretical perspective is made difficult by its bias toward institutional stasis. Reference to a middle range theory of institutional
change is necessary. The following section argues that pairing federal theory and historical institutionalism creates an analytical framework capable of capturing the Union’s federalisation process.

Federalisation is about the transformation of political relationships and the establishment of federal governance structures. Through the process of federalisation certain divisions of political authority and governance structures emerge to define and manage the federal political relationship. However, federal theory as a whole has not concerned itself with this process – it lacks the language and concepts to explain the federalisation process itself. It can propose the conditions under which federation may be appropriate and the form of that federation. It does not have the language to describe such things as the role of actors and institutions in federalising a community or the impact of actors and their preferences on institutions and vice versa. In other words, it is inadequate to describe why a particular form of federation emerged and developed over time. Federal theory can mark the stages in federalising a community but cannot analyse the interactions between actors and institutions that bring about that federalisation.

Federalism is able to explain a number of things:
- the nature of institutional relationships (the structure of the federal polity);
- the political and legal relationship between citizen and state (the basis of the federal polity); and
- the nature of the relationship between federal and state governments and between the state governments themselves (intergovernmental relations).

There may be changes to any or all of these aspects and federal theory could analyse the polity ‘before and after’ but not between. That is, it does not have the language to analyse the process of change.
Take, for example, changes in the organisation of intergovernmental relations in a federation. Federal scholars could identify who supports or opposes such changes and what this says about actor views or preferences with regard to the federation, could speculate on the likely effects of such changes on the balance of power between state and federal governments and on policy initiation and change. They could also analyse the state of the polity and the place of intergovernmental relations within it after the changes were in place. What we would not know about, without recourse to a theory of institutional stasis and change, are actor intent, endogenous institutional preference formation, the role of institutions in managing change, the source of institutional dynamism and the role of norms and ideas. All of these elements offer a great deal of information about the community that is federalising which can be fed back into a federal analysis of the governance of that community.

If we apply this to the Union, a similar situation arises. In the case of an intergovernmental conference and a treaty, federal theory can analyse the federal nature of any proposals; assess the impact of proposals on the current structure; analyse the treaty (politico-legal analysis); discuss the impact on intergovernmental relations and inter-institutional relations; and analyse the division of competencies. Between treaty negotiations, federal analysis could focus on changes in formal and informal practices which affect decision-making (the growth of summity, the Luxembourg compromise, co-decision procedure) and track changes in policy-making and implementation (federalisation of competition policy, the involvement of subnational units in policy implementation). However, as with the domestic federal example, we would find a great deal about what but not necessarily why.

It is for this reason that a federal account of the Union needs to be accompanied by a theory of institutional stasis and change. The necessary animation is provided by historical institutionalism, a variant of new
institutionalism. In the European integration process, federalism sees the ongoing construction of a bargain to restructure state activities and responsibilities. The result of this construction is determined as federal governance. In this way, federalism sees what has resulted from the process described by historical institutionalism. As will be seen below, historical institutionalism allows us to examine those events which led to the federalisation of the Union and understand how federalisation occurred.

During the 1970s and 1980s there was a growing body of literature in comparative politics that moved away from the behaviouralist paradigm and towards a new understanding of the role of institutions in structuring political life (Steinmo et al 1992, Taylor & Hall 1996). In the late 1980s, John March and Johan Olsen’s work, Rediscovering Institutions, brought together the themes of this new institutionalism and examined institutional stability and transformation through the role of rules, action and interpretation (March & Olsen 1989). In brief, March and Olsen’s view of institutions began with the arguments that rules and routines represent the institutionalisation of action. Rules are the application of the logic of appropriate behaviour as a fundamental logic of political action; they reflect historical experience; and are an efficient means of coping with stability and change. Institutions often have multiple sets of rules which can result in conformity and standardisation but they may also engender conflict, contradiction and ambiguity, creating the possibility of deviation and variability (March and Olsen 1989: 38). Additionally, political institutions are able to shape meaning and can ‘create an interpretative order within which political behaviour can be understood and provide continuity’ (March and Olsen 1989: 52).

New institutionalism expanded the scope of institutions to include different forms of institutions and moved away from a formal constitutional-legal approach (Armstrong and Bulmer 1997: 50). The concerns of new institutionalism are formal institutions (such as the Council of Ministers, the
European Court of Justice etc), informal institutions and conventions (the Luxembourg compromise), norms and symbols embedded in those institutions, and policy instruments and procedures. It therefore spans traditional constitutional-legal notions of governance and the culture of political institutions, informal decisional arenas, and the accumulation of jurisprudence and development of legal norms as factors contributing to institutional policy norms and also incorporates the role of soft law and political declarations (Bulmer 1997: 7).

In summary, new institutionalism is characterised by

its emphasis on intermediate institutions that shape political strategies, the ways institutions structure relations of power among contending groups in society, and especially the focus on the process of politics and policy-making within given institutional parameters. (Steinmo et al 1992: 7)

This is the core statement of new institutionalism – institutions matter. In this theory, it is accepted that ‘institutions structure the access of political forces to the political process, creating a kind of bias’. Additionally, institutions ‘can develop endogenous institutional impetus for policy change that exceeds mere institutional mediation’ (Bulmer 1997: 7). Through this focus, new institutionalism is able to explain institutional stasis and transformation.

There are three variants of new institutionalism: rational choice, sociological and historical. Rational choice emphasises fixed actor preferences, utility maximising behaviour and strategic calculation; that politics is a series of collective action dilemmas; and that institutions structure individuals’ strategic calculations. In regard to institution formation, rational choice institutionalists posit that institutions are created through the voluntary agreement of the actors and will survive if it continues to provide greater benefits than other institutional alternatives available (Hall & Taylor 1996: 10-13). Authors have employed this analysis to the Union in areas such as
legislative politics (Tsebelis 1999, 2000) and decision-making politics and
the role of institutions (Pollack 1999, 2000).

Sociological institutionalism emphasises the role of culture and socialisation
in defining the form and operation of institutions. Institutions themselves
are defined more broadly, taking in the ‘symbol systems, cognitive scripts,
and moral templates that provide the ‘frames of meaning’ guiding human
action’ (Hall & Taylor 1996: 14). The relationship between actors and
institutions is based on the meaning and identity that institutions provide to
actors, as well as their effect on strategic calculations and rational action
(which itself is socially constructed). Sociological institutionalism offers a
different basis for the origin and operation of institutions, proposing a ‘logic
of social appropriateness’ rather than instrumentality as the primary reason
for the particular choice of institutional organisation (Hall & Taylor 1996:
15-16). Sociological institutionalist analysis has also been applied to the

Historical institutionalism occupies a position between these two. Bulmer
and Armstrong have described it as a ‘thicker’ version of rational choice
analysis since it incorporates ‘normative and cultural dimensions which go
beyond rational choice calculations’ (Armstrong and Bulmer 1997: 53).
Steinmo et al have claimed the historical institutionalism project to be about
building analytical bridges between state-centred and society-centred
analyses and between grand theories of cross-national regularities and
confined national cases by highlighting ‘sources of variation on a common
theme’; that it is about the relationship between ‘political actors as objects
and as agents of history’ (Steinmo et al 1992: 11).

Taylor and Hall have observed that historical institutionalists have an
eclectic view of the relationship between institutions and individuals,
adopting either a calculus (utility maximising) or cultural approach
(satisfying through socially appropriate behaviour). Historical
institutionalists have also focused on the role of power and asymmetrical
power relations (Taylor & Hall 1996: 7-8). Here we can see a concern with the mobilisation of bias – that institutional structure defines the actors who are involved in decision-making and shapes their power within that decision-making arena. Path dependency is also important in historical institutionalism. This is the argument that operative forces ‘will be mediated by the contextual features of a given situation often inherited from the past’ (Taylor & Hall 1996: 9). This translates to an emphasis on the initial conditions of institutions and the contingent nature of social, political and economic development. Taylor and Hall also note that historical institutionalists rarely insist that institutions are the only ‘causal force’ in politics, instead placing institutions within a ‘causal chain’ (Taylor & Hall 1996: 10).

Steinmo et al argue that

Historical institutionalism has carved out an important theoretical niche at the middle range that can help us integrate an understanding of general patterns of political history with an explanation of the contingent nature of political and economic development, and especially the role of political agency, conflict and choice, in shaping that development. (Steinmo et al 1992: 11-12.

In summary, historical institutionalism interprets institutions as forming a ‘web’ of structure, relationships and meaning within which political actors move. Institutions – formal and informal, rules and meaning – do not simply carry political actors along a defined path, nor are they perfectly malleable to those actors’ preferences. Instead, institutions are able to channel political actors’ access and purposefully interact with political actors so that the resultant change or confirmation of the path already chosen is a combination of actor and institutional intent. As the ‘web’ is woven and re-woven institutions impart their own structure and purpose to political action.
There are two applications of an explicitly historical institutionalist account of Union governance which are of interest here. The first was by Paul Pierson (1996; 1998) who wrote particularly on the path dependent nature of European integration; and Simon Bulmer and Kenneth Armstrong adopted an historical institutional framework for their analysis of the development of the Single Internal Market (SIM) project (Armstrong and Bulmer 1997). Paul Pierson’s investigation of path dependency in European integration was the first piece of historical institutionalist analysis to focus explicitly on the Union. Observing the propositions put forward by intergovernmental and neofunctional accounts of the Union, Pierson argued that neither could account adequately for ‘gaps’ in member state control of the integration process, why these gaps were difficult to close and how they allowed actors other than member states to influence the path of European integration, thereby constraining themselves and others (Pierson 1998: 29).

For Pierson, historical institutionalism’s temporal analysis and its emphasis on the manner in which institutions (formal rules, policy structures, social norms) shape contemporary and future decision-making holds more theoretical promise than either neofunctionalism or intergovernmentalism.

The benefits of a temporal analysis are outlined by Pierson thus:

> Just as a film often reveals meaning that cannot be discerned from a single photograph, a view of the European Union’s development over time gives us a richer sense of the nature of the emerging European polity. At any given time, the diplomatic manoeuvring among national governments looms large, and an intergovernmentalist perspective makes considerable sense. Seen as a historical process, however, the authority of national governments appears far more circumscribed, and both the interventions of other actors and the cumulative constraints of rule-based governance more considerable. (Pierson 1989: 24)
When applied to decision-making, the means that the bargain made by member states at time $T^0$ leads to institutional consequences developing during $T^1$. When member states next bargain at $T^2$, they may have a dominant role in the negotiating process but they are negotiating in quite a different context to the bargain struck at $T^0$. In moving away from the assumption that any political actor can subject institutional development to strict control, Pierson is satisfied that historical institutionalism possesses theoretical promise in explaining the process of European integration.

In an article related to his work with Armstrong, Bulmer argued that their application of historical institutionalism to the Union was grounded on the fit between the nature of governance in the Union and historical institutional theory (Bulmer 1997). The nature of Union governance is supranational, which involves ‘finding joint solutions through multi-level partnerships and through mediating the claims of affected interests’ (Bulmer 1997: 2). This results in a nested governance structure where systemic and subsystemic governance regimes exist. Within such a governance structure, changes can occur along three parameters:

- step or incremental;
- negotiated political or judicial change;
- system-wide or localised (Bulmer 1997: 3-4).

The Union is supranational, its governance is multi-levelled, is capable of change initiated through political or judicial channels, and such change may be step-change or incremental and occur at a systemic or subsystemic level. For grappling with this type of governance regime, historical institutionalism is particularly useful since it is ‘located at the intersection of comparative politics, international relations and legal theory: the core areas affected by EU governance’ (Bulmer 1997: 2).

Bulmer nominated four areas of Union governance where historical institutionalism has ‘analytical purchase’:

- systemic change;
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- governance structures;
- policy evolution; and
- norms and values (Bulmer 1997: 7).

With regard to systemic change, Bulmer argues that historical institutionalism regards it as multi-level phenomenon rather than a zero-sum game (Bulmer 1997: 8). It does not identify member states as winners or losers but focuses on ‘the way in which the negotiating fora shape the outcome of negotiations in a process of state reconstruction’ (Bulmer 1997: 8). Bulmer notes the ability of historical institutionalism to deal with institutional change at ‘critical junctures’ (treaty negotiations) by explaining the involvement of key actors and institutions and also institutional change between these points, such as constitutionalisation as a result of the judicial process (Bulmer 1997: 8).

In dealing with governance structures, historical institutionalism can highlight how institutional configurations can impact on governance capacity. In the Union, these configurations vary between policy subsystems and offer a rich field for theoretical exploration. Bulmer notes that when looking at the SEM project, two research issues were highlighted: governance capability and the variable performance of the Union in executing its policies. In the latter case, historical institutionalism attributes varying policy outcomes to the different institutional arrangements across policy subsystems (Bulmer 1997: 9).

Policy evolution is emphasised as a cumulative process and the historical institutionalist methodology assists in a process-tracing exercise in policy case studies. Bulmer argues that while historical institutionalism often reveals path dependency and policy solutions outliving their usefulness, there is the…possibility that lessons may be drawn from past experience, resulting in new strategies being put
forward... Thus the rationality of policy changes is a bounded rationality based on the endogenous constitution of experience: ‘learning by doing’ (Bulmer 1997: 10).

This iterative process is seen in the first proposal, lobbying, drafting and implementing legislation, Court of Justice jurisprudence, institutional and actor responses to jurisprudence, further legislative proposals etc.

The historical institutionalist treatment of systemic change, governance structures, policy evolution and the role of norms and ideas allows for a rich account of Union governance at all levels and over time. Bulmer strongly declared that historical institutionalism was able to pull together ‘social science’ of the governance of the Union because at the cost of parsimony, it emphasises the multi-faceted and multi-levelled nature of governance. In referring to the reconstruction of state authority, and by dropping the teleological presumption that the trend is for that authority to flow in one direction (or not at all), we are necessarily describing a phenomenon of multi-level governance (Bulmer 1997: 14).

It is important to note Bulmer’s accurate representation of historical institutionalism as having no teleology of development. It does not presume that certain institutions will be established in certain circumstances nor that those institutions should or will develop in a certain fashion.

Linking historical institutionalism with comparative federalism alters this perspective by introducing an element of teleology. The declaration that the Union can be considered a federal polity and the process-tracing of this development may augment the path dependency argument of historical institutionalism to such a degree that federal teleology is a starting assumption. However, the teleological impulse of a comparative federalist analysis is tempered by historical institutionalism’s acceptance of
in institutional dynamism and the probability that institutions and their associated power relationships will change over time. By giving a temporal account of federalism and the Union we can trace federalisation and its changing institutional expression, such as initial attempts at the clear division of competencies to increased reliance on norms such as the principle of subsidiarity.

**Federalisation**

The federalisation of the EU has focused on the management of complex policy bargains rather than the democratic expression of the federal relationships between the EU, its member states, regions and citizens. Reliance on contemporary models of federation to explain the EU will always be limited and qualified due to the inherent twinning of federalism and democracy. As discussed, the Althusian model of government makes no presumption of democracy and this highlights that federation is about the conduct and management of the relationships between groups of people for the common good. Modern interpretations of federalism have inserted republican (i.e. democratic) means of managing these relationships but this does not indicate that federalism and democracy are so closely related that federalism cannot be said to exist without democracy.

Chapter One discussed the differences between Type I and II federalising processes. The Union was identified as having a Type II process involving incremental change and multiple veto points. Rather than being a democratisation project (Spain) or conflict management (Belgium), the creation of the confederal European Coal and Steel Community (ECSC) in 1951 was, this thesis argues, the initial solution to a collective action dilemma. The solution involved seeking a form of governance appropriate to the scope and nature of the problem (securing peace and prosperity in Europe); maintaining individual authority within collective decision-making;
securing defection from agreement; and the consistent implementation of the bargain across all participants.

Confederation solved this by permitting in depth action in limited fields with scope for further expansion; by securing defection from agreement through the European Court of Justice; and the consistent implementation of bargains through the High Authority. From this the Union has experienced a Type II federalisation process: an incremental, élite and institution driven process marked by built in veto points. The Union varies this theme in that the political form of integration was not defined from the outset. In the case of the Union, although élite bargaining and cooperation valued integration itself, the institutional form of that integration was only important in so far as it enabled a solution to the particular problem at hand – federal techne predominated over federal telos. In these circumstances, federalisation is problematic because the motivation to federalise is not immediately apparent. Unlike Type II processes in domestic federations where federalisation is a deliberate political choice to manage societal cleavages, the Union did not commit itself to the goal of a federal polity – there was (and is) no telos. That leaves techne as a motivation for federalisation. That is, mechanisms of federal governance are appealing to member states who have decided to pursue a path of economic, then political, integration.

Three federalisation hypotheses are stated here and will guide the following analysis of the Union’s federalisation process. The first hypothesis frames the motivation for the member states to federalise when solving collective action dilemmas. It contains an *a priori* assumption that federal teleology is not paramount though it does not discount that possibility entirely. The second hypothesis recognises the limits of federal theory to explain institutional development and change and so incorporates the conceptual framework and methodology of historical institutionalism to examine institutional behaviour. The third and final hypothesis binds the first two
together through the historical institutionalist understanding of a mutual constituted political space. This hypothesis makes it clear that in this federalisation process, the member states are not fully autonomous – as they build an institutional structure so they are changed by the fact of its existence and operation.

Hypothesis I: The member states will prioritise bargain implementation, sanction for defection from agreement, and the relative equality of member states when institutionalizing collective action.

In order to minimise costs to their own governments and administration, the member states will establish institutional mechanisms for the implementation of bargains. Along with implementation, these institutional mechanisms will assist in securing defection from agreement. Once bargains have been negotiated each member state will be concerned with protecting the benefits gained from negotiation from the predatory behaviour of other member states. They will seek to establish an independent means of ensuring that the others do not defect from the agreement to their cost. This will require the establishment of institutions to monitor, implement and enforce bargains. Some delegation of authority from the member states to the collective institutions will be necessary so that the benefits of collective action are not outweighed by the costs of duplicated administration. Independent enforcement of bargains will ensure the sanctioning of agreement defectors and maintain the benefits of collective action.

Institutionalisation of collective action will take varied forms. Issue saliency will determine the importance of rules and consequently the extent of institutionalisation. When member states decide to institutionalise collective action there are two primary tools which will shape that institutionalisation: rule writing and policy access. The member states may allow others to write the rules by accepting the recommendations of the Commission and/or the EP or they may write the rules themselves through Coreper, the Council of
Ministers or the European Council. The member states may allow the other institutions of the Union (the Commission, Court and EP) limited or comprehensive access to the policy process. They may also deny such access altogether by confining the matter to the European Council. There is a spectrum of institutionalisation ranging from ‘weak’ to ‘strong’, from guidelines to treaties. All institutionalisation involves a supervising authority to ensure bargain implementation and a sanctioning authority to censure defection from agreement; however the nature and power of these authorities will vary.

Further to these first order concerns for member states we hypothesise that institutional efficiency and the value of federation itself will emerge as second order priorities and may become evident as the integration process produces a more complex governance regime. Institutional efficiency is desirable in order to reduce the costs of collective action but we can expect it to be implemented to the minimum extent necessary in order to secure first order concerns (presuming that member states will want to maintain maximum control of their agents). This institutional efficiency will be evident in the increased demands for, and recourse to, federal governance solutions so as to ease the burden of decision-making. New arrangements for institutional efficiency are more likely to reinforce existing confederal or federal governance mechanisms; that is, the federalisation process may become path dependent.

As the European polity has become more complex it has become necessary for the Union and member states to confront citizen-driven concerns about democracy and legitimacy. In these cases, it is likely that the democratic values of federation will be highlighted in order to claim legitimacy for the integration process and the Union as a polity.
Hypothesis II: The creation of institutions by member states has the effect of creating new actors involved in the integration process.

These new actors are agents of the member states but are also involved in its further development. Therefore we expect that they will have their own concerns, generating endogenous preferences:

- maximum utility interpretations of agreed outcomes;
- preference for delegated authority;
- promotion of their expertise in solving problems of governance;
- self-identification with certain norms and values promoted by the language of integration (self-perception as the embodiment of ‘Europe’); and
- federalisation may be a higher order priority than with member states as it legitimises their utility-maximising behaviour.

We predict that as a result of institutional entrepreneurialism or endogenous preference formation, institutions will seek to implement the strongest role possible for themselves, whether in initiating, implementing or sanctioning agreement. Policy implementation and rule enforcement are opportunities for Union institutions to optimise their involvement in governance regimes. Opportunities are maximised when rules or policy statements are open-ended (more likely in issues of low salience) or based on legislative procedures which involve Union institutions heavily. Opportunities are minimised when Union rules or policy statement are closely defined, based on legislative procedures that minimise or exclude the involvement of Union institutions and bodies (more likely in issues of high salience).

Institutional preference for delegated authority and promotion of their own expertise in governance may be evidenced by their proposals for institutional design during reform of existing institutions or the creation of new institutions (rules, procedures etc). Their self-perception as the embodiment of ‘Europe’ may be seen in the development of a
representational role and the use of symbols and advocacy for the ideas of Europe in various means (such as the European Parliament’s 1984 Draft Treaty establishing a European Union).

**Hypothesis III: Federalisation is a mutually constitutive process**

Federalisation is a mutually constitutive process that, as it structures the emerging institutional environment, restrains the actors within that environment. Federalisation, particularly an incremental Type II process, is a recursive process wherein actors learn by doing – they have the opportunity to reflect on past decisions, bargains etc and modify their future course of action should they wish to do so. Federalisation within the Union is a complex process of managing multiple goals and preferences over time. In the absence of a self-imposed teleology of polity development the process itself becomes crucial; the institutional structure, inter-institutional relationships, the place of reflection and reaction.

In learning by doing, member states may move away from loose and unstructured agreements that contain loopholes which institutions may exploit. They may also learn the value of federal governance mechanisms and advocate or agree to their use with increasing frequency. Institutions may learn by adapting their behaviour, showing increasingly sophisticated use of rules, bargains, opportunities and negotiation to further their interests.

**Testing the model**

In the remaining chapters, the federalisation of the Union is tested by operationalising the three hypotheses discussed above and adopting an historical institutionalist methodology. The first step is to assess the initial conditions (the establishment of the ECSC) against which subsequent development may be compared. From this, an iterative process of learning and adaptation by actors and institutional development emerges. That is, learning and adaptation from the first set of rules informs the development
of new rules or modification of old ones, which then leads to a new cycle of learning and adaptation affecting the next rule-making episode.

Each of these phases will require a process-tracing exercise which tracks the expressed preferences of institutions and member states and checking against the agreed outcome. Repeating these assessments over the different periods of Union federalisation should capture variations in member state and institutional preferences and the capacity of each to mould the Union. The periods adopted in the following chapters broadly reflect periods of system-wide institutional origination and adaptation as follows: 1945-1969, 1970-1989 and 1990-2005. In each of these phases the three federalisation hypotheses will be directly addressed through examination of the major institutions of the Union and draw on the examples provided by the development and implementation of competition, environment and foreign and security policies. These policies have been selected for their variation in saliency, development and governance mechanisms over time.

Part B will begin with a description and assessment of the initial conditions of the Union. It will review the context of its origination through post-war debates on European integration and the role of federal ideas in those debates. It will analyse the institutional structure established by the Treaty of Paris (1951) and the expectations of each actors’ role. From this basis, it will be possible to analyse the iterative, incremental federalisation process by testing each hypothesis in each phase of development.

In order to test Hypothesis I (The member states will prioritise bargain implementation, sanction for defection from agreement, and the relative equality of member states when institutionalizing collective action), we will need to identify:

- institutional mechanisms for the implementation of bargains;
- the sanctioning authority(ies) for securing against defection from agreement;
- instances of the delegation of authority to collective institutions; and
The manner of ensuring relative equality of member states.

The extent of these mechanisms will vary due to policy saliency and we will need to assess the individual and overall effect of these mechanisms. Additionally, we will need to identify instances where concern for institutional efficiency and/or the value of federation shaped the institutional outcome. The evidence for this hypothesis will be found in treaties, due to the necessity of formalising structural arrangements for governance and in inter-institutional agreements that affect the operation of the Union.

Testing Hypothesis II (The creation of institutions by member states has the effect of creating new actors in involved in the integration process) will require the identification of instances of endogenous institutional preference formation and categorisation of those instances into one or more of the following:

- maximum utility interpretations of agreed outcomes;
- preference for delegated authority;
- promotion of own expertise in solving problems of governance;
- self-identification with ‘European’ or federal norms and values; and
- federalisation as a legitimising tool.

We expect these preferences to be expressed in a variety of internal and external documents and in the implementation of institutional preferences in treaties, policy development and implementation procedures. Those with greatest effect can be expected to be expressed in formal arrangements or system-wide governance practices. Other instances may only impact their particular policy area.

Hypothesis III (Federalisation is a mutually constitutive process) requires the identification of instances of actors learning by doing – reflecting on previous experience and reinforcing, maintaining or modifying their course of action – and assess the federalising effects (if any) of those reflections. This will enable an analysis of the circumstances under which federal
mechanisms were reinforced, maintained or weakened. Evidence for this can be seen in internal documents or public comments reflecting on the results of institutional reform and in changes to existing governance mechanisms via treaty reform or inter-institutional agreement.

This thesis will concentrate on systemic federalisation, focusing on instruments such as treaties, case law and broad policy development where new institutions were created. In addition to considering legal instruments and policy procedures, it will consider the expressed preferences of member states and institutions through reports, other documentary material and historical reports. In the following chapters, the focus is not a policy analysis of who got what out of each treaty – the literature on this is already extensive (for example, Moravscik 1998). Similarly to recent works by Armstrong and Bulmer (1998), Stone Sweet and Sandholtz (1998) and Stone Sweet et al (2001), the main concerns in this work are the sources and consequences of European integration. Our focus remains on decisions about institutional design and the allocation of competence: why certain institutional designs were preferred over others and the effect of competence allocation on the Union’s authoritative decision making.

Historical institutionalism provides us with the tools to trace the influence of norms, values and ideas and the governance structures they have brought about. We are able to analyse both the initial institutional configuration and its development over time, taking into account the swirl of argument, preferences, values and the effect of rules already made. When historical institutionalism is applied to the federalisation of the Union we can see a rich environment where initial institutional conditions matter; where discrete decisions may influence broader political strategies and actions; and where norms and values are a part of the institutional structure. What is highlighted by this methodology is the process of bargaining, the results of bargains, and adaptation to those bargains in a cycle of learning and
adaptive behaviour. In sum, we are in a position to analyse the federalisation of the Union as a contested political goal.

Over the next three chapters, a picture will emerge of a federative process fostered by an emerging consensus on institutional rules and increases in the Union’s authoritative decision making. The Union, which began as a limited confederation, has gradually developed to expand economically and to increase its competence over a broader policy area. Sanctioning of this development has usually come from the member states during periodic renegotiations of the original agreement but significantly for the Union’s moves towards federal governance, some of this expansion has had its source in institutions of the Union, the Commission and the Court of Justice.
PART B

THE FEDERALISATION
OF THE EUROPEAN
UNION
Out of the arguments, proposals and organisations for European integration during the 1940s and 1950s, the Union has come closest to achieving the ambitions of the era. What was possible was the ECSC – limited and decisive – that met the policy goals of the six founding states. Coal and steel production could be optimised for post-war reconstruction and Germany could be defused as a future military threat. This step alone meant the restructuring of political relationships and the formation of new rules and identities. The period 1945-1969 is crucial in understanding the later development of the Union. On display were the ideas that mattered – new and old – and the role of individuals in bringing about political change. We see also how the new European identity of member states’ melded or clashed with older self-concepts of the nation-state. The institutional rules that were developed to embody these political ideas and policy goals were also a reflection of the struggle between new and old means of international cooperation and organisation. This period is concerned with the initial conditions of the Union: which rules were chosen and why; who chose those rules, who contested them and the outcome; and the grand ideas behind those rules in order to understand which type of ‘Europe’ was being built.

The critical task of this era was to establish new ideas about European integration and build support for them. The most important was that of European cooperation which transcended the nation-state so as to avoid another war and build a lasting peace. This idea of supranational cooperation had to displace traditional ideas about national sovereignty, international cooperation and the role of Europe. And if the period 1945-
1950 was about identifying and promoting new ideas for Europe, then the period from 1950-1969 was about finding a working expression of those ideas.

The progress and form of integration during this period was due not only to economic imperatives but also to the stabilisation of ideas about political relationships. The saliency of a supranational European union receded as the place of Europe between the Soviet Union and the USA emerged and solidified, as national political identities redefined and re-established themselves. In the case of France, recovering national identity was complicated by violent decolonisation from 1950-62. By the early 1960s, economic integration had established itself as a necessary though arduous task. Calls for a political role for Europe declined until its only proponents were Paul Henri Spaak and organisations such as Monnet’s Action Committee for Europe and the Union of European Federalists. The next generation of political leaders were not averse to political cooperation in federal forms but came to accept that progress in economic cooperation could not be sacrificed for a teleology of federal political integration.

The demands for a federal Europe did not cease with the ratification of the Treaty of Paris in 1951. European federalists continued their campaign for a United States of Europe established through a constitutive assembly. It was not until the early 1960s that federalism as telos abandoned its project and resigned itself to campaigning for a federal Europe based on the Communities. Federalism as telos generated significant popular and political support but its goals were, in the end, too ambitious. It was perhaps too much of a ‘leap in the dark’ and the limited nature of the ECSC was more appealing. The ECSC was a controlled experiment in integration where member states could test degrees of control and cooperation. On its performance alone, one would not expect the ECSC to expand to the EEC and Euratom. This indicates that long term intentions were important – the ECSC was only intended as a first step – and may also indicate that member
states were confident they could exert significant control over the integration process.

In the first two decades of the ECSC and the EEC, the member states were the dominant actors in the integration process. From the mid 1960s the Court of Justice became a factor with its developing jurisprudence. The Commission (originally the High Authority) was still establishing itself and needed to develop the capacity to implement and enforce legislation and policy before it could become consistent in its effect on the integration process. The European Assembly was active in its pursuit of a democratic and federal Community but lacked the authority to force change.

**Post-war debates**

The Schuman Plan, announced on 9 May 1950 and embodied in the Treaty of Paris a year later, is seen as the birth of the Union. And in a formal and institutional sense, this is correct. In an informal sense, the origins of the Union lie in the post-war debates on the reconstruction of Europe and the prior attempts at instituting a new set of relationships between European countries. In order to understand the choice made in Paris in May 1950 we need to understand the proposals and choices made between 1945 and 1949.

As the European nations re-emerged after the Second World War, one of the most problematic political questions was the nature and position of the nation-state. This question was most urgent in the continental European countries with their experience of occupation. At the national level, the pre-war political order quickly re-established itself, given the existence of governments-in-exile and the maintenance of pre-war party politics during overt and covert resistance to the Nazi regime. The system of international relations did not return completely to the pre-war order. The division of Europe into Western (American allied) and Soviet blocs was apparent from 1945, although not widely accepted until 1947. The tension between the
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United States and the Soviet Union, coupled with a recognition that the Second World War was the result of such factors as precarious balance of power strategies, unfettered national sovereignty and a revanchist attitude to the defeated, forced a debate on the future regulation of international relations in the European region and the best path for economic and political recovery.

Between 1945 and 1950 this debate, which had been a matter for discussion among Europe’s political leadership during the war, moved into the public arena. Options for European cooperation or integration were discussed by both politicians and private citizens groups in an ongoing debate which spanned parliamentary debates, congresses and public discussions via the media. By 1947, the impetus towards some form of cooperation was being maintained by the convergence of expediency and demand: the high level of public debate and support, together with the stability of national governments made it expedient to discuss European unification, whilst the scope and complexity of the United States aid package to Europe, the Marshall Plan, demanded a coordinated European response.

In continental Europe during the Second World War and afterwards, three strands of thought dominated the arguments for formal cooperation: Atlanticist, Third Force and functional federalism. The Atlanticist and Third Force arguments were similar in their call for a political and economic federation of Europe in order to restore Europe’s economic well-being and to secure stability in international relations. The real difference lay in the foreign policy of such a federation: Atlanticists were willing to accept American aid (the Marshall Plan) as a means of pursuing liberal economic and political policies but insisted on remaining open to Eastern European states under Soviet influence; Third Force proponents seemed willing to accept the Marshall Plan whilst remaining wary of American and Soviet imperialism and advocating European neutrality. Functional federalism was defined by its concentration on economic integration as a more realistic and
effective means of integration and far more likely to succeed without the
distraction of pursuing political compromises.

The Atlanticist argument, with its slogan of ‘beginning in the west’, was an
especially pragmatic response to the emergence of the Cold War. Noting
the ‘iron curtain’ descending between the Soviet Union, her Eastern
European satellite states and the remainder of Europe, Spinelli and other
federalists (Léon Blum, former Socialist French Premier; Ernesto Rossi, co-
author of the Ventotene Manifesto) urged that the only candidates for a
European union in the foreseeable future were from the Western bloc. In
order not to lose the historical moment, Spinelli asserted that integration
must start with these countries by taking advantage of the opportunities
presented by the Marshall Plan. Such a decision had to be in the mould of a
positive step towards an integrated and autonomous Europe, eventually able
to deal with the United States as an equal partner. The view that the United
States was in a position to influence heavily the political and economic
future of Europe, predominated in the Atlanticist argument. In Spinelli’s
view, the choice was either a liberal or imperialist American policy and the
former could only be achieved with a politically strong and economically
prosperous Europe. If Europe failed to develop federal institutions in the
political and economic spheres, then the United States would treat every
individual country as a protectorate so as to maintain her position of
strength on the continent vis-à-vis the Soviet Union (Lipgens 1985: 172-5).

Léon Blum, in his text L’unite européenne, also viewed the Marshall Plan as a
unique opportunity for European federalism. Since it had become
increasingly apparent that the Soviet Union would not support moves
towards European unity, Blum urged the French public to support the
strategy of ‘beginning in the west’ with the United States’ support whilst at
the same time remaining open to a change in Soviet strategy. Ernesto Rossi,
writing in his minority report of the National Executive Council of the
Movimento Federalista Europeano, supported Spinelli’s line of argument and
clearly stated that the United States’ aid should be used as an instrument of European unification both economically and politically. He also concurred with Blum on the point of Soviet involvement in unification: the door should always remain open to the Soviet Union. Rossi elaborated on this last point by suggesting that a unified Western Europe in which armed conflict would be impossible was an ideal buffer between the Soviet Union and the United States. Again, the idea appears to be of an independent Europe dealing and negotiating with the United States and the Soviet Union.

It becomes apparent from this that the underlying assumption of the Atlanticist argument was that through federal union, Europe would become a major independent actor on the world stage. So although the Atlanticists were the first to recognise and act upon the division between the United States and the Soviet Union, it will be seen that the proponents of the Third Force argument took this observation to its logical conclusion by accepting the state of enmity between the two nations and positioning Europe in the role of mediator. The basic premise of Third Force arguments for European unity was that in a state of Cold War between the United States and the Soviet Union, the only means of preserving the independence of the European continent and maintaining a balance between the two superpowers was the political union of a Europe whose task it should be to act as negotiator and mediator. Given this assumption, European integration was necessarily restricted to those countries in the Western sphere of influence and the motive for integration was primarily political.

The most concise enunciation of the principle of international stability and Europe’s role in international relations came from Henrik Brugmans in his pamphlet describing the theses of Europese Actie, an organisation established for the purpose of promoting European political integration:

An essential condition of the international rule of law is the creation of a counterweight to the development of two rival
power groups that are constantly embracing more territory and threaten to absorb or to crush any nation weaker than themselves. Such a counterweight would exist if, alongside the two super-powers, there were a European federation (Lipgens 1985: ‘Theses of Europese Actie’ 14 June 1946: 364-5).

Brugmans captured the essence of the Third Force argument and the fear that Europe could find itself subsumed by the enmity between the United States and the Soviet Union. Thus the two essential elements of the Third Force idea are revealed: the need to avoid any possibility of a third world war fought on the European continent and the desire to re-establish Europe’s political and economic credibility.

The arguments of those who proposed Europe as a Third Force ranged from sophisticated debates on international stability to fear of cultural and political imperialism from both the Soviet Union and the Americans. The French organisation Cercles Socialistes, Fédéralistes et Communautaires pour une République Moderne stated that a European federation was a means of liberating the continent from ‘American control and Soviet dependence’ and that they ‘want[ed] no Communist or American parties, but only the party of Europe’ (Lipgens 1985: ‘Declarations’, February and December 1947: 44-5). Europese Actie continued this theme of autonomy when it stated that:

The federation must show that Europe is not merely an area of friction but can also be a meeting-point and a human society open in both directions, resolved to be colonized by no one and not to be the instrument of anyone’s imperialism…We do not wish to burn our bridges in either direction, and the unification of our continent will have the object of preserving our independence vis-à-vis both the great powers that may become each other’s enemies. (Lipgens 1985: ‘The only way out’, June 1947: 375)
The question of cultural and political autonomy aside, the issues which most occupied the thoughts of the proponents of the Third Force argument were peace and the maintenance of international stability. The French Senator Auguste Pinton, speaking in 1947, was forceful when he declared that since the two blocs (American and Soviet) already existed, ‘may it not be our best course to prevent Europe being, as hitherto, a stake in somebody’s game or, before long, a prey to be disputed? We have no intention of being the stalking horse of either antagonistic group, still less a battleground between them’ (Lipgens 1985: ‘Speech to the 39th National Congress of the Radical Republican and Radical Socialist Party’, 18 September 1947: 55). Other promoters of the Third Force idea, such as Giacomo Devoto, Ivan Lombardo and Etienne de la Vallée Poussin, were just as determined in their arguments for a politically and economically strong Europe to stand as a neutral force, balancing the animosity of the United States and the Soviet Union.

The functional federal argument represented an early attempt to depoliticise the issue of European integration so as to allow the creation of a union on a solid foundation as soon as possible. The key point in all functional federal arguments was that ideas for policy union were abstract political constructs with no basis in the economic reality of post-war Europe. Given this situation, functional federalists argued that attempts to establish some type of integrative political structure faced inevitable difficulties as conflicts arose over the extent of integration and the role and place of national governments. It seems no accident that functionalism did not make any regular appearance in the debates on European union until late 1947, and more commonly in 1948 (a brief mention of a customs and monetary union was made by Paul van Zeeland in 1946). It was at this time that the Marshall Plan was being introduced and implemented; it also coincided with an apparent stalemate in the political sphere in regard to European unification.
The political scientist Maurice Duverger first proposed this ‘progressive federalism’ as a means of actively involving Germany in the economic reconstruction of Europe with as little enmity as possible and as much fairness as possible. Duverger’s suggestion was that German industry (and that of other European countries) should be controlled by a technical Commission and output would be controlled by a European federal Commission. Through this ‘collective organization in economic and technical matters…European nations will come to realise their profound solidarity and will acquire the habit of collaboration’ (Lipgens 1985: ‘No Europe without Germany’, 9 September 1947: 51-4).

This basic idea was taken up again in 1948 and expanded in form and scope. Édouard Bonnefous urged the reversing of priorities in discussions of European federalism. Instead of pursuing political federalism, a beginning should be made ‘with more limited aims and looking first to an improvement of economic conditions’ (Lipgens 1985: ‘Towards a united Europe’, June 1948: 71). Europe could only hope to stage a complete economic recovery by overcoming the fragmented nature of the European economies. Federal integration of a limited economic nature could provide the much needed foundation for economic reconstruction, but more ambitious aims than this, such as political integration, could be so difficult to achieve as to be of no use at all.

Others, such as Paul van Zeeland and M Lambilliotte, urged economic union based on the recognition that modern technology demanded resources that small, individual states could not supply. Integration was a basic fact of economic success (Lipgens 1985: P. van Zeeland, ‘For a customs and monetary union’, 19 June 1946: 287-8; M Lambilliotte, ‘Making Europe’ September 1948: 311-19). Lambilliotte expressed the functional federal argument neatly when he stated:

In its most immediate and concrete aspects the building of Europe does not require and need not necessarily proceed
from any ideology or doctrine, any abstuse idealism or mystery. It is simply a matter of seeing things aright and producing more in better conditions so as to give the masses a better life and more opportunities of employment, hence greater dignity and even greater freedom. (Lipgens 1985: ‘Making Europe’: 315).

This belief in the depoliticisation of the issue of European integration and a focus on economic functions is a clear echo of David Mitrany’s functional theory of integration developed during the Second World War. M. Buset remarked that ‘the right course is to organize, in every possible sphere, functional cooperation for specific purposes among European countries which are able and willing to cooperate in each particular case’ (Lipgens 1985: ‘What kind of Europe?’, 27/28 February 1949: 322). Areas which Buset suggested for such functional cooperation were electricity, new industries, agriculture, finance, currency, trade agreements etc. It is not difficult to see in such statements the influence of Mitrany’s arguments in regard to economic cooperation and the development of regional peace and stability (Mitrany 1975). Federal functionalist arguments were apolitical insofar as they did not presume a role for a European union in the same manner as the Atlanticist and Third Force arguments.

In all of these arguments, federation is accepted as the most appropriate means of organising a European union. Certainly the aims and starting points differ in each of these visions of a future Europe but it is quite clear that unification was expected to proceed on a federal basis. The strongest principles of the European union argument were equality, democracy and supranationality: the only means of organising these principles and going beyond the restrictions of international diplomacy was to develop a European federation. Importantly, these debates involved commentators, activists and politicians – many of those whose signatures can be found at
the bottom of the Treaty of Paris establishing the European Coal and Steel Community were actively involved in the debate on the future of Europe.

A number of attempts were made to formalise European cooperation in the immediate post-war years, with varying degrees of success. The first of these attempts came with the founding of the Organisation for European Economic Cooperation (OEEC) in April 1948. Concerned that the Marshall Plan could fail due to inefficient planning and allocation and aware of the political instability of the region, it was part of American policy that the countries of Western Europe be encouraged to cooperate more closely. Due to the OEEC’s limited brief and its concern with short to medium term economic recovery, it had neither the capacity nor the will to become the major vehicle for European integration.

In May 1948 at The Hague, a Congress of over 750 participants founded the Council of Europe. Despite grandiose ambitions regarding closer unity between members and promises of common action in economic, legal, scientific, cultural fields etc, the Council did not pave the way for a new system of organising European states. The intentions of its various members differed wildly – the British actively discouraged any notion of policy cooperation and preferred an even looser arrangement than that eventually concluded. Other members, particularly the French and Italians, argued that the Congress ought to vote itself in as a constituent assembly and form proposals for a European federal government. Ultimately, such a compromise between two very different ideas on what European unity meant could not effectively function as a vehicle for the political regeneration of Europe (Lipgens 1985; Urwin 1995).

The Schuman Plan and the European Coal and Steel Community

On 9 May 1950, the French Foreign Minister Robert Schuman announced a proposal that the coal and steel production of France and Germany be placed under the common control of a High Authority. Acting on a plan
initiated by Jean Monnet, General Commissioner for the Modernisation Plan, Schuman intended to carry France and Germany into the first phase of European integration. Extending the invitation to other European countries, Schuman hoped that by acting on ‘one limited but decisive point’ the political impasse on integration could be surmounted.

At the time of the Schuman Plan, Jean Monnet was Head of the Commissariat General du Plan (CGP), a position he had occupied since its establishment in December 1945. In this position he developed the Monnet Plan for the reconstruction and economic recovery of France and the method Monnet employed in this instance would be echoed in the development and implementation of the Schuman Plan. Monnet presented his Plan as crisis management, a response to the withdrawal of the American Lend Lease programme that was a significant source of funding for recovery projects. In this way it was not a political plan of action, one that could stir ideological arguments and create divisions between ministries but rather a functional plan that bypassed bureaucracy and dealt directly with the industries concerned. Monnet focussed the Plan on ‘basic activities’ essential to industrial recovery – coal, hydro-electricity, railways, steel, cement and tractors. The Plan was developed through widespread consultation within the industries concerned. Modernisation Commissions were established within each branch of the economy the Plan addressed and these Commissions consisted of employers, cadres, workers and experts. Their role was to recommend priorities for their sector from which the CGP would draw overall conclusions and incorporate into the Plan.

Once adopted by the French Government in January 1947, the Monnet Plan served domestically as a guide for action and internationally as a prospectus for investment (Duchene 1994). As a response to the crisis of French recovery, it was a functional plan which focussed the energy of its participants on finding solutions to problems immediately at hand while looking forward to medium term recovery and success of the French
economy. Through his experience at the CGP, Monnet established a functional method and form of economic planning that was to heavily inform the Schuman Plan and the resulting European Coal and Steel Community.

It is evident from the text of the Schuman Declaration that the aim was political integration and the creation of a European federation. The method by which this was to be achieved differed markedly from earlier attempts at European integration. In their proposal to first create a *de facto* ‘solidarity’ and to proceed incrementally within clearly defined sectors, Schuman and Monnet were a part of the functional federalist school of thought in the wider debate over post-war reconstruction and cooperation in Europe. The essence of this method of integration was expressed by Schuman in the Declaration:

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World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it…Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The rassemblement of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries. With this aim in view, the French Government proposes to take action immediately on one limited but decisive point. It proposes to place Franco-German production of coal and steel as a whole under a common higher authority, within the framework of an organisation open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which
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have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting-up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification. This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements.


Although such an approach had been discussed in predominantly French circles since 1947, it was perceived by both the public and politicians as radically different and daring. The expected manner of achieving European federation was by constituent assembly, as had been attempted with the Council of Europe. Proponents of European integration felt that any federal organisation ought to have its beginnings outside the nation-state: that its foundations ought to be in the citizens of Europe. The idea of grounding a European federation in the nation-states it sought to overcome went against this expectation.

Further, by stating from the outset the basis of negotiations and the expected outcome (i.e. the ECSC), Schuman and Monnet had performed something of a fait accompli. It was a take it or leave it proposal, presented to Europe as a chance to radically shape and alter her future. As the later communications between Monnet and the British government were to show, the basic operating principles would not be altered to make it easier
for uncertain or less courageous countries to enter further negotiations. A mere eleven days after the Declaration, a conference to refine the plan was convened and chaired by Monnet and was attended by Belgium, the Netherlands, Luxembourg (Benelux) and Italy, in addition to France and Germany. Less than a year later, the Treaty establishing the European Coal and Steel Community was signed in Paris on 18 April 1951 (the Treaty of Paris). The Treaty came into effect on 25 July 1952.

The key to the Schuman Plan’s success lies in its difference from earlier proposals for European integration. Where the OEEC and the Council of Europe sought the broadest possible membership, the Schuman Plan was targeted at only a few countries; where the OEEC and the Council of Europe sought broad policy competence, the Schuman Plan was focused only on coal and steel production; where the OEEC and the Council of Europe accepted national sovereignty as sacrosanct, the Schuman Plan had as its price the principle of supranationality; where the OEEC and the Council of Europe worked intergovernmentally, the Schuman Plan intended federal governance. The source of these differences was a combination of Monnet’s experience as head of the CGP, a collective recognition by the conference participants of European integration as a force idée, and the crisis of the historical moment which encouraged an innovative and forceful solution to a seemingly intractable problem.

The ECSC was a new venture in international politics at a difficult time. It was admittedly far less adventurous than demanded by federal lobby groups such as the Union of European Federalists and its prominent campaigners — Altiero Spinelli and Denis de Rougemont, among others. In its transfer of authority in limited policy areas, it certainly went beyond the expectation of some such as the British government, who refused to countenance the complete transfer of decision making to a supranational body over which member states would have very limited control. Coal and steel production were at the core of each European nation’s ability to recover from World
Federal Governance in the European Union

War Two and to defend itself. To hand over authority for these areas to an independent, supranational body with the intention of increasing policy coordination was a transformational event. It required that countries, that had been at war with each other less than ten years previously to cooperate intensely in one policy area and over an extended period of time. The creation of the ECSC was recognition that different political arrangements were necessary in order to achieve national goals.

The immediate and practical problem of post-war reconstruction that the ECSC sought to manage was sharing the cost burden of recovery by increasing market efficiencies in the two industries which supported almost all other manufacturing. However, the political form of this management was just as important. The ECSC was the vehicle through which former enemies could learn to cooperate and manage the politically sensitive issues of defence and rearmament. It was an attempt to solve an intractable problem at a moment of crisis (Franco-German relations, the economic and political rehabilitation of Germany as seen in the Saar and International Ruhr Authority). Its most important feature was its idea of European unity – a supranational federation to transcend and arbitrate national interests in order to fulfil the common interest of European unity.

The political debates in the Six and UK demonstrate clearly the powers of ideas and their ability to shape solutions and actions in response to political problems. There was a common feeling that an historic opportunity was available to build new institutions for new times. A consensus emerged among key actors that innovation was desirable and must be supported. France and Germany championed the idea of European federation through key and influential people: Jean Monnet, Robert Schuman, Etienne Hirsch, Konrad Adenauer and Walter Hallstein. In debates in the Bundestag, Adenauer stated that

I should make it quite clear that I am not in any way motivated by economic considerations, and, as far as this whole issue is
concerned, I would also like to make it completely clear...that the significance of this entire proposal is primarily not so much economic as political...this pact is to constitute the foundation stone of a federal structure for Europe. (Verhandlungen des deutschen Bundestages, 27 June 1950).

Italy strongly supported this vision of Europe and championed the idea in national debates by Carlo Sforza, Alcide de Gasperi and Altiero Spinelli. In June 1950 Sforza instructed Emilio Taviani, the Italian Head of Delegation in the Schuman Plan negotiations:

All your colleagues must realise that, in the Schuman Plan, we are witnessing the first serious attempt to establish a supranational authority in modern Europe. This, in a Europe where there is a chance of settling once and for all the Franco-German differences that have caused so many wars, is one of the best guarantees we have at the present time. Italy has everything to gain from peace and everything to lose from war, and it must support the Schuman Plan to the best of its ability. (Sforza, 1952: 303).

In Belgium, the Netherlands and Luxembourg, strong national interest in the future of the coal and steel industries was matched by a strong interest in European peace. Federalism was acceptable (particularly Joseph Bechs and Henrik Brugmans) although functional variations were argued (Paul-Henri Spaak, Paul van Zeeland). Spaak, as President of the Council of Europe’s Consultative Assembly argued that

Any practical action is worth more than any amount of dreaming. It is essential to take positive action, however limited it may be. We can no longer be satisfied with saying, ‘I am in favour of European integration’ or, ‘I should like to see a United States of Europe.’ We must act! (Spaak, 28 January 1950)
There was shared recognition of the need for an innovative solution so that an old problem might be solved.

In the UK, the most arresting feature about the debate on European unity was the constant and consistent reference to the inviolability of UK sovereignty and the limitation this conception placed on developing new international institutions. The Labour Party was particularly adamant that the protection of UK sovereignty, together with the growing relationship with the United States, the position of the domestic coal and steel industries and orientation toward Empire, meant that the UK could not be involved intimately in any programme of European unity which had anything other than strictly intergovernmental structures and methods (National Executive Committee 1950). As Leader of the Opposition, Winston Churchill also argued for the central importance of protecting British sovereignty in the pursuit of its foreign policy aims. As his speeches to the House of Commons demonstrate, this did not prevent him from urging close association with any form of European union (Parliamentary Debates 1950, no. 476, 5th series).

National ideas about Europe and the relationship between one’s nation and others shaped the response of political leaders to the Schuman Plan. Ordering peaceful relations between the countries of Europe – the idea of European unity – became more important than the idea of national sovereignty in the Six. Recovery from war and the continuation of peace were the most salient issues for the governments and public of the Six. The achievement of these policy goals was beyond the function of national institutions – these institutions were not considered capable of performing adequately the functions assigned to them and had declined in saliency and meaning. The idea of European unity, which had been broadly and generally discussed in various fora since the end of the war, assumed greater significance in the conduct of national political and economic life. Support grew among political actors and the public for new institutions to carry out
new political and economic functions. In contrast, a similar undermining of the saliency and ability of existing national institutions did not occur in the UK. Although the problems of post-war economic recovery were nearly as acute for the UK as they were for Germany, there was no similar decline in the belief in the ability of national institutions to carry out the task of recovery. The idea of UK sovereignty and its relationship with the rest of the world was not undermined by the UK’s experience of war. Although there were variations between domestic political actors in their policies and attitudes towards Europe, there remained a consensus on national ideas about the UK.

Each member state brought their own set of preferences to the negotiations. France and Germany recognised the need for political cooperation to manage conflict – the history of war and its destruction between the two were significant factors in the preparation of the Schuman Plan. Belgium, the Netherlands and Luxembourg did not want to repeat their experiences as the battleground of Europe; political cooperation was a precondition for economic recovery. Their significant coal and steel industries made them critical for Western Europe’s economic recovery. Italy was reliant on the coalfield of its neighbours for its steel industry. Thus, the interests being served were economic and political.

These broad policy aims were honed during the negotiations that drew up the Treaty of Paris. The document is set against the backdrop of foreign and defence policy aims, but its negotiation and content were directly concerned with the minutiae of pricing setting formulas, labour and market conditions in each of the Six, the formation of competition policy and the institutional arrangements which would serve both the market and the Six. Differences in labour market conditions constrained action, as did the comprehensive nature of competition policy and a common tariff regime; the situation in which the High Authority could or would intervene in the marketplace was also a matter of some concern. Thus the ECSC was a trial
run, a first step into European integration, and that first step was undertaken in the knowledge that it was necessary, though its consequences could not be predicted.

The Preamble to the Treaty, which might reasonably be described as containing the idealistic motivation behind the ECSC, clearly indicates a commitment to the rebuilding of Europe through action in defined policy areas and to a continual process of expansion and integration. The Common Objectives are described as being the establishment of a Common Market and economic expansion, and commits the ECSC to a stable economic recovery based on modernisation of the means of production, an orderly supply of goods and a rise in the standards of living. More explicitly, the abolition and prohibition of tariffs, trade barriers, state aid and market exploitation are listed. The Treaty listed a five-year transitional period in two distinct stages in order to achieve this Common Market. This first period was to be based on the removal of tariffs and trade barriers, before proceeding to the next stage of developing a free common market.

The institutional structure set up to achieve these aims was a radical departure from previous international organisations. Rather than adopt a purely intergovernmental approach as was the accepted custom, the ECSC established institutions of both a supranational and intergovernmental nature. The pivotal supranational element lay with the High Authority, which was given the authority to direct the coal and steel industries through a variety of measures including directing investment, prices and production. It could pursue non-compliance by taking punitive action against offenders, including member states. The High Authority could exercise its authority by delivering binding decisions, making recommendations or expressing opinions. It had its own source of funding through levies imposed on coal and steel production and the ability to contract loans. Its nine members included at least one member from every member state and each member
was to be ‘completely independent in the performance of their duties.’ It was aided in its work by a Consultative Committee composed of equal numbers of producers, workers, consumers and dealers.

Representation was given to the member states in the Council of Ministers, which was intended to have a harmonising role, liaising between the High Authority and the member states. The Treaty recommended that there be exchanges of information between the two institutions and Article 26 granted the Council some influence with the High Authority by allowing the former to recommend to the High Authority proposals or measures which it considered necessary for the attainment of the common objectives. The Council was granted some control over the High Authority in some areas but in the majority of areas the High Authority was the final decision making body. A passing nod to the notion of democracy was given with the creation of the European Assembly which was granted supervisory powers over the High Authority. This power of supervision was weakened by the fact that the only punitive measure the Assembly could take was to bring down the High Authority by a two-thirds majority vote, and then have no say in the reconstruction of the replacement High Authority. It had no advisory powers and its purpose was simply to serve as a democratic overseer of the High Authority. The Assembly was made up of delegates from the national parliaments of member states. There is no evidence to suggest that the Assembly was created with the future possibility of it becoming a constituent assembly and forming a political federation. The role of arbiter in the case of any disputes was given to the Court of Justice, which was also charged with the duty of interpreting and applying the Treaty. Its jurisdiction covered actions brought by the Council or member states over decisions by the High Authority on grounds of lack of competence, infringement of procedural requirements, and infringement of the Treaty or misuse of powers. The High Authority was compelled by the
Treaty to apply the judgement of the Court, and such judgements were enforceable in the territories of the member states.

The ECSC was confederal in structure: a group of nations placed a discrete set of policies under the authority of an independent governing body. Member state representatives maintained their influence through the Council of Ministers but could not override the decisions of the High Authority. Whilst the High Authority was supranational and removed from intergovernmental bargaining, its jurisdiction was limited to actors in the coal and steel industries. The Council of Ministers, an arrangement supported by Benelux to avoid Franco-German domination, could and did act as a brake on the supranationalism of the High Authority through its representation of member state interests. The primary political relationship was between the member states and the High Authority and did not refer to the citizens of member states. The independent role of the Court of Justice was important for the maintenance of the confederal bargain and to protect against defection from common agreements and would prove to be a crucial defender of the Treaties against the arguments of member states.

The decision to adopt a confederal form was significant in that this accommodated the possibility of future expansion and it incorporated governance structures which were strong enough to be effective in policy making, implementation and enforcement without being so rigid as to completely constrain member states. Confederation also permitted measures such as the equal representation of member states in institutions such as the Council of Ministers. The provisions for weighted voting combined with qualified majorities were intended to militate against the emergence of dominant member states, although for many years the Council worked under a system of unanimity. The purpose of the ECSC was not purely the regulation of particular industries but also to share the burden of economic recovery and redevelopment. This element of regional equalisation and the avoidance of simple, purely intergovernmental forms of decision making
marked the ECSC as an institution fostering close and continual cooperation among member states. It confirmed the transformation of member state identities — from enemies to friendly nations committed to ongoing cooperation — and formed the basis for changes in member state interests. The Treaty of Paris was a limited, enforceable agreement that created an institutional structure and set of rules for further bargaining and cooperation.

The ECSC was not the decisive moment when the path of European integration was set. It was intended as an interim measure, a necessary yet insufficient means of achieving integration. The debate continued after the Treaty of Paris was signed, while the institutions were being established and while the ECSC began its first years of operation. Debate about the form of integration was still active throughout the 1950s; the institutional form and policy intent of integration was fluid until 1960. The formation of the EEC and Euratom in the late 1950s indicated an emerging consensus on the method of integration though teleology remained unclear.

The debate about national identity and supranational integration was placed in the spotlight when France announced in September 1951 its Pleven Plan (named for the Foreign Minister) for a European army. Prompted by American plans for the rearmament of Germany, France proposed a European army of 100,000 personnel. Such an army would be constituted of battalions from different European countries, including Germany, headed by a European Minister for Defence and possess a common budget. The supreme command of this army would be the North Atlantic Treaty Organisation. What emerged after negotiations with the other members of the ECSC, were the treaties establishing the European Defence Community (EDC) and the European Political Community (EPC). The EDC now proposed forty national divisions of 13,000 personnel each, a Collegial Commissariat of nine powers, and a Council of Ministers. Article 38 of the treaty provided for the development of a plan for a federal structure to
oversee and control the European army (the EPC). This would be developed by the EDC Assembly which would possess constitutive authority for the European Political Community.

The Pleven Plan was borne from France’s fundamental desire that German rearmament be managed by Europeans. France would not be content with promises of defence cooperation and alliance, particularly if the United States were guarantor. The only security France would accept was the common curtailment of political sovereignty of the Six – she was prepared to permit limitations on French sovereignty if that meant a guarantee of safety from a future German army and foreign policy. Benelux felt no compelling need for EDC and EPC as they were satisfied that German containment could be effected through current mechanisms, particularly NATO; Italy was supportive of the policy aim of European self-defence. EDC and EPC tapped into popular concern about the future of Germany and support for the principle of European integration.

The treaties were signed and presented for ratification, a process that took over two years. The French National Assembly, voting in September 1954, declined to ratify the treaties thus collapsing the agreement. By this time the political situation that had prompted the original proposal (the Korean war and United States’ commitment to the defence of Western Europe) had abated in importance and there was a significant decline in public and political support. The EDC and EPC treaties were not accepted by the National Assembly because the content was too far removed from the original Pleven Plan. The Assembly’s non collapsed the treaties since they were drafted at the prompting of France to support the post-war Franco-German relationship. The difficult and protracted experience of negotiating EDC and EPC sharply affected the desire of the leadership of the Six to sponsor further supranational integration.

Against this background, the early years of the ECSC saw mixed success in the achievement of its stated objectives. By 1958 significant progress had
been made in the abolition of customs tariffs, quotas and the removal of non-tariff barriers to trade. One of the key objectives of the ECSC, the increase in production and trade, was easily met. However, Belgian and Italian steel still enjoyed national protection, whilst by the end of the transition period (1956) French subsidisation policies meant that the coal industry effectively remained outside the ECSC structure. A major setback came in 1959 when cheap oil imports and a fall in energy consumption resulted in the significant overproduction of coal. At this first real crisis the High Authority was shown to be not as powerful as it appeared when the member states refused to endorse an ECSC action policy and instituted their own fragmented and protective measures.

The failed EDC and EPC proposals dampened expectations of political integration among political leaders and the public. A new generation of leaders was emerging, one not nearly so steeped in the war experience or directly involved in the vigorous post-war debate on the future structure of Europe. In 1955, Monnet announced his decision not to seek another term as President of the High Authority as a response to the failure of EDC and EPC and to the slow pace of supranational integration. The Italian Prime Minister, de Gasperi, who had always argued strongly in favour of federal integration died about this time, and Schuman was no longer of central importance in French politics. Overall however, the experience of cooperation was positive enough for the six member states of the ECSC to consider extending that cooperation to other fields.

**The European Economic Community**

In June 1955, the foreign ministers of the ECSC met at Messina to discuss proposals put forward by Benelux for further economic integration. Rather than pursue political integration, the Benelux proposal was intended to promote only economic integration. The resolution adopted at the Messina conference included commitments to develop further integration of national economies, the creation of a common market and gradual
coordination of social policy. In order to give full consideration to these matters a committee headed by the Belgian Foreign Minister, Paul-Henri Spaak was convened. The report of the Spaak Committee was accepted by the foreign ministers in April 1956 and used as the basis for negotiations which produced, in 1957, the two treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). These are referred to as the Treaties of Rome, and it is the first treaty which is considered to be the most important.

An examination of the Treaty Establishing the European Economic Community reveals a comprehensive program which does, however, display some inconsistencies. Where member states were in agreement on the type and scope of integration for particular sectors (such as trade), the treaty is more detailed; where member states had difficulty in reaching agreement, the treaty is vague (such as social policy and agriculture). It is important to note that the Treaties of Rome gave the EEC and Euratom a separate institutional structure from the ECSC — although similar in its construction, there are important differences which affected the balance of power between the Commission (similar to the High Authority) and member states. The Treaty extends the confederal form of the ECSC to its policy areas but in an effort to counteract this extension of supranational authority it curtailed the decision and policy making autonomy of the Commission. The Council of Ministers was given a more decisive role and its decisions were based initially on larger-than-minimum winning coalitions at the insistence of Benelux who were concerned by the possibility of German-Franco domination. It is one early indication that the confederal form was appropriate not only for its sanctioning of defectors and implementation function but also for the manner in which it could balance member state interests.

In the Preamble to the Treaties of Rome is found the now oft-repeated statement regarding ‘ever closer union’ which was no doubt a sincere goal
but the signatories could not have been unaware of the practical difficulties in achieving this with the experience of the ECSC and more tellingly, the fate of the EDC and EPC proposals. The Principles of the treaty include the establishment of various common policies: commercial, agricultural and transport policies. Also declared was a commitment to the freedoms of movement, services and capital, the elimination of customs duties and restriction on inter-state trade, the coordination of economic policies, and the approximation of national laws to the extent required for the proper functioning of the common market. The European Social Fund was created for the purposes of promoting worker’s geographical and occupational mobility. The European Investment Bank was established to assist undertakings in converting or modernising their business.

The Council of Ministers of the EEC was charged with ensuring the coordination of the general economic policies of the member states and was granted the power to take decisions. Each member state had one representative (usually a minister) on the Council and decision making was either by simple or qualified majority, as stipulated in the Treaty. As was the case with the ECSC, the Council continued to act on proposals submitted by the Commission but, in a significant shift which indicated the desire of member states to have greater control over the development of the EEC, Article 152 gave the Council authority to ‘request the Commission to undertake any studies which the Council considers desirable for the attainment of the common objectives, and to submit to it any proposals.’ In the ECSC, the right of legislative initiation lay solely with the High Authority. However, this arrangement was not carried over into the EEC and Article 152 now meant that the Council could give very clear directions to the Commission as to the type and extent of legislation it wished to consider. Membership of the Council varied according to the matter under discussion: agricultural ministers attended Council meetings on the Common Agricultural Policy, finance ministers attended meetings
concerned with economic policies etc. Since the Council was not permanently situated in Brussels, it quickly established the Committee of Permanent Representative (Coreper) in Brussels to deal with the Commission on a day to day basis. Coreper is the diplomatic representation of each of the member states to the Commission, and eventually came to act as another institution within the machinery of the EEC.

Under Article 155, the Commission was authorised to ensure the application of the Treaty, to formulate recommendations or deliver opinions where the Treaty provided or if the Commission considered it necessary. It was given its own power of decision and authorised to participate in the shaping of measures taken by the Council and Assembly. Furthermore, it was empowered by the Council to enforce and implement rules laid down by the Council. The Commission was established as an independent body and its members were abjured from seeking or taking instructions from any government or body. Members of the Commission were appointed by the agreement of the Council. The main tasks of the Commission were policy development, drafting legislation and enforcing the legislative decisions of the Council. Given the high hurdle for approving draft legislation in the Council (qualified majorities or even unanimity), the Commission eventually developed lengthy consultation procedures which involved all the stakeholders such as member states (through Coreper), businesses and interest groups.

The nine judges of the Court of Justice, together with the four Advocates-General, were appointed by the governments of member states, acting in accord. The Commission could bring institutions or member states to the Court, while member states could bring action against other member states. The Court was given jurisdiction over Treaty interpretation, validity and interpretation of the acts of the institutions and of statute of bodies established by the Council. Importantly, provision was made for national courts to seek a preliminary ruling from the Court of Justice in the areas of
its jurisdiction or to refer the matter in its entirety to the Court of Justice in cases where there was no remedy under national law.

The Assembly (which adopted the name European Parliament in 1960), drew its members from national parliaments and charged with ‘advisory and supervisory powers’ conferred by the Treaty. It replicated the experience of the Assembly for the ECSC in that it could question the Commission, consider the annual report submitted by the Commission and, in extreme cases, bring the Commission down (without having any say in the membership of the new Commission). Its two gains were that it was now formally included in the legislative process, though in a highly restricted fashion, and that it was required to draw up proposals for direct election of its members. The Commission was now required to seek the opinion of the Assembly on certain matters, though it was not required to heed that advice. Implementation of the proposals for direct election was left to the Council, and this did not occur until the mid 1970s.

The Economic and Social Committee was established under Article 193, with each member state proportionally represented by representatives of ‘producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and the general public.’ It was intended as a forum for the representation of sectional views since it was considered that the policy work of the EEC would have a significant impact on these sections and that the Assembly would not provide an appropriate forum for these views. The purpose of the Economic and Social Committee (ESC) was to provide its opinion on draft legislation when requested to do so. It was a purely consultative role and neither the Commission nor the Council was required to adopt its recommendations, placing it on much the same level as the Assembly.

The legislative framework of the EEC was laid out in Article 189 and continued that of the ECSC:
A regulation shall have general application, binding in its entirety and directly applicable in all member states;

A directive shall be binding, as to the result to be achieved, on each member state to which it is addressed but shall leave to the national authorities the choice of form and methods;

A decision shall be binding in its entirety upon those to whom it is addressed;

Recommendations and opinions shall have no binding force.

A regulation was the strongest form of legislation, imposing uniformity in both the ends to be achieved and the means of obtaining that end. A directive was in the fashion of framework legislation whereby legislative authority was held by the EEC but delegated administrative authority to member states. It had the additional flexibility of addressing situations specific to only one or a few member states if necessary. A decision was most commonly addressed to companies or other bodies. It was also declared that decisions which imposed a pecuniary obligation ‘on persons other than States shall be enforceable’.

The EEC broadened the policy competence of the European level of government. The Treaty provided for the development of common policies in the areas of agriculture, competition, commerce and transport and for coordination of economic and social policies. ‘Common’ policies were those where all decision making would eventually be transferred to the European level, while coordination asked that member states exchange information and to take into account the prevailing economic conditions and policies of other member states when formulating their own national policy.

On most points the EEC reflects the ECSC in structure and method but the role of the Council of Ministers in the legislative process was secured. The Commission’s place in the institutional structure was now balanced by the Council of Ministers to whom greater means to direct the level and pace of policy coordination was given. The language of the treaty suggests a
subtle shift away from the federalist integration championed by Monnet and Schuman: ‘ever closer union’ replaces federal union; ‘harmonious development’, ‘coordination’ and ‘approximation’ replace ‘integration’. It has already been noted that by the mid 1950s European union, as an issue, no longer dominated public and political discourse. Both politically and economically, Western Europe was far more stable and the emergency post-war situation had significantly receded. There was no demand for grand political gestures and solutions, and the slow and steady pace of the ECSC was acceptable to the member states. In setting aside the question of the political form of Europe the member states could, and did, focus on its economic form. However, this approach did not obviate the need for rules and institutions to govern economic integration. The institutional incentives for gradual federalisation remained though the ideological motivation had receded.

**Institutional development 1959-1969**

The Treaty itself and the years immediately following its ratification and implementation give an indication of the type of problems which would surface in the mid 1960s and continue to figure in any discussion of further integration. The tensions between integration of a purely technical nature and those requiring political commitments or involvement became more evident. Progress towards a full customs union proceeded without difficulty and there was considerable success in establishing a common competition policy. The EEC, however, was making little or no progress in the areas of social policy or harmonisation of national economic policies. Without the widespread demand and support for political integration which existed in the immediate post-war years, there was little incentive within the Council to embark on a process of policy development which would lead to full political integration. The Commission was no longer in a position to successfully force the pace of integration in a political direction, and it has been argued that its concern with creating a more supranational Community
aggravated latent tensions between French President Charles de Gaulle and the Commission (Dinan 1994: 48).

The contest over the form of European unity was first expressed in the failure of the EDC and EPC, continued in the discussions surrounding the Fouchet Plan and were resolved with the Luxembourg Compromise, when a consensus was reached (albeit reluctantly) about the method and form of integration. The period 1950-1969 was characterised by learning-by-doing, by taking steps towards integration. The need for economic integration was recognised by all participants but neither the extent nor form of political union was subject to explicit agreement. The relative slowdown of rule and institutional formation during the 1960s may be attributed to the departure from political life of the post-war leaders (Adenauer, de Gasperi, Bech, Mollet, Schuman, Monnet etc) and the decline in saliency of European integration for the public. Progress was being made on economic integration, however slowly, and this may have reduced the political urgency of the integration project. General economic stabilisation and post-war recovery also normalised the political and economic scene. The acceptance of the state of ‘cold war’ and the use of NATO and WEU reduced the pressure for an immediate political and defence response from the Six. The process of European integration was also being normalised; given the acceptance of the need for economic integration, its achievement was accepted as the eventual outcome of a yet to be negotiated process.

The Community discussions surrounding political integration provide an insight into the varying intentions held by the Six. In July 1960, the Heads of State or Government of the Six had established a committee ‘to submit to them proposals on the means which will enable a statutory character to be given to the union of their peoples’. This was driven by the Six’s stated intention of

Giving shape to the will for political union already implicit
in the Treaties establishing the European Communities, and
for this purpose to organise their cooperation, to provide for its development and to secure for it the regularity which will progressively create the conditions for a common policy and will ultimately make it possible to embody in institutions the work that has been begun. (*Bull-EEC*, July/August 1961: 35)

This action was prompted by General Charles de Gaulle who wished to define the shape of the latent European union. His discussions had begun in July 1960 with Chancellor Konrad Adenauer; after clarification of the bases for discussion the conversation was adopted by the Six, despite recognised differences in opinion about the participation of Great Britain and the institutional form of a union. There was, however, a consensus on the need to develop political cooperation in order to facilitate and balance economic integration.

The Fouchet Committee, named for its chair and French ambassador Christian Fouchet, presented its first draft treaty in October 1961 (Fouchet I). It called for an indissoluble European Union (outside of the ECSC, Euratom and EEC) whose main goals were to bring about a common foreign policy, close cooperation in science and culture, and a common defence policy. It described the institutional structure of the Union as the Council, the European Parliament and Court of Justice. It formalised the emerging summit meetings of the Heads of Government or State by scheduling such meetings, installing a rotating Presidency and ascribing to this Council the political direction of the Union. Fouchet I proposed a formal inter-institutional dialogue and a European Political Commission to support the work of the Council. It established ‘own revenue’ for the Union with the budget to be implemented by the Political Commission. The treaty was to be reviewed after 3 years in operation.

It was an intergovernmental Union of States; a limited confederal structure that abolished the supranational Commission leaving the Court of Justice as
the only independent and whole-of-Union institution. The proposal was unacceptable to the Five who insisted that the independent and supranational bodies of the Communities be maintained and that any future reform was integrative and federalist (Archives Nationales du Luxembourg AE 13079). Additionally, Belgium and the Netherlands wished to assure the accession of the United Kingdom to the Communities by associating the United Kingdom with the work of the Committee (Communauté européenne, May 1962, no. 5; Archives Nationales du Luxembourg AE 13079). Fouchet II was submitted on January 18 1962 and reintroduced economic management to the remit of the Union (previously withdrawn before Fouchet I), dropped all mention of NATO and set out restrictions on the activities of the EP (Deutsche Zeitung, 17 February 1962). It was more restrictive than the first proposal and embodied General de Gaulle’s distaste for NATO, the United Kingdom and the United States. It sought to impose a French foreign policy as well as de Gaulle’s concept of Europe des Patries. As the French Foreign Minister noted, it was not well received:

This new draft was given a cool reception by the other delegations, which were disappointed that their amendments had not been considered. They stated that the French delegation had gone back on both its initial project and the result achieved in Bonn on 18 July. For that reason, the mention of the economy in Article 2 appeared to raise some difficulties that the delegations thought had already been resolved between the Union and the Communities. Likewise, the delegations felt that Article 16, more condensed that in the previous version, might even jeopardise the future of the Communities. The other delegations were also troubled by the fact that, in the area of defence policy, no references was made to the Atlantic Alliance. (Ministère des Affaires étrangères 1998: 36-39)
On 20 January 1962 the Five put forward their own draft. It was a federalist document that incorporated the existing Communities, established a legislative procedure between the Committees of Ministers and the EP, confirmed the right of the EP to address matters concerning European union and provided for the development of a draft constitution. In providing for a review, the document stated that such a review would have specific objectives related to the independence of Union institutions such as direct elections to the EP, introduction of the majority principle for the Council, an independent executive and extension of the competence of the Court of Justice (European Parliament 1982: 122-126).

This debate between the Six over the form of political integration demonstrates the majority commitment to a federal structure. The necessity of independent and supranational bodies was explicitly recognised, in particular the representative and legislative roles of the EP. It was a determined attempt to move from confederation to federation but it could not succeed while it relied upon the confederal principle of unanimity. Nor would the member states rely on traditional federal constitutive methods – a representative constitutive assembly – because of their need to direct the course of an integration project still in its infancy.

In June 1965, underlying tensions over the intergovernmental and supranational tendencies within the EC came to a head with the Luxembourg Compromise. France had decided to absent itself from any but the most mundane meetings of the EC due to objection to a Commission package being considered at the time. The package of proposals which sought to introduce a system of ‘own resources’ for the EC (direct funding of the EC from tariffs imposed on third country goods), oversight of the EC budget by the EP and to finalise the Common Agricultural Policy (CAP), was flatly rejected by de Gaulle because of its overtly supranational nature and implications. Each proposal would have granted the core EC institutions (the EP and Commission) greater authority
within the general institutional structure of the EC and in its policy development. The implementation of ‘own resources’ had particular significance because it increased the independence of the Commission.

At issue was the conception of the EC: an intergovernmental *Europe des Patries*, essentially a loose confederation of fully sovereign nation-states, or a supranational arrangement which involved significant and continuing loss of national sovereignty. Having previously attempted and failed to impose on the EC his blueprint for Europe during negotiations on the Fouchet Plan, de Gaulle was now prepared to push hard for a definite assertion of an intergovernmental EC. The Commission, under Walter Hallstein, had been active in placing proposals before the Council of Ministers and acting very much as the ‘motor of integration’. The ambiguity of Treaty of Rome with regard to the exact nature and extent of the powers of the Commission facilitated a progressive and supranational interpretation. At the same time, five of the six members of the Council of Ministers were apparently content to allow the Commission to take the lead in the development of the EC.

The Luxembourg Compromise brought the French back into the empty chair in the Council of Ministers after a seven month absence from the table. Under this agreement the authority of the Council of Ministers was asserted against that of the Commission and the latter accepted an informal curtailment of its activism. More important was the agreement reached on voting procedure. Majority voting in the Council of Ministers was due to be adopted in January 1966 under the timetable outlined in the Treaty of Rome. This was of principal concern to de Gaulle who perceived it as a threat to the superiority and sovereignty of the nation state. The following statement introduced the veto in the defence of national interests which effectively maintained unanimous voting in the Council of Ministers beyond this deadline:

> Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very
important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community (Bull. EEC (3) 1966: 9).

The effect of the Luxembourg Compromise was to bolster the intergovernmental elements of the EC (the Council of Ministers) at the expense of the supranational elements (the Commission and majority voting). This threatened the timetable of integration measures which had been agreed to in the EEC Treaty and gave the Council effective veto on any legislative proposal put before it by the Commission. The Commission would now have to ensure that its proposals dealt with possible objections from every member state — it would no longer be possible for the Commission together with a qualified majority of more progressive members of the Council to push through integrative proposals.

Importantly, the Luxembourg Compromise was more than an occasional threat: it significantly altered the ethos surrounding Community decision-making, particularly within the Council of Ministers. As Joseph Weiler has commented,

it symbolized a transformation from a ‘Community’ spirit to a more selfish and pragmatic ‘cost-benefit’ attitude of the member states. It was a change of ethos, at first rejected by the Five but later, especially after the first enlargement, eagerly seized upon by all. (Weiler 1983: 134)

This change in attitude was seen in an almost universal application of the rule of unanimity in Council decision-making, even where it was not required. The effect of the Luxembourg Compromise was to place the member states, through the Council of Ministers, in a stronger bargaining position with regard to the Commission by threatening inaction or
considerable delay if the legislation before it could not garner unanimous support. The demand for unanimity slowed the decision-making process and was a rebuttal to any arguments for a supranational Community, one which would consciously develop into a federation.

The Luxembourg Compromise resolved the issue of the pace and form of economic and political integration for the next 20 years. It highlighted the utility of ideational consensus in integration as effectively as it demonstrated the effects of internal conflict. Prior to 1960, federation was the expected outcome of the European integration project. The experience of the EDC and EPC proposals indicate some disagreement but it was not until France’s change of leadership and policy with de Gaulle that this goal was seriously and consistently disputed. The empty chair crisis signalled the breakdown of ideational consensus and forced upon the Five a clear choice: between limited integration and none at all, with the probable demise of the Communities. Previous treaty negotiations had always meant some type of compromise from all parties as each attempted to assert their own preferences. Yet the idea of a federal European union was a restraint in that it shaped the final agreement. General de Gaulle was the first to reject this restraint and to refuse to negotiate in the shadow of a federation. The Luxembourg Compromise protected the idea and the reality of European integration by disconnecting it from the idea of federalism. It was the first, and most significant, separation of federalism as techne and telos in the EC.

By this stage, the Court of Justice had already produced a small body of case law which was to have a significant role in shaping the development of the Union and which counterbalanced the acceptance of intergovernmentalism by the member states. Its strong teleological bias in Treaty interpretation had protected the integrity of the Treaties and promoted legal integration. This approach to interpretation not only referred to provisions which explicitly stated Community competence but also relied on the implied commitment to a full realisation of the overall goals of the Treaty, that is, a
common market. It did so through the development of the principles of
direct effect and supremacy and assisted by Article 177 of the EEC Treaty
which allowed for the referral of national court cases to the Court of Justice.
The Court was at its most expansive in its interpretations in the first twenty
years of the EEC. In its rigorous defence of the Treaty, the Court began to
constitutionalise the Treaty, taking it from a document which ordered the
relationship between states to one which ordered the relationship between
the citizens of a polity and their institutions.

The principle of direct effect was first enunciated in Case 26/62 *Van Gend
en Loos*, which arose after Dutch importers argued that a tariff imposed on
unreformaldehyde as a result of modifications to the Benelux tariff system
was in contravention of Article 12 of the EEC Treaty regarding intra-
Community trade. Referred to the Court of Justice by the Dutch
Tariefcommissie, the principal question was whether Article 12 had the
effect of national law from which individuals derived rights and which a
national court must protect. In delivering its ruling the Court declared that:

> The objective of the EEC Treaty…implies that this Treaty
> is more than an agreement which merely creates mutual
> obligations between the contracting states. This view is
> confirmed by the preamble to the Treaty which refers not
> only to governments but to peoples. It is also confirmed
> more specifically by the establishment of institutions
> endowed with sovereign rights the exercise of which affects
> Member States and also their citizens. Furthermore, it must
> be noted that the nationals of the states brought together in
> the Community are called upon to co-operate in the
> functioning of this Community through the intermediary of
> the European Parliament and the Economic and Social
> Committee….the Community constitutes a new legal order
> of international law for the benefit of which the states have
limited their sovereign rights, albeit within limited fields, and
the subjects of which comprise not only Member States but
also their nationals. Independently of the legislation of
Member States, Community law therefore not only imposes
obligations on individuals but is also intended to confer
upon them rights which become part of their legal heritage.
These rights arise not only where they are expressly granted
by the Treaty but also by reason of obligations which the
Treaty imposes in a clearly defined way upon individuals as
well as upon the Member States and upon the institutions of
the Community.

Direct effect refers to the capacity of EC law to be invoked by individuals in
proceedings before national courts. It differs from direct applicability which
is a characteristic of regulations and ensures that regulations are given the
status of law within the domestic legal orders of member states. Direct
effect is a characteristic capable of attachment to any EC legal provision,
not just regulations. Once a provision is declared by the Court of Justice to
have direct effect, it confers legally enforceable rights on individuals within
the national legal system and is the source of protection against action in
violation of EC law. The reasoning behind the Court’s decision to extend
direct effect stems from its task to ‘secure the realisation of the overall
objectives of the Treaty’ (Weatherill 1995: 97). Tillotson describes the
Court’s decision as resting on two factors: the Court’s perception of the
federal and constitutional nature of the Treaty, and that the customs union
was a ‘key element of negative integration within the Community — and
that Community law must be fully effective in that respect’ (Tillotson 1993:
54). Van Gend en Loos also introduced the notion of dual vigilance whereby
alleged violations of Community law can be pursued by the Commission
under Article 169 proceedings or by an individual seeking redress through
national courts.
The principle of supremacy of Community law was not referred to in the Treaty but was deduced by the Court as a necessary means of realising Treaty obligations. In Case 6/64 *Costa v. ENEL*, an Italian lawyer, Flaminio Costa, alleged that a 1962 Italian law nationalising private electricity companies infringed certain provisions of the Italian constitution and the EEC Treaty. At Signor Costa’s request, the local judge referred the matter to the Court of Justice. The Italian government intervened and argued that a national court could not apply to the Court for a ruling when, in deciding a dispute, it need only apply a domestic law and not a provision of the Treaty. This particular question arose in Italy because Italy required domestic enabling legislation to implement international law. The Court decided otherwise arguing that:

By creating a Community of unlimited duration...the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. It follows...that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

Where member states have conceded competence to the Community, EC law was deemed supreme. The Court did not limit the principle of supremacy to Treaty provisions where competence had been expressly ceded but held that member states ceded competence ‘by necessary implication whenever they have adopted a common policy to regulate a given matter’ (Plunder & Usher 1993: 5). The Court has been consistent in its application of this principle, even to the extent of overriding national constitutionally protected rights (Case 11/70 *Internationale Handelgesellschaft*).
The principle of supremacy was later bolstered by the Court’s decision in Case 804/79, Commission v. United Kingdom, which determined that the Community had pre-empted national action in the field of fisheries conservation even though the Council had failed to reach agreement on fisheries conservation by the expiry of the date in the Treaty by which the Council should have acted. It was a judicial response to the restrictions on decision making imposed by the Luxembourg Compromise. It prevented member states from blocking agreement in the Council by invoking the national veto and then using the lack of Community legislation as a reason to impose national measures. The Court decided that the Community had exclusive competence but in its failure to act, a member state could act in case of need but only as a guardian of the common interest. Any member state action could only take place in a highly restricted sphere and only with the explicit permission of the Commission.

Article 177 empowers the Court to give preliminary rulings on cases brought before national courts in three circumstances: Treaty interpretation; validity and interpretation of acts of Community institutions; and interpretation of statutes and bodies established by the Council. Article 177 establishes a cooperative judicial procedure whereby national courts may receive guidance and interpretation on the case in hand. It is not an appellate procedure and the national court decides the case. Two types of referral are outlined in Article 177: discretionary and obligatory. In the first, judges in national courts use their own discretion in making an application for a preliminary ruling. Under obligatory referrals, a judge in a national court must apply for a preliminary ruling if the case is ‘pending before a court or tribunal…against whose decisions there is no judicial remedy under national law.’ The system of national referrals served to tie together the legal systems of the Community and the member states and involve national courts in the implementation of Community law.
Federalisation

All of the delegations, governments, oppositions and public knew that the ECSC was only the first step and that the Treaty described only the initial phase of the journey to European union. The ignorance of the final destination and its route was a source of apprehension for some and excitement for others; for both it provided an incentive to start the journey. Those with the teleological aim of a European federation could see an incipient form of federation growing to full maturity with encouragement and action. Those with more contingent concerns saw the malleability of limited institutions under political control.

By the mid 1950s, France’s support for supranational integration had faded due to a changeover in national leadership and its experience of violent decolonisation in Indochina and Algeria. This lack of leadership in European issues weakened the pace and extent of integration since the only other large member, Germany, was still occupied and without full sovereign rights. Italy was not politically or economically strong enough to take over ideational leadership and Benelux were always in a supplementary position. Without persistent advocates of federal integration, its teleology (ideas and values) could not be sustained and federalism as techne became more prominent.

The support for populist campaigns for a federal Europe had dwindled by the early 1960s. In response to the creation of the ECSC and later the EC, the European federalists continued to argue for the foundation of a federal union of the citizens of Western Europe. The creation of the ECSC and its preferred method of functional integration was a profound challenge to European federalists. They could either support the ECSC and its processes as a viable means of achieving a federation, or refuse to accept it and continue to lobby for a constituent assembly. In the late 1950s, Spinelli and a few other federalists attempted to organise a series of congresses in order to develop European unity and form a constituent assembly with delegates
elected from all over Western Europe, but this was cancelled in 1961 due to a lack of popular support.

By the time of the Schuman Declaration there was already some feeling in the federalist camp that they had lost the battle: by the end of 1959 and the last of the congresses, Denis de Rougemont was to claim that the unionists had the Council of Europe, the economists had the ECSC and the federalists had achieved nothing (1966–7: 329). Rougemont called upon the federalists to formulate a model for a federal Europe and to agitate for its adoption by the European Communities. Rougemont’s challenge to formulate a new model or theory of European federation was not taken up. The populist road to European unity had failed, denying the constituent basis upon which dreams of European federation had been founded. Constituent federalism explicitly rejected a federalising process within the EC as contrary to the true nature and intent of a federation. The refusal of federalists to accept the EC as a legitimate political organisation denied any possibility of a federal model of European integration being developed based on their philosophy.

From 1965, when the executives of the ECSC, EEC and Euratom were merged to create the European Communities (EC), the split between federalism as telos and as techne was apparent. The telos, the idea and political goal, of federalism was overshadowed by the implementation of the confederal agreement. Federalism as techne, which adopts the mechanisms of federal governance, provided a more useful and practical tool with which the member states could manage the integration process. With the resignation of Walter Hallstein at the end of his term (his reappointment was vigorously opposed by de Gaulle), the Commission lost a President energetic in his pursuit of further integration. From the mid-1960s one can also chart the rising importance of the intergovernmental institutions: the Council of Ministers, Coreper and, later, the summit meetings of the European Council. The Luxembourg Compromise was the first major
indication that member states were prepared to counter the effect of formal rules — the pressure from the Commission to proceed with the Treaty timetable for a common market — with informal rules that could negate such action. Although the member states were successful in defending their interests against that of the Commission and continued to do so for a considerable length of time, it does indicate the existence of an independent, supranational institutional identity associated most strongly with the Commission and which promoted an alternative vision of future Community development and governance. The member states continued for many years, even decades, to have a determining influence on the pace and extent of Community development. However, the growth of formal and informal rules, the institutionalisation of the policy and legislative processes and the decisions of the Court of Justice created a supranational sphere of governance which impacted on member state preferences and identity and shaped their behaviour.

As with the ECSC, the EC was clearly confederal, being an entity composed of states, participating in an ordered and permanent way in the formation of the central entity’s will. The member states remained sovereign states under international law. But by the end of the 1960s this was beginning to change. Judicial activism was constitutionalising the Treaty, making international law directly effective in member states, granting individuals rights which it was the duty of national courts to protect and enforcing the supremacy of EC law over that of member states. While the member states clearly could determine the pace and extent of future integration, Community institutions were still effective in maintaining previous agreements and pursuing those agreements to their fullest extent.

What the member states had set up for themselves was an institution to which they transferred policies previously considered the domain of domestic policy. Agriculture had already been completely transferred: the agreements contained in the EEC Treaty committed them to the transfer of
other policies, no matter how slowly they acted in so doing. The Court of Justice was forming a federal constitutional order, not simply because it was implementing the Treaties but because it was forced to deal with the legal implications of the bargain struck by member states and chose to do so in an expansive manner not under the control of member states. In its duty to uphold the Treaties and the laws made by the ECSC and EEC it had to consider the legal consequences of multi-level governance: whose law was supreme? what legal rights flowed from ECSC and EEC law? The consequences of establishing a supranational body possessing overlapping jurisdiction shared with its nation-state members was being resolved through the development of a federal legal order. The Court of Justice could do so on the basis of the preliminary (con)federal structures built into the Treaties, those structures present because the majority of member states (Italy, Benelux, Germany) favoured a federal structure for the ECSC and EC.

The extent of federalisation during this period was determined by the Treaties and the ability of each institution to determine its purpose and its place within the new institutional framework. The Council of Ministers, the Assembly, the Commission and the Court of Justice developed their institutional identity at varying rates. From the outset, the Court of Justice was equipped with a clear role, independence from national or sectoral interests and the judges held the common values of impartial interpretation and judgement. Its decisions during the 1950s upheld the bargain enshrined in the Treaty of Rome, particularly the intention to create a supranational union. This continued during the 1960s and was reinforced by judgements enforcing the supremacy of Union law and its direct effect. The compliance of national courts and member states in accepting the process of normative binding contributed to the constitutionalisation of Community law. This was not the intention of the ECSC and EEC treaties: the Court of Justice was established to protect the economic agreement made by member states
and to ensure compliance throughout the area of the member states by sanctioning defection and preventing distortion of the market.

The decisions of the Court of Justice took integration to a deeper point than originally forecast by the member states. Their rational action in delegating adjudication of disputes and interpretation of their original agreement to an independent Court had unintended consequences. Member states were not able or willing to halt or reverse this integrative action by the Court of Justice because of their own adherence to certain legal norms. There was no movement against the Court’s activism because of commonly accepted norms which accept as valid the authority of a court (national or supranational) to pass judgement and interpret statutes (Wind 1996: 52–60).

For member states to move against the Court in one area would jeopardise the authority of the Court in other less sensitive areas, thus threatening the security of the entire Community agreement. The involvement of individuals in enforcing rights granted by the EEC or ECSC together with the referral procedure under Article 177 contributed to and reinforced the legitimization of the Court of Justice. In this manner, the rational action of the member states in establishing a forum to protect their agreement had the unintended consequence of establishing a federal legal structure and extending the Union’s competence (where the Court has confirmed the legality of Union action in a new field).

The Commission’s identity was shaped by its relations with the member states through the Council of Ministers, its clear mission as the embodiment of Europe and its relative autonomy. Its endogenous preferences were more easily formed due to commonly accepted ideas about the goal of its work. The Commission relied on the idea of a supranational, united Europe and its role as the guardian of the Treaties. This task was made more difficult by the passing of the generation of leaders who had been closely involved in the integration effort during and after the Second World War and the first decade of the ECSC, EEC and Euratom. The next generation of political
leaders did not have a common experience of war and its aftermath and European integration as a force idée had declined in importance. When the Council of Ministers diverged from this shared preference, the Commission found it difficult to pursue and achieve its endogenous preferences.

The Council of Ministers had a precise identity as the representatives of the member states but their ability to shape the form of European integration was hampered by contestation about the form and pace of integration and the role of Europe. This may be described as the burden of innovation; the demand to lead a new form of organisation in the absence of a defined teleology. By the late 1960s it was evident that the member states chose to protect their initial integration bargain through compromise rather than jeopardise it through continued ideological disagreement. The EP’s purpose was ambiguous for much of this period though it saw itself as the only institution representing the peoples of Europe. Its role was limited and entirely dependent on the activities and attitudes of other institutions. It is possible to describe a consistent policy adopted by Members of the EP towards functional and institutional integration but the EP’s role in the decision making process did not allow it to implement those policies and shape the context of future decision making.

The development of these institutional identities did not determine the outcome of bargains or decisions, but it did produce a stable web of institutional relationships within which each actor worked. It created the constitutive process of federalisation whereby the intentions and actions of each institution defined expectations of future behaviour; developed rules of procedure and communication; and which shaped the form of later decisions and bargains. This is federalism as techne.

The initial period of the Union’s existence proved that the idea of European unity was more important than the idea of federation. Such was the commitment to this unity that disruptive events such as the coal crises of the 1950s, failure of EDC and EPC, and French policy under de Gaulle
were accommodated with a dilution of the commitment to European federalism. It did not simply mean the triumph of the nation-state particularism over the idea of a supranational community; after all the Six did sign up to the Schuman Plan and committed themselves to building a European federation. Certainly, national interest was more important than a federal Europe, but the commitment to the economic and political recovery of Europe through cooperation prevailed. The removal of an explicit federal teleology left a process of integration which relied on the commitment of member states, the discernment of common purposes and the development of common governance mechanisms – the process just described as federalism as techne.

The European idea changed with the times, with the experience of ‘being Europe’ and with the expectations of the leaders and populations of the member states. By the late 1960s, the European idea was shaped by its practical expression, by what had been done and by what could be done. In this it had moved away from the commitment to federal teleology expressed by the Six in 1951 toward the functionalist method of gradual, sectoral economic integration.

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Georges Pompidou’s call in 1969 for a summit of the European heads of state to consider the problems facing the EC served to confirm the role that member states had assumed for themselves in determining the direction of the EC. The Hague summit of December 1969 was intended to set the tone for the following decade: funding of the EC was to be from own resources rather than direct national contributions; the issue of direct elections to the EP was to be finally considered by the Council of Ministers and the EP was given expanded budgetary powers; a commitment to Economic and Monetary Union through gradual harmonisation of economic policies was stated; acknowledgment was made of the necessity to reform the Social Fund; an agreement to open negotiations for enlargement was made,
dependent on applicant countries accepting the *acquis communautaire*; and a committee chaired by Étienne Davignon was commissioned to examine proposals for political coordination (EP 1982: 136–8). After a difficult period it was hoped that some steps would be taken to further the growth and development of the Communities.
FROM CONFEDERATION TO FEDERATION 1970-1989

The period from 1970 to 1989 marks the longest period of structural stability in the Union’s 50 year history. Few new policies were created and the Single European Act (1987) was intended to complete the single internal market and was not a renegotiation of the integration bargain. The intriguing aspect of this period is to detect the type and sources of change because there was change within the Union – mostly informal or extra-institutional. The changes that did take place did so outside of the formal institutional framework (for example, the development of the purely intergovernmental European Council) or through the efforts of some institutions to interpret their remit as fully as possible (particularly seen in the EP and Commission). The focus of this chapter is the process of federalisation in this environment of enlargement and intergovernmental and supranational tension.

This chapter explores the three federalisation hypotheses set out in Chapter Three. Following from the previous chapter which analysed the initial conditions of the Union’s development, what is now examined is the behaviour of actors within the EC as they work within a stabilised institutional structure. Broadly speaking, the actors within the EC were involved in informal changes which were intended to extend their influence in the legislative and policy processes. The member states sought to innovate outside of the formal institutional structure of the EC – this will challenge the first federalising hypothesis regarding member states and the institutionalisation of collective action. The Commission, the Parliament and the Court of Justice pursued the full extent of their remit as determined by the treaties, though their success in achieving maximum utility interpretations varied. This provides us with the opportunity to study the
second federalisation hypothesis, that the creation of institutions by member states will have the effect of creating new actors involved in the integration process. Finally, these two federalisation strands can be brought together with the third hypothesis which proposes that federalisation is a mutually constitutive process. This will require analysis of the interaction between the actors and the extent to which the actors modified their expectations or behaviour based on their experience of the federalisation process.

The activity of the member states through the European Council will be examined, specifically the establishment of the Council, its relationships with the institutions of the EC and its developments in the area of monetary and foreign policy. This will demonstrate the extent to which the first federalising hypothesis can be sustained. The three main institutions – Commission, EP and Court of Justice – will be examined to ascertain their behaviour and intentions during this period of institutional stability. We are interested in any action they may have taken which was intended to bolster their role in the integration process. The Commission’s role in competition and environment policy will be analysed, the EP’s endeavours to legitimise and expand its role in the legislative process as well as its move to direct elections, and the impact of the judgements of the Court of Justice on the scope of integration.

This will be followed by analysis of the Single European Act (SEA). This will incorporate the roles played by member states and institutions, the impact of the SEA on the institutional structure of the EC and inter-institutional relationships. The consolidation of the integration process during the 1970s and the recognition of the need for further adaptation in the 1980s pushed the EC to the brink of federation. To this point, the integration process was insular, incremental and élite-driven but the completion of the internal market project and a changing global political
environment would pressure the EC into a more active phase of change in the 1990s.

**The member states**

In December 1969, the Hague summit of the heads of government or of state of the Six met to determine the future of political integration in the EC. The 1960s had seen strained relations between the member states over the possible admission of the UK to the EC, the extent of supranationality in the institutional structure of the EC and the type of political integration that was the aim of the EC. Previous attempts at defining the end stage of the political integration process had been unsuccessful: the EDC and EPC proposals of the early 1950s and the French Fouchet plan of the early 1960s. Various plans or memoranda had sought to initiate dialogue on political unity – the Spaak plan of September 1964 for a treaty on political union; the Germany memorandum of November 1964 advocating negotiations on political union with consultations on foreign policy, defence and culture to take place in the interim, and the Harmel plan of 1968. Each of these foundered on details of institutional design and policy orientation. Recent progress on other matters of economic policy, particularly on Common Agricultural Policy, freed the agenda for discussion of political integration. However, the most important element was the departure from French political life of President Charles de Gaulle.

This signalled a shift in France’s policy demands and permitted the accession of the United Kingdom to the EC. In previous discussions on political integration, Benelux had consistently expressed their concerns at the lack of British involvement. They feared Franco-German domination of the agenda and a diminution in the importance of the Atlantic Alliance. Italy also shared Benelux’s concerned at proposals which would have weakened the institutions of the EC and these countries had openly preferred a supranational form of political cooperation with its institutions provided by or at least associated with the EC. The new French President, Georges
Pompidou, was not attached to the strategy adopted by de Gaulle and proposed the Hague summit which would have as its theme completion (change over to the definitive period of the common market and contemplation of future economic and monetary integration), strengthening (institutional reform, particularly the capacity of the Commission and the budgetary powers of the EP) and enlargement (the UK as well as Denmark, Ireland and other applicants). The *quid pro quo* for the accession of the UK would be progress on political unity in some form. The French also dropped their opposition to having the Commission involved in the summit and accepted that future summit meetings could not be conducted wholly outside of the EC. With this change in policy, the primary institutional and political concerns of the other member states were met.

In its *aide-mémoire* to the summit, the Commission called attention to the urgent necessity of a political commitment to the matters under discussion. The Commission argued strongly for economic and monetary union, strengthening the institutions of the EC and pursuing the enlargement of the Community (*Bull-EC* January 1970, 1 (3): 16-18). This agenda was supported by Germany’s Chancellor, Willy Brandt, who emphasised the urgency of enlargement, the need to coordinate foreign policy, the development of economic and monetary integration to protect against the wider effects of ‘economic disequilibrium’ between the member states, and institutional reform which would see the streamlining of Council decision making, expansion of the executive functions of the Commission where required, direct elections for the EP and the granting of budgetary control (*Bull-EC* February 1970, 2: 39-43). Luxembourg was particularly in favour of economic and monetary union and the strengthening of the EP as a consequence (*Bull-EC* February 1970, 2: 47-53). Italy argued that completion, strengthening and enlargement were essentially political tasks that needed to be considered as a whole, rather than on separate terms.

The Hague summit had two important consequences for the organisation and conduct of business between the member states without actually impinging on the institutional structure of the EC. The final communiqué of the summit reported that Viscomt Etienne Davignon, Political Director of the Belgian foreign ministry, had been commissioned to report on ‘the best way of achieving progress in the matter of political unification, within the context of enlargement’ (*European Parliament* 1982: 109-112). This Report led to the development of European Political Cooperation (EPC) with the intent of fostering common views between the member states on certain aspects of foreign policy. The second development occurred more gradually and was not confirmed until the Paris summit in 1974 – the establishment of the European Council as regular and formal meetings of the heads of government or state of the member states.

The progress made in The Hague over the political direction of the EC was such that further summits were held irregularly to cope with political developments that could not be resolved at ministerial level nor dealt with by the Commission – for example, enlargement of the Community from Six to Nine. By the time of the Paris summit in 1974, French President Giscard d’Estaing and German Chancellor Helmut Schmidt were able to convince their colleagues of the necessity of the European Council as a permanent institution. To this effect, the final communiqué announced that

> Recognising the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe, the Heads of Government consider it essential to ensure progress and overall consistency in the activities of the Communities and in the work on political cooperation.
The Heads of Government have therefore decided to meet, accompanied by the Ministers of Foreign Affairs, three times a year and, whenever necessary, in the Council of the Communities and in the context of political cooperation. The administrative secretariat will be provided for in an appropriate manner with due regard for existing practices and procedures.

In order to ensure consistency in Community activities and continuity of work, the Ministers of Foreign Affairs, meeting in the Council of the Community, will act as initiators and coordinators. They may hold political cooperation meetings at the same time (*Bull-EC*, no. 12, December 1974: 7).

The second consequence of The Hague summit was the Davignon Report on political cooperation which was adopted by the foreign ministers of the member states on 27 October 1970. The major consideration of the Report was the need to match the political development of the EC with its economic development. The Report recommended that the basis for political cooperation should be foreign policy ‘concertation’ and that this would require the member states to ‘intensify their political cooperation and provide in an initial phase the mechanism for harmonizing their views regarding international affairs’ ([FRG 1978: 29](#)). In the policy context of the Union at this time, concertation indicated ongoing discussion between government representatives. Such discussions were conducted with the intent of discovering common view though that result was not presumed. Policy coordination – the active structuring of member states’ policies so as to be mutually supportive – was more integrative in intent and effect. Harmonisation or convergence of policies indicated uniformity of outcome with the possibility of a diversity of member states processes.

The objectives of this European Political Cooperation (EPC) should be:
To ensure, through regular exchanges of information and consultations, a better mutual understanding on the great international problems;

To strengthen their solidarity by promoting the harmonization of their views, coordination of their positions and, where it appears possible and desirable, common actions (FRG 1978: 29).

These objectives would be supported by consultation mechanisms sitting outside the institutional structure of the EC yet associated with its work through annual reporting to the EP and consultation with Commission where there was overlap between political coordination and the activities of the EC. It was proposed that the foreign ministers would meet every six months with a Political Committee (heads of foreign policy departments) meeting every four months. There would be no secretariat to support these meetings so as to avoid the question of institutional structure and relationship with the institutions of the EC. The necessary support and guidance would instead come from the member state currently holding the Presidency of the Council of Ministers. The Political Committee would be permitted to establish working groups to deal with special matters and expert groups for the preparation of advice on specific problems.

The topics chosen for discussion at the first EPC meeting were the Middle East and the Conference on Security and Cooperation in Europe (CSCE). These were not subjects on which agreement could be made easily and quickly given the known divergence of views between the member states. Simon Nuttall has interpreted this as a deliberate move:

There was a genuine desire, in embarking on these subjects, to achieve convergence of policy in the spirit of the Luxembourg [Davignon] Report, and a feeling that these were real problems on which EPC could, if it chose, be effective (Nuttall 1992: 56).
By investing their energies into such difficult though relevant topics, the foreign ministers wished to display a commitment to the process which had not shown itself in an institutional form. Certainly CSCE was an issue for which a European policy was appropriate. In managing the issue of détente there was a desire among Western European nations to develop a policy which reflected their geopolitical position rather than that of the United States. The impending expirations of the transition period for the national conduct of trade relations with Eastern Europe also served to concentrate the minds of the foreign ministers who were anxious to form a common view before those powers were transferred to the EC. The desire for a policy on the Middle East was largely driven by the French who had, in the course of the preceding decade, swung from Israeli to Arab support. The possibility of an independent European policy on this issue was also attractive to other member states.

The operating mechanisms and the connections between EPC and the EC were worked out on the ground. Apart from the first held in Munich, EPC meetings were conducted in the capital cities of member states holding the Presidency. There was an agreement that the meetings should not take place in Brussels so as to maintain the separation between EPC and the EC. The Commission President participated in the second day of meetings, in a consultative capacity only. The Political Committee established a Mediterranean Working Group, whose function was to monitor developments in the region and to act as an information channel between the Six and the region. Other working groups were established to deal with the CSCE and the Middle East. The Political Committee also created the Heads of Protocol whose mission was to harmonise protocols for state and official visits. The task of the Group of Correspondents, originally a sub-committee of the Political Committee, was to finalise the conclusions of the meetings of the Political Committee and the Ministers. It gradually acquired functions in other areas such as drafting joint directives to diplomatic
missions, security, and preparations for the second Report for EPC (a requirement of the Davignon Report).

Arguments regarding a permanent secretariat for EPC were raised prior to the Paris summit in October 1972. Pompidou gave a press conference in January of that year where he declared his support for a confederal Europe, with ultimate political authority remaining with the national states in an institutional setting which might develop into a system of European governance. This Council of Ministers for European Affairs would be serviced by a permanent secretariat based in Paris, with the secretariat under the full control of the Ministers. It was a clear reference to France’s plan for EPC and failed to gather any support from the remaining member states. Germany still preferred a federal Europe and, in any case, did not feel that a permanent secretariat was yet necessary for EPC. The remaining member states were concerned about a developing Paris-Bonn-London axis and were keen to prevent further intergovernmental developments which would impair their ability to shape EPC. These member states favoured a secretariat stationed in Brussels in order to more effectively coordinate EPC activities with the EC. Since these views could not be reconciled, the outcome was no secretariat at all.

The second Report on EPC, the Copenhagen Report (22 July 1973), reviewed the progress made since 1970 and declared the process a success. The Report acknowledged the peculiarity of the procedure and affirmed its effectiveness and the development of a ‘reflex’ of coordination among member states. It noted with satisfaction that ‘this collegiate sense in Europe is becoming a real force in international relations’ (FRG 1978: 52-3).

The recommendations of this Report dealt with anchoring the coordination procedure by formalising and extending the contact between member states without expanding the scope of such coordination. The Copenhagen Report increased the number of ministerial meetings from twice to four times a year and made a coy reference to being able to consult each other
on specific subjects ‘when they happen to come together on other occasion.’ It formalised the role of the Group of Correspondents as following up the implementation of political cooperation and preparing the work of the Political Committee. The practice of Working Groups was affirmed as was the role of expert groups in formulating medium and long term policy options. The association of the embassies of the Nine (the enlarged number of members of EPC following the accession of the United Kingdom, Ireland and Denmark) within and without the EC was acknowledged, and recommendations were made for improved political communications to those embassies. For the first time, the priorities of EPC were outlined as seeking common policies on practical problems in areas which concerned European interests (FRG 1978:58).

The Report also made clear the relationship between EPC and the EC:

The Political Cooperation machinery, which deals on the intergovernmental level with problems of international politics, is distinct from and additional to the activities of the institutions of the Community which are based on the juridical commitments undertaken by the Member States in the Treaty of Rome. Both sets of machinery have the aim of contributing to the development of European unification (FRG 1978: 59, emphasis added).

When taken in conjunction with the arguments over a permanent secretariat, the loose commitments brought about by common positions, the ad hoc determination of EPC’s agenda the frequent references to the member states’ individual and traditional loyalties and alliances, the Copenhagen Report confirms the limited and intergovernmental nature of EPC. These limitations were the result of a compromise between two different views of the purpose and nature of political cooperation. France and the United Kingdom, with some support from Denmark, preferred purely intergovernmental cooperation with possible confederal outcomes.
Germany was in a position to compromise but the smaller member states were determined that EPC would not develop entirely outside of the EC. The conjunction of these views meant that a formal, distant link with the EC was established which informed the institutions of developments within EPC. This restricted communication could not permit EC institutions to shape EPC but it did provide space for contested views to be aired and the possibility that the pressure created by such differences could be exploited within the mechanisms of the EC.

On October 13 1981, the foreign ministers of the Ten (Greece had acceded to the EC earlier in the year) accepted the third Report on European Political Cooperation, commonly referred to as the London Report. It was a consolidation of the experiences and practices of the previous decade and its primary aim was to update the EPC machinery to face increased demands and to ensure effective operation in times of crisis. The preamble to the Report reaffirmed the Ten’s commitment to consultation and to the objective of European union. In reflecting on previous achievements, the Report noted:

In spite of what has been achieved, the Ten are still far from playing a role in the world appropriate to their combined influence. It is increasingly their conviction the Ten should seek increasingly to shape events and not merely to react to them. (Bull-EC, s. 3/81: 14)

The Report confirmed the established practice in the operation of ministerial meetings, the Political Committee, the Group of Correspondents and Working Groups and encouraged the practice of Heads of Missions of the Ten in third countries meeting to discuss in-country developments and the response of the Ten. A troika system was initiated with the Presidency which acknowledged the vastly increased workload of the Presidency due to the extension of the areas of consultation and the desire of third countries to establish regular contact with the Ten. The concern was to increase the
efficiency of the Presidency without endangering the ‘direct contact, pragmatism and economy which are among the chief virtues of the present arrangements’ (Bull-EC, s. 3/81: 14). The work of the Presidency would henceforth be supported by a small team of seconded officials from the current, preceding and succeeding Presidencies. Given the amount of work that may fall to a foreign minister holding the Presidency it was also made possible for the President to delegate certain, appropriate tasks to his predecessor and successor. This troika arrangement ensured a greater degree of consistency between Presidencies and coherency of views and programmes. Relations between the Ten and the EP were maintained at their current level of contact (written questions, annual report on political cooperation, four annual colloquies with the Political Affairs committee, and informal meetings with directors of political groups). The Ten signalled the possibility of ‘more frequent reference [by the Ten] to resolutions adopted by Parliament in the deliberations, communiqués, and declarations of the Ten’ (Bull-EC, s. 3/81: 17). The two major changes initiated by the Report were the full association of the Commission with political cooperation at all levels and the crisis procedure which provided for the convening of the Political Committee or the ministers within forty eight hours, should three member states so request. In some effort to anticipate problem areas, working groups were encouraged to identify possible problem areas and prepare a range of scenarios for the Ten.

The London Report did not transform EPC in the manner which some of the Ten had preferred. Italy and Germany favoured bigger institutional changes and the expansion of EPC’s agenda to include consideration of defence and security issues. The efforts of the UK in producing a workable intergovernmental arrangement prevailed. The Report reflected the extent of agreement on issues the Ten could reach at that time and securing the full association of the Commission was not an insignificant achievement. Improved communication with the EP is interesting for its normative
connotations. The decision taken by member states to expand the dialogue between EPC and the EP could not be motivated by a concern for efficient decision making since the EP had no role at all. What such dialogue could achieve was the legitimation of foreign policy coordination by giving it restricted access to the most democratic of EC institutions. The member states ‘borrowed’ the legitimacy and transparency afforded by a parliamentary institution while limiting the risk to member states that institutional preferences could shape policy content. In these modifications to the EPC mechanisms we see the first federalisation hypothesis in action, both in first order concerns for efficiency and second order concerns for legitimacy.

The first ten years of EPC had demonstrated the limits of political cooperation but this was not yet a concern for all of the Ten. Reaching a common position was considered an achievement in itself; transforming this into joint action remained an aspiration. The main achievement of EPC during this period was the development of the ‘concertation reflex’ and a recognition of what might be described as a moral obligation to uphold EPC procedures. Henry Simonet, a former Belgian Foreign Minister speaking before the EP in November 1977 expressed this:

There is less and less recourse to the escape clauses which allow the member states to question the guidelines of political cooperation. Instead, I believe I can go as far as to say the political cooperation has become closer and more demanding than the original documents foresaw. A kind of unwritten law has developed among the member states. There are no penalties attached, of course, but there is tacit recognition of rule which may be broken from time to time, but which nevertheless exists (as quoted in Ifestos 1987: 271-2).
A German governmental official echoed this view:

There is no legal but only a political commitment to conduct a concerted or common foreign policy. In the meantime, however, a subtle network of incentives and pressure has grown up within EPC providing the necessary degree of compulsion compatible with the present state of European integration...The history of EPC is full of gentle hints that attempts by one partner to go it alone in one field might reduce the enthusiasm of other partners to stick to the agreed line in other fields (Gablentz 1979: 690).

It implies the gradual development of binding norms and values which have moral if not legal import. The ability of individual Western European nations to influence world affairs had declined significantly and it could be argued that EPC was a low-commitment vehicle for the pursuit of national interest by other means. Yet there grew a sense that there was more to EPC than simply agreeing to a lowest common denominator position: it created expectations of expanding the EPC process to other areas, to respect the accumulation of decisions, procedures and processes which combined to make up the EPC’s *acquis politique*. It built up a commonality of interest and identity which served to bind member states and the EC closer to EPC than originally intended. EPC had managed to embed itself as another mechanism in the conduct of the Ten’s foreign policies and garnered for itself an international recognition of the political identity of the Ten.

Despite the London Report’s modification to the EPC mechanism, attempts were made very soon after its signing to push for greater institutional changes. What began as the Genscher-Colombo proposals in 1981 (Hans-Dietrich Genscher, German foreign minister and Emilio Colombo, Italian foreign minister), developed into the Draft European Act, and emerged in 1983 in its final form as the Solemn Declaration on Greater Foreign Policy Cooperation. As well as implementing more effective
decision making structures, the proposals sought to extend EC competence in external relations. Negotiations were protracted and reluctant given the recent adoption of the London Report which was viewed by the majority of member states as an accurate reflection of what was then possible with EPC. By July 1983 an agreement had been reached on the Solemn Declaration which did little more than reaffirm the contents of the London Report. It reaffirmed that the link between EPC and the EC was only through the European Council, but it did acknowledge the involvement of the Commission, the EP and the Court of Justice. The development of EPC was placed within the broader debate of further economic and political integration and a commitment to an eventual European Union.

The 1970s produced a consensus among a new generation of member state leaders on the nature of the integration process. Recognising the need for formal and regular exchange of views, the member states formed the European Council which provided regular summit meetings of the heads of government and state. It was a formal institutional replacement for the informal relationship between longstanding political figures who guided national and European policies from 1945 to the early 1960s. It permitted member states to liaise over strategy, tackle high level negotiations ill-suited to the Council of Ministers and attempt to develop a coherent and shared view of the direction of the EC. During the 1970s new forms of cooperation and coordination were developed within the European Council – particularly monetary policy – as well as attitudes to legislative and policy proposals developed by the Commission.

During the development of EPC and the European Council, the member states also conducted reviews into political integration. The Paris summit of December 1974, which had marked the formalisation of the European Council, also gave Leo Tindemans (Belgian Prime Minister) a mandate to report on what a European union should be. The Tindemans Report was completed on 29 December 1975 and included a consultation process
involving other institutions, member states and representatives of public opinion. The Report began by describing the ideal characteristics of a European union and then discussed practical proposals for gradual implementation: common external policy, economic and social policy, a citizen’s Europe and strengthening the institutions. Unlike the Davignon Report, the Tindemans Report was very much concerned with furthering political and economic integration within the framework of existing institutions and procedures. Just falling short of being ignored by the EC, the European Council at The Hague (November 1976) called for annual reports from the Council of Ministers and the Commission on the progress being made towards the construction of a European union.

In terms of a common external policy, the Report called for the centralisation of the EPC decision making process with the European Council, with the gradual inclusion of all aspects of external policy such as trade and defence. Tindemans called for moves towards a truly common external policy, with majority voting and with the force of legal obligation (i.e. involving treaty amendment). In calling for such a move, Tindemans was not unaware of the political consequences:

[It] cannot occur without a transfer of competencies to common institutions. [It] cannot occur without a transfer of resources from prosperous to less prosperous regions. [It] cannot occur without constraints, freely accepted certainly but then enforced unreservedly. (European Parliament 1982: 369–70)

Tindemans made no direct reference to a preferred model of union but the extent of political and economic integration proposed in the Report demanded a federal model.

The fate of the Tindemans Report was shared by the Report of the ‘Three Wise Men’, which was initiated by Giscard d’Estaing seeking an opinion on Community reform without Treaty revision. Reporting in November 1979,
the Three Wise Men (Barend Bushevel, former Dutch Prime Minister, Edmund Dell, former British government minister, and Robert Marjolin, former Vice-President of the Commission) criticised the Commission, reproved Community presidencies for their lack of direction, endorsed the European Council and observed that a lack of political will was the major obstacle for further Community development. After some discussion at the Dublin summit the report was shelved and any recommendations ignored. The fate of these Reports is worth some comment. They would not have been initiated had there not existed within the member states some concern about how integration was meant to proceed. The failure of the Reports to garner support indicates that some agreement had been reached that the most effective means of fostering integration at that time was to continue with a gradual, elite and intergovernmental process. It seems plausible to argue that the current condition of the Community did not compel the member states to pursue further supranationalisation – decision making was as efficient as the member states needed it to be.

The European Monetary System (EMS), which was first proposed in December 1977 and concluded in March 1979, is an excellent example of decision making in that decade. Although initially proposed by the Commission President Roy Jenkins, it was championed by Giscard d’Estaing and Helmut Schmidt, rejected by the United Kingdom and finally implemented as a quasi-Community policy. As Jenkins argued, the attainment of exchange rate stability through monetary policy would be an essential plank in achieving the common market’s full potential and possess the additional macroeconomic benefits of lowering inflation, increasing investment and reducing unemployment. After some months of carefully massing support from within the Commission and delicate public discussion, Schmidt decided to support Jenkin’s proposal in February 1978. This was quickly followed by French support, a move which effectively guaranteed its adoption.
Between July 1978 and March 1979 the details of the EMS were hammered out in a series of meetings and European Council summits at which domestic issues certainly had their influence. Both Ireland and Italy argued for compensation for poorer participating member states in the form of increases for the Regional Fund and subsidised loans for infrastructure development. France delayed completion of the EMS over last minute concerns with monetary compensation amounts, a mechanism which protected the CAP from fluctuations in the exchange rate. By the time the EMS emerged from these negotiations, it was a mechanism not entirely part of the EC or entirely out of it. It was not based on the Treaty of Rome though closer cooperation on monetary policy was certainly one of the Treaty’s objectives. The EMS was open only to EC member states, though membership was not compulsory. It did not emerge from a Commission proposal though the involvement of EC institutions was essential, particularly the Council of Finance Ministers.

**The institutions**

The second federalisation hypothesis argues that the creation of institutions by member states will have the effect of creating new actors in the integration process. Although these institutions may be constrained by the rules and boundaries imposed upon them by the member states, this hypothesis further argues that the institutions’ role in enforcing bargains (the Court of Justice), legislative proposals and policy implementation (Commission) and representation (the EP) will lead to the development of endogenous preferences with regard to the scope, pace and form of integration. These endogenous preferences are likely to encompass:

- maximum utility interpretations of agreed outcomes;
- preference for delegated authority;
- promotion of their expertise in solving problems of governance;
- self-perception as the embodiment of ‘Europe’; and
explicit federalisation may be a higher order priority than with member states as it legitimises their utility maximising behaviour. These preferences are most likely to be fulfilled when the rules adopted by the member states are broadly defined, have been drafted by these institutions, involve low saliency policy issues or permit institutional access to the policy through judicial review, consultation with the EP, legislative and/or implementation role for the Commission. Conversely, these preferences are least likely to be fulfilled when the member states have adopted their own version of the rules (drafted by their secretariat, Coreper); the issue is highly salient for the member states; and the policy framework restricts the access of institutions.

The following section tests this hypothesis by tracing the involvement of the Commission in the development of competition and environment policy and the activities of the EP with regard to direct elections, its legislative role and its input into the integration debate through the Committee on Institutional Affairs. The role of the Court of Justice is incorporated into these discussions through the impact of its judicial policy making in the areas of competition and environment policy and its interpretation of required steps in the legislative process which bolstered the role of the EP. The Commission and EP will be introduced with a short overview of their internal structure.

THE COMMISSION

The Commission is divided into Directorates-General (DG) responsible for the development, administration, and enforcement of Union policy, with each DG responsible for a particular policy area. In addition to the DGs there are specialised agencies which provide services to the Commission as a whole. A Commissioner, who is a member of the College of Commissioners appointed by the member states, is responsible for major decisions and policy direction and ultimately heads the DGs. Each DG is internally divided into directorates which themselves will be subdivided into
divisions. These Heads of Division are responsible to the Director who in turn answers to the Director-General. The relationship between the Director-General and the responsible Commissioner is usually a close one since the Director-General will be responsible for implementing the Commissioner’s policy vision. There has not always been a clear match between a Commissioner’s portfolio and a DG. During the 1970s and 1980s, the DGs and special agencies were rather technically defined, reinforced by the practice of referring to a Directorate-General by a designated number rather than by policy portfolio. The Commissioner can be seen as the political-executive head of the DG, providing policy direction and leadership, while the Director-General is the legislative-administrative head ensuring effective policy implementation and enforcement. The Commissioners themselves meet in the College of Commissioners, with all decisions being taken collegially. The President of the Commission has a coordinating function, expressing a Commission view on broad policy directions for the Union and ensuring that some coherence is maintained in the development of Commission policy.

It is the role of the Commission to propose legislation to the Council of Ministers; it may do this on its own initiative or upon request by the Council of Ministers. During this period of the EC’s development, the EP may have also requested the Commission to initiate legislation, but the Commission was not required to oblige. Requests for legislation from the Council of Ministers could vary widely in its detail; increased direction from the Council of Ministers restricted the ability of the Commission to interpret the brief in its own preferred manner. Broadly outlined requests increased the Commission’s manoeuvrability and may have permitted utility maximising behaviour.

Environment Policy

The development of the EC’s environment policy was curious in that no specific treaty provision was made for such a policy until the SEA, despite
the fact that the EC had been issuing environmental legislation since the late 1960s. Until the early 1980s, environment legislation was grounded on the need to prevent distorted competition due to differing environmental conditions and legislation between member states. The first years of the EC’s environment policy were marked largely by regulations and directives of a highly technical nature controlling pollutants and nuisances and this can be attributed to the role of the Commission in its development. Having no explicit treaty basis for its environment policy proposals required the Commission to choose carefully the treaty articles which legitimated its proposals. This had the effect of stimulating court action and consequent judgements which clarified the role of the Commission. A technical and market-based approach to new proposals normatively justified the Commission’s involvement and allowed the Commission to exploit its policy opportunities.

Technically, the first pieces of environmental legislation appeared in 1967 (classification, packaging and labelling of dangerous substances) and 1970 (noise levels) though there was no environment policy to encompass them. The Commission proposed such a policy in July 1971 in its First Commission Memorandum on Community Environmental Policy (OJ, 22 July 1971). This proposed priority objectives such as the reduction of the ‘most dangerous’ air and water pollutants, reduction of pollution caused by certain commercial products and industrial processes, area and environmental policy, research and Community participation in the work of international organisations and cooperation with third countries. The member states endorsed the development of an environment policy at the Paris summit of 1972. The early pieces of legislation and the first listed objectives were clearly oriented towards the elimination of national discrimination in traded goods and therefore firmly entrenched in the market integration process. They were not drafted primarily for their
environmental effects. At the Paris summit, the Heads of Government and State declared that:

Economic expansion should result in an improvement in the quality of life as well as in standards of living and that particular attentions should be given to intangible values and to protecting the environment. (as quoted in Johnson & Corcelle 1989: 12)

The United Nation’s conference on the Human Environment in Stockholm in 1972 echoed growing public concern when it called upon nations to cooperate in ‘conservation and development’. As Juliet Lodge has noted, this was not the overriding concern for the member states to adopt common actions in the field of the environment:

[They were] spurred not so much by the upsurge in post-industrial values…as by the realization that widely differing national rules on industrial pollution could distort competition: ‘dirty states’ could profit economically by being slack. (Lodge 1989: 320)

This attitude indicates the type of environmental action expected by the member states: the prevention of pollution and nuisances so as to enforce a standard industrial environment throughout the Community.

The Commission drafted the First Environmental Action Programme (1EAP) which was adopted on 22 November 1973 and outlined Community objectives for the period 1973-6 (OJ C 112 20/12/73). Lacking a specific legal basis for action, the 1EAP based its action on Article 2 of the Treaty of Rome which referred to ‘a harmonious development of economic activities and a continuous and balanced expansion’ and declared that this was no longer possible ‘in the absence of an effective campaign to combat pollution and nuisance’ (OJ C 112: 2). The principal legal basis of any legislation could be Article 100 of the EEC Treaty which states that
The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

Alternatively, Article 235 could be employed:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Both of these articles require unanimity, though only Article 235 required the involvement of the EP. Both Article 2, with its reference to the principles of ‘continued and balanced expansion’ and ‘raising of the standard of living’, and Article 36, which allows the restriction of imports on the grounds of the ‘protection of health and life of humans, animals or plants; [and] the protection of national treasures’, were interpreted as permitting environmental measures, though on clearly restricted grounds.

The main Principles of the Community’s environment policy were defined in the 1EAP as:

- The prevention of pollution at the source;
- The improvement of scientific and technological knowledge;
- The ‘polluter pays’ principle;
- The development of member states’ and Community policies;
- Establishing the appropriate level of action for each category of pollution (local, regional, national, Community, international); and
That national programmes in the field of the environment should be co-ordinated and those national policies should be harmonised within the Community (OJ C 112: 5-7).

The 1EAP was clearly an agenda setting document, outlining the interests of a Community policy and yet to determine the locus of policy making. Within this framework, the Commission set for itself the tasks of reducing and preventing pollution and nuisance (particularly water pollution and noise), waste management, protection of special common areas such as the Rhine basin, action to improve the quality of the environment by studying problems raised by the use of water and natural resources, and the improvement of the working environment. The Commission also committed itself to cooperating in the field of the environment with international bodies such as the OECD, the Council of Europe and the United Nations (OJ C 112: 8-11).

The 1EAP did not set for itself ambitious tasks and refers constantly to the need to obtain information on the state of the environment and to improve the flow of information between national agencies and the Community to ensure a reliable base for any action. The transboundary nature of water pollution and the need for standard regulation for industrial pollution to prevent market distortion shaped the provisions of the 1EAP. Concurrently, member states' reluctance to simply hand over competence in an entire field resulted in multiple references to determining the level of appropriate action. This, combined with the basis in Articles 100 and 235, indicated the desire of the member states to limit EC action. It does represent federalisation in that it was a transfer of competence and it had the potential to involve the EP. Indeed, the Commission was consistent in basing its proposals on both Articles 100 and 235 and thereby increasing the EP's access to environment policy.

At this time, the Environment and Consumer Protection Service of the Commission administered environment policy. During the period 1973-76,
the Commission transmitted 36 proposals to the Council of which 17 were adopted. The major directives concerned drinking water (Directive 75/440), bathing water (Directive 76/160), dangerous substances in water (Directive 76/464) and a general waste framework (Directive 75/442). All of these Directives were adopted on the dual basis of Articles 100 and 235. Other Directives were also issued concerning fuels and detergents. Commentators agree that this initial legislation was a response to the environmental crises of the 1970s, which legitimated environment policy making at the Community level. The first of these was in Flixborough (UK 1974) followed by Seveso (Italy 1976), both being industrial spills of such significance as to cause great alarm (Lodge 1989: 319; Hildebrand 1993: 25).

The Second EAP (2EAP) was issued in May 1977 and reaffirmed and continued the commitments made in the 1EAP [OJ C 13/6/77]. The recitals to the resolution noted progress made on water, air and noise pollution and expanded the scope of the policy by declaring that ‘it would be beneficial to strengthen the preventive nature of the environment policy and to pay particular attention to the non-damaging use and rational management of land, the environment and natural resources’ [OJ C 13/6/77: 2]. The priorities outlined in the 2EAP were:

- the prevention and reduction of pollution of fresh and sea water, the atmosphere and noise;
- management of resources;
- measures relating to industrial sectors;
- flora and fauna; and
- waste management.

It also introduced the notion of environmental impact assessment and requested the Commission to propose an appropriate procedure to put before the Council. The 2EAP was originally to run from 1977 to 1981, but was extended to 1983 due to the transition period occasioned by the accession of Spain and Greece to the Community and the upgrading of the

This period is noteworthy for the first environment cases to appear before the Court of Justice. In May 1979 the Commission began infringement proceedings against Italy for failure to implement Directive 73/404 relating to detergents and Directive 75/716 relating to the sulphur content of certain liquid fuels. Italy’s argument was not based on whether the directives were invalid because ‘combating pollution was not one of the tasks entrusted to the Community by the Treaty’ but instead depended on an interpretation that such powers were on the fringe of Community powers and the measures were actually an international convention (Cases 91 & 92/79 ECR 1980). The Court ruled that both directives were validly based on Article 100 and stated that, ‘If there is no harmonization of national provisions on the matter…competition may be appreciably distorted’ (ECR 1980: 1106, 1122). It confirmed that environmental measures by the Community to harmonise national laws were legal so long as their intention was to prevent trade barriers.

In 1981, the Commission brought a number of cases against Belgium for failure to implement directives relating to the disposal of waste oils, drinking water, waste, bathing water, the disposal of certain chemicals and titanium dioxide waste (Cases 68-73/81, ECR 1982). The crucial element of the Court’s decision in the case was to accept the dual basis of Articles 100 and 235 by repeating its reasoning in the Cases 91 and 92 on Article 100 and further adding in respect of Article 235 that environmental measures may be necessary 'to achieve one of the aims of the community in the sphere of protection of the environment and improvement of the quality of life’ (ECR 1982: 191). In this statement Ida Koppen argues that the Court applied the doctrine of implied powers which it developed with regard to external powers in the ERTA case (Case 22/70, ECR 1971). In that case the Court abandoned the principle of enumerated powers in favour of implied powers.
by ruling that the Community had the power to enter into external relations in all the fields for which it had internal competence. Its reasoning in the ERTA case was that ‘no separation must be created…between the system of internal Community measures and external relations’ (Koeppen 1993: 134). In making reference to the protection of the environment and quality of life as EC objectives derived from the Preamble and Article 2 of the EEC Treaty, the Court determined that the EC had implied power to act. To some extent it was a creative interpretation of those objectives stated in the Preamble and Article 2, but no more creative than that adopted by the Council in the 1EAP.

The period between 1972 and 1983 was very much an initiation period as the EC established its environment legislation and the scope of its policy. The Commission’s first tasks were necessarily focussed on gathering data and other information on the state of the environment in Western Europe before it could present to the Council appropriate legislation. The emphasis on the prevention of market distortion delineated the extent of environment policy at the Community level and marked off other action in areas of conservation, natural resources and land management as the preserve of the member states. The status of environment policy in the Community was still ambiguous: important enough to have been adopted by the member states but not initially so essential that it demanded the full bureaucratic resources of a Directorate-General. The EAPs emphasised the information-gathering role of the Commission and its coordinating function in exchanging information between scientific agencies and member states. Both acknowledged that some environment projects would be carried out by the Commission and some by the member states: the latter were not supervised by the Commission, but by the member states meeting in Council.

The Third Environmental Action Programme (3EAP) which covered the period 1982-86 introduced new elements to Community environmental
policy (OJ C 46 17/2/83: 1). Protection of the environment was specifically included as a Community activity in the preamble to the 3EAP, indicating a move away from the complete subordination of environment policy to the demands of the economy and the internal market. This policy innovation was developed by the Commission and approved by the member states. Moreover,

the improvement of the quality of life and the most economical use possible of the natural resources...are among the fundamental tasks of the...Community; whereas a Community environment policy would help accomplish this purpose. (OJ C 46 17/2/83: 1).

This confirmed the Court of Justice’s determinations on this matter and is the most explicit reference by the member states to the necessity of a Community policy. Regardless of the legal ambiguity surrounding environmental action, the member states had firmly committed themselves to further developing the environment as a Community competence.

The market distorting effects of divergent environment regulations were recognised, as was the need to integrate environment policy into other policy areas. In their re-commitment to the reduction of pollution and nuisances at the source, the member states placed such action ‘in the context of an approach to prevent the transfer of pollution from one part of the environment to another’ which indicates the transnational effects of pollution and its costs as a motivating factor in the development of a Community environment policy. Priority areas for the 3EAP were listed as atmospheric, noise and water pollution, environmental protection in the Mediterranean (in recognition of the recent accession of Greece), dangerous chemical substances, waste management, the protection of sensitive areas within the Community and cooperation with developing countries on environmental matters. The Commission was urged to avoid ‘unnecessary duplication’ at the international level, conduct a cost/benefit analysis of
each proposal, account for the ‘different economic and ecological conditions and the differing structures in the Community’, and reminded to consider these carefully and in the fullest possible terms when placing proposals before the Council (OJ C 46 17/2/83: 2).

The 3EAP indicated a growing recognition of the need to co-ordinate environment policy with structural and regional policies in order to maintain the integrity of policy action. It signalled the accession of environment policy into the acquis communautaire. The prospect of increased Community action was of course balanced by the conditions imposed by the Council on the Commission, though they could not remove the involvement of the EP. The emphasis on the implementation of environment policy indicated member states’ concern that the Commission not push too far for uniformity given the varied development of environment policy among the member states. Although it did not use the term ‘subsidiarity’, it is one of the first formal debates between the Council of Minister and the Commission about the appropriate allocation of powers and competencies between different levels of government.

The expansion of Community competence within environment policy meant a consequent increase in the amount of environment legislation, with over forty directives, eight decisions and ten regulations being passed between February 1983 and December 1985. The period of the 3EAP is something of a transition phase between the gradual evolution of the terms of environment policy and its legal incorporation in the SEA in 1986. The Commission and the Council developed the first three EAPs almost solely: the requirement of Article 235 for consultation with the EP did little to give the EP any leverage in shaping environment policy. Political attitudes towards the environment began to change during the life of the 3EAP and by the time the 4EAP was required it was evident that significant institutional change was possible.
Political direction for environment policy was provided by the European Council, particularly in statements made in 1983 and 1985 (the beginning and end of the 3EAP). The Stuttgart meeting in June 1983 declared that:

The European Council underlines the urgent necessity of accelerating and reinforcing action at national, Community and international level aimed at combating the pollution of the environment. It underlines in particular the acute danger threatening the European forest areas, which calls for immediate action. The European Council welcomes in this connection the memorandum from the Federal German Government and the Commission communication which illustrates the urgency of the question and the necessity to take co-ordinated and effective initiatives both within the Community and internationally…if an irreversible situation is to be avoided (as quoted in Johnson & Courcelle 1995: 22).

This type of statement was a clear indication of the support for environmental action at the highest level of member state representation. These statements are no guarantee of effective or extensive action within the Council of Ministers, but are perceived as an authorisation for further agreement and action whether initiated by member states or the Commission.

The March 1985 meeting of the European Council was a foretaste of the environment provisions that were incorporated into the SEA. Having declared 1987 the ‘European Year of the Environment’, the European Council concluded that

having acknowledged that this policy can contribute to improved economic growth and job creation, it affirms its determination to give this policy the dimension of an essential component of the economic, industrial, agricultural
and social policies implemented by the Community and by its Member States.

It acknowledged the need for the Member States to take coherent action in the Community framework to ‘protect the air, the sea and the soil, where isolated action is unlikely to prove effective and may even be harmful’ (as quoted in Johnson & Courcelle 1995: 23).

The European Council was not decisive in this stage of environment policy but its explicit endorsement of the further development conducted by the Commission and the Council was important in legitimising action undertaken at the Community level. The EP was also taking an interest in environment policy, targeting it in its campaign for a greater and more decisive role in Community decision making. The EP had taken the 1979 direct elections as a starting point in a long-term campaign to democratise the Community. As a transnational policy, environment was a particularly attractive target. The EP had included an Article on the environment in its 1984 Draft Treaty establishing the European Union and argued consistently for the incorporation of environment into the Community treaties.

Environment policy at this stage was largely concerned with establishing an agenda and working to define a Community policy. The Commission had been particularly active in this work and successive EAPs demonstrated the slowly expanding scope of Community action. What had been overlooked was the extent of implementation or, perhaps more to the point, non-implementation. The structure of environment policy, where the role of the member states in implementing and enforcing laws had been emphasised, did not encourage the Commission to adopt its own enforcement mechanism. Into the late 1980s and the 1990s, the effect of non-implementation on the mature development of a Community environment policy was a prompt for increased coordination between the Commission and member states.
The 4EAP (OJ C 7/2/87), enacted to cover the period 1987-92, must be seen in the context of the SEA and the treaty incorporation of environment policy. It continued to define the themes of Community environment policy by building on those outlined in the previous three EAPs (pollution prevention, resource management, international activities, developing the effectiveness of policy instrument) and reiterated the priorities and approach to the environment outlined in the SEA. Title VIII, Articles 130r-t covered the environment, outlining the objectives, the extent of Community action and the legislative process to be applied to environment measures. Article 130r(1) defined policy objectives as to ‘preserve, protect and improve the quality of the environment to contribute towards protecting human health; and to ensure a prudent and rational utilisation of natural resources’. Article 130r(3) reiterated the practical constraints to Community action that had been defined in the previous EAPs (cost/benefit analysis; varying environmental, social and economic conditions etc), but the whole confirms the place of the environment within Community policy without explicit reference to market prerogatives. Article 130s outlined the applicable legislative procedures in the Council as consultation with the EP and the Economic and Social Committee.

The most significant aspect of the environment policy was the inclusion of the principle of subsidiarity in Article 130r (4):

> The Community shall take action relating to the environment to the extent which the objectives referred to in paragraph 1 can be attained at Community level rather than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures.

This had been the approach adopted in each of the EAPs, but its inclusion in the Treaty marked a departure from standard Community procedure.
This was the first time that explicit reference was made to the option of pursuing policy objectives outlined in the Treaty at the level of member states rather than at Community level. Without any provision for specifying the most appropriate level of action, the article remained legally ambiguous, though there was no doubt that it reinforced the federal nature of decision making in environment policy.

Other changes relating to the environment were made in Article 100a(3) which included ‘health, safety, environmental protection and consumer protection’ in the procedures relating to the harmonisation of laws relating to the internal market. While Article 103s defined unanimity in the Council and consultation with the EP for environmental matters, Article 100a(3) defined qualified majority voting and cooperation as the procedure for the harmonisation of laws. This set up a conflict over the choice for Community environmental measures: either Article 130s which required unanimity or Article 100a which had the less demanding requirements of a qualified majority in the Council and the more democratic legislative procedure. Unsurprisingly, the Commission considered Article 100a to be the proper legal base wherever possible. The Council preferred action to be taken under Article 130s. This confusion was not clarified until a Court of Justice decision in 1991 in the titanium dioxide case (Case 300/89) where the Court declared in favour of Article 100a and thereby supported majority voting and the involvement of the EP in the legislative process.

**Competition Policy**

Competition policy differed substantially from environment policy in that it had a clear foundation in the Treaty establishing the EEC. However, there was less political interest in competition policy during its development phase and this allowed the Commission and the Court of Justice a significant role in shaping the policy. This section will begin with the adoption of Council Regulation 17 (OJ 1962 204) which enabled the Commission to pursue the competition policy goals outlined in Articles 3(f)
and 85-94 of the EEC Treaty. From this basis, the focus turns towards the Commission and the Court of Justice. Apart from certain limited types of legislation called block exemptions, the Council did not legislate again until the Merger Control Regulation of 1989. This refusal to legislate had its source in the low priority originally accorded to competition policy in the 1960s and was further compounded by the overwhelmingly national policy responses to the economic recession in the 1970s. This made the pursuit of Community competition goals unattractive and difficult. As a result, the Commission embarked on a programme of policy expansion through the prosecution of certain cases. This inevitably called upon the Court of Justice to take a policy-making role by confirming, amending or denying Commission decisions and articulating its view of competition principles. Analysis of competition policy during the period of the late 1960s to the mid 1980s must take into account the developing body of case law, its impact on the direction of competition policy and the Commission’s own responses to Court decisions and its policy activism.

The importance of competition policy is not contained solely within itself but within the links it has to the broader goals of integration and the effect that it can exert on other policies such as industry, research and development, and information technology. In the establishment period of competition policy when the Commission (specifically DG-IV) was seeking to confirm its procedures and policy, the goal of market integration was the reference point in Commission and Court of Justice decisions. This conviction proceeded from the very real fact that once tariff and non-tariff barriers to inter-Community trade had been broken down, this significant achievement could be undermined by uncompetitive practices between companies with the possibility of member states’ encouragement. This was precisely why articles pertaining to competition had been included in the EEC Treaty; and the continuation of trade barriers until the completion of the common customs union in 1968 explains why competition was initially
a low priority, at least for member states. This determined the nature and extent of the rules made and the norms and values of competition policy.

The Community’s competition policy was clearly articulated in Articles 85-94 of the EEC Treaty, though no procedural rules were included. Article 3(f) also had significant bearing as a statement of principle that declared one of the activities of the Community to be ‘the institution of a system ensuring that competition in the common market is not distorted.’ Articles 85-94 outlined the different aspects of competition policy: restrictive practices (Article 85); abuse of a dominant position (Article 86); application of competition principles to public undertakings (Article 90); anti-dumping (Article 91); and the regulation of state aids (Articles 92-3). Article 87 provided for the adoption, by the Council, of regulations or directives to give effect to Articles 85 and 86, a process that took longer than the three years originally scheduled in the Treaty. Regulation 17 is the product of this process and defines the administrative, investigative and decision making powers of DG-IV. Articles 87 and 88 provided for interim enforcement of competition rules by the national courts and DG-IV respectively, though little use was made of these provisions due to legal uncertainty.

The length of time it took the Council to negotiate Regulation 17 was due to differing opinions over which approach to take to competition and the demand for clarity regarding administration, enforcement and penalties. In the end, the German system of ‘notification, evaluation and exemption’ (Wilks & McGowan 1996: 231) was preferred over the French system which involved a system of self-assessment whereby undertakings would compare their agreements with specific exemptions drawn up by DG-IV and the automatic application of such exemptions should all conditions be satisfied (Goyder 1993: 35). Adoption of the German approach ensured centralised control of competition policy with undertakings required to notify DG-IV of all agreements. These would then be assessed by DG-IV and either rejected or accepted.
The recital pursuant to the articles of Regulation 17 stresses the need for uniformity and simple administrative procedures, two aims which it infers can only be fulfilled by granting DG-IV significant authority. There is acknowledgement of the need to involve the member states whereby DG-IV ‘acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying those Articles.’ These competent authorities play a subordinate role to DG-IV by assisting in its powers of investigation rather than being a part of its administration and enforcement procedures. DG-IV was given the power to investigate, adjudicate and impose penalties for infringing agreements with its decision subject to review by the Court of Justice.

The regulation is applicable to Articles 85 and 86, as described below (refer to Tables 6.1 and 6.2). The Regulation begins by affirming that agreements which fall under the prohibitions outlined in those Articles are void, without the necessity of a prior decision to that effect. DG-IV has the discretion to declare that, due to certain ameliorating facts, there are no grounds under either Articles 85(1) or 86 for action on its part regarding an agreement, action referred to as a negative clearance or ‘comfort letter’. DG-IV has sole power to give exemptions under Article 85(1) and has power to apply Articles 85 and 86. Member states, or natural or legal persons with a legitimate interest, may notify an infringement. DG-IV has the power to order the termination of an infringement and has been given extensive powers of investigation. It must keep the national competent authorities (NCAs) informed of such investigations. Fines and periodic penalty payments may be applied by DG-IV as a result of a negative decision or because of obstruction to its investigation.

The Council has no part to play in the application of Articles 85(1) and 86 which, given their centrality to competition policy, significantly sidelines the Council. Member states have had some input into final Commission decisions through the Advisory Committee on Restrictive Practices and
Monopolies, but DG-IV is not obliged to heed the advice of the Committee, even if it is unanimous in its disagreement with DG-IV. The authority of DG-IV with regard to competition is almost complete, and its decisions are subject only to the review of the Court of Justice. It was one of the first truly supranational policies in the Community, placing inter-state trade as an exclusively federal competence.

Table 6.1: Article 85, EEC Treaty (restrictive practices)

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| 1. | The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:  
   a) directly or indirectly fix purchase or selling prices or any other trading condition;  
   b) limit or control production, markets, technical development, or investment;  
   c) share markets or sources of supply;  
   d) apply dissimilar condition to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;  
   e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;  
| 2. | Any agreements or decision prohibited pursuant to this Article shall be automatically void.  
| 3. | The provisions of paragraph 1 may, however, be declared inapplicable in the case of:  
   -any agreement or category of agreements between undertakings;  
   -any decision or category of decision by associations of undertakings;  
   -any concerted practice or category of concerted practices;  
   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:  
   (a) impose on the undertakings concerned restriction which are not indispensable to the attainment of these objectives;  
   (b) afford such undertakings the possibility of eliminating competition in respects of a substantial part of the products in question.  

Federal Governance in the European Union

Table 6.2: Article 86, EEC Treaty (abuse of a dominant position)

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.

This rather long recitation of the Articles is necessary because it gives a real indication of the extent of DG-IV competence and very marginal member state involvement. The Spaak Report that preceded negotiations over the EEC Treaty was cognisant of the necessity of some type of competition policy:

In the final period, the elimination of trade barriers will lead to the disappearance of the opportunities for discrimination by competing enterprises. The problem only remains because there are enterprises which, owing to their size or specialisation or the agreements they have concluded, enjoy a monopoly position…The Treaty will have to provide means of ensuring that monopoly situations or practices do not stand in the way of the fundamental objectives of the Common Market (as quoted in Goyder 1993: 25).

This awareness of the consequences of establishing a common market for competition conflicted to some extent with varying degrees of national enthusiasm for competition rules. Cini and McGowan (1998: 18-19) have noted that in the late 1950s only Germany had an established competition
regime while the Dutch, Italians and French had quite limited laws and Belgium and Luxembourg had no legislation at all. This member state ambivalence towards competition regulation stemmed from a benign attitude towards cartels (deemed more capable of technological innovation and competing with the United States) and a view that other economic policies could achieve more effectively the goals of market integration. Competition was clearly a second order priority in establishing an economic community and this can be seen as a decisive factor in the latitude granted to DG-IV in regulating and enforcing competition policy. Had the member states been able to accurately forecast the importance of competition regulations in the context of a truly internal market then it is reasonable to argue that the powers given to DG-IV would have been more limited and more liable to direction from the Council of Ministers.

DG-IV had not been very active in pursuing competition infringements during the period leading up to the passage of Regulation 17, being reluctant to issue proceedings without clear guidelines. Some informal settlements were reached but no formal decisions were taken. Armed with the Regulation, DG-IV was in a position to develop its policy priorities and establish a body of decisions. Inevitably, the early decisions were subject to appeal to the Court of Justice, circumstances that did not conflict with DG-IV’s desire to establish legal certainty.

The first full year of operation for competition policy was 1964 and it produced a case in which the Court of Justice delivered a significant judgement in the Établissements Consten and Grundig v. Commission (Cases 56 & 58/64 [1966] ECR 299). The effect of the Court’s judgement in this case was to reinforce DG-IV’s interpretation of Article 85(1) and establish policy direction for DG-IV. The matter arose when the German manufacturer Grundig, together with Consten (its sole distributor for France, the Saar and Corsica) appealed a Commission decision which prohibited their sole distribution agreement as a violation of Article 85(1). The governments of
Italy and Germany intervened in support of Consten and Grundig, with the Italian Government arguing that Article 85 did not apply to sole distribution (vertical) agreements and that the Commission’s decision regarding the use of a trademark in this case did not comply with Article 222 which states that the Treaty will not prejudice national rules regarding property ownership. The German Government argued that the Commission lacked discretionary power to grant exemptions and other procedural points.

The Court upheld the Commission’s decision insofar as it determined that vertical agreements could affect trade between member states and have as their object or effect the prevention, restriction or distortion of competition, thus falling under the prohibition of Article 85(1). It also gave an interpretation of the phrase ‘affecting trade’ in Article 85(1) and indicated its attitude to the relationship between national and Community law:

The concept of ‘agreements’…which may affect trade between Member States is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law. In this connexion, what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. The Community rules on competition do not allow the improper use of rights under national trade-mark law in order to frustrate the Community’s law on cartels. (Cases 56 & 58/64 [1966] ECR 299).

Even if the agreement meant an increased trade between Grundig and Consten, the agreement still affected trade between member states because it prevented Consten’s competitors from importing Grundig products and Consten itself from re-exporting. The Court’s judgement on the claim for
protection of rights under national trademark laws made it clear that it interpreted Community law as superior to national law. The purpose and scope of the Community’s competition regulations was clearly established as applying to any trade between member states which does or may have an effect on competition; the Court also judged that the attainment of the single market was a factor to be considered when deciding competition cases. The Court found against the Commission in that only the clauses which had the intent or effect of restricting competition were invalid, and not the entire agreement. At this early stage the two principles of competition policy were defined: the defence of competition per se and the defence of the single market. Competition policy or regulations would not be determined without reference to their broader impact on the attainment of the single market.

The jurisprudence developed in the Grundig case was further refined by the Court’s advice in Völk v. Vervaeke (Case 5/69 [1969] ECR 295). The Oberlandesgericht in Munich requested the Court’s interpretation of the applicability of Article 85(1) in respect of a vertical agreement with exclusive territorial protection, given the small proportion of the market involved. The Court gave as its opinion that ‘an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question.’ In what became known as the de minimus rule, the size of the market share of the contracting parties has an effect on whether the competition law of the Community or member states applies. In a piece of judicial policy making, the Court allocated competence between the Community and member states. It is evidence of a further distinction between a purely intergovernmental international organisation and a federal structure. In the former it is accepted that the extent of agreement between member states is clearly defined across all areas with extremely limited potential for such agreements.
to be altered or decided by institutions without prior reference to the member states. It is only in federal polities where the authority of the Court to interpret the competence of federal and states governments according to the constitution is accepted.

During the 1960s, DG-IV was in an institution-building phase, developing the administrative structures and expertise with which to implement and enforce competition policy effectively. Formal decisions were outnumbered by informal decisions reached after negotiations and by the publication of notices which sought to explain DG-IV thinking on a number of policy issues. Another factor in the incremental development of competition policy was the backlog of cases caused by the notification requirements of Regulation 17. DG-IV eventually realised that some form of exemption for categories of agreements would be necessary so that it could concentrate its efforts on the most important cases.

Regulation 19/65, adopted by the Council, allowed DG-IV to exempt two types of bilateral agreements: (a) sole purchase and distribution and (b) defined categories of patent licenses. The preamble to the Regulation states that such exemptions are only to proceed ‘in close and constant liaison with the competent authorities of the Member States…[and] after sufficient experience has been gained in the light of individual decisions and becomes possible to define the categories of agreements.’ As with formal DG-IV decisions, block exemptions would be considered by the Advisory Committee on Restrictive Practices and Monopolies. Publication through the Official Journal was designed to allow comment from interested third parties. Regulation 19/65 delegated to DG-IV the ability to make regulations, as this would be the form a block exemption would take. In the interests of administrative efficiency (the Council noted the need for block exemptions to ‘facilitate the work of the Commission’), the Council delegated its legislative ability to DG-IV. Although this was regarded at the
time as a purely administrative procedure, it did give to DG-IV considerable leverage in determining the priorities and direction of competition policy.

By the end of the 1960s, those priorities and directions had begun to solidify, not through Council directives or regulations, but through DG-IV’s interpretation of the competition Articles and through judicial policy making. It can be argued from the Council’s point of view that competition policy had been determined by them through Articles 85-94 in the EEC Treaty and reasonably expected that DG-IV could do no more than enforce those regulations. DG-IV chose carefully when giving formal decisions in certain cases, knowing that such a decision would inevitably be appealed as business and member states sought legal certainty in interpreting competition regulation. Judicial interpretation did not adopt such a narrow view of competition policy as member states may have preferred. German and Italian intervention in the Consten and Grundig case was indicative of those member states’ concerns about the extent of DG-IV’s power in interpreting and enforcing competition rules and how broadly the Court would interpret those rules. During the 1960s, the Court confirmed DGIV’s interpretation and signalled that its decisions would be made in the context of the overall goal of market integration, rather than simply competition rules. It provided a solid base for DG-IV’s autonomous development of competition policy in the following decades.

Competition, along with many other Community policies, suffered from the effects of the economic recession of the 1970s and the consequent stasis in many areas of Council decision making. To some extent DG-IV’s policy autonomy protected it from the effect of Council reticence to legislate, but the challenge posed by the recession as member states sought their own national solutions had its own impact. In the early years of competition policy DG-IV concentrated on Article 85, particularly as it applied to vertical restraints on trade. As Cini & McGowan have noted, the 1970s saw DG-IV shifting its emphasis from Article 85 towards an emphasis on
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Article 86 (abuse of a dominant position), with a particular effort to use it as a means of merger control (Cini & McGowan 1998: 28). The remaining pillar of competition policy, state aids, was almost futile to pursue in an environment where member states were subsidising industry in an attempt to soften the impact of the recession. So while the Commission was active in the two other pillars of competition policy, the Commission was reluctant to pursue the member states themselves and fracture inter-institutional relationships within and outside of competition policy.

DG-IV, being under resourced compared to almost all other DGs (just over 100 officials in 1974), lacked the ability to pursue all investigative options available to it: notified agreements, complaints made to it by member states or undertakings and to conduct its own *ex officio* investigations in response to information in the public domain. The limited use of block exemptions had assisted in clearing the backlog of notifications, but the use of formal and informal decisions was slow and ineffective in providing business with the legal certainty it demanded. DG-IV adopted a strategy which targeted certain agreements for formal decisions in the knowledge that the decision would be challenged in the Court of Justice. This strategy had been adopted during the early part of the 1960s, but became a primary policy instrument in the 1970s.

Along with the policy shift towards abuse of dominant position restrictions, came a concern with merger control. DG-IV’s pursuit of abuse of dominant position practices was not controversial, but its intention to control mergers was. Goyder argues forcefully that,

> There seems little doubt that those responsible for the drafting of Article 86 did not intend that it should give control over mergers to the Commission. Neither the actual wording of the Article nor the evidence of those who participated in the negotiations leading up the Treaty or in
its early administration support any contrary argument.  
(Goyder 1993: 386).

When the Treaty was drafted it was assumed that the expansive economic goals contained therein would require some degree of market concentration in order to achieve economies of scale. Mergers were simply not viewed as anti-competitive. The experience of the 1960s changed this view and some member states had begun to insert merger regulations into their own competition policies. Member states were extremely reluctant to hand over merger control to the Community because it trespassed on an area seen as the exclusive competence of member states. Rather than ignore the issues, DG-IV chose to make use of existing instruments. This attitude was foreshadowed in the 1966 Memorandum on the Problems of Concentration in the Common Market, in which DG-IV first announced that in its judgement Article 86 could be used in merger control. This was not tested in the Court until 1973 when DG-IV chose what became known as the Continental Can case (Case 6/72 [1973] ECR: 215) to confirm its decision to prohibit a merger when the result of that merger served to strengthen pre-existing dominance in a market.

In the facts of the case, the American company Continental Can, a manufacturer of metal packages and packaging materials, acquired in 1969 an 85.8% holding in the German company, SLW. In 1970, Continental Can formed the Europemballage Corporation which had an office in Brussels and subsequently acquired 91.7% of the shares of a Dutch company, TDV. This transaction was financially supported by the parent company, Continental Can. SLW was the largest German producer of packaging and metal closures and TDV was a leading manufacturer of packing material in Belgium, Luxembourg and the Netherlands (Case 6/72 [1973] ECR: 218-20). In December 1971, the Commission made a decision under Article 86 that Continental Can held a dominant position over a substantial part of the Common Market in the market for light packaging for meat and fish
products and had abused that position by its acquisition of shares in TDV. The applicants argued strongly that the Commission had erroneously interpreted Article 86 and that in attempting to introduce merger control had exceeded its powers and, furthermore, that strengthening a dominant position through a merger was not an abuse of that position. In response the Court held that in determining this question reference must be made not only to Article 86, but also to Articles 2 and 3 of the Treaty. Article 2 states that one of the tasks of the Community is to ‘promote through the Community a harmonious development of economic activities’ while Article 3(f) commits the Community to ‘instituting a system ensuring that competition in the Common Market is not distorted.’ The Court concluded that Articles 2 and 3 contained the principles and objectives of competition policy which Articles 85-90 are designed to safeguard and achieve (Case 6/72 [1973] ECR: 244). This interpretation broadened the scope of competition policy since any distortion of competition, however achieved, became subject to Articles 85-90.

The Court’s interpretation is made clear in the following statement:

Articles 85 and 86 seek to achieve the same aim on different levels, viz: the maintenance of effective competition within the Common Market. The restraint of competition which is prohibited if it is the result of behaviour falling under Article 85, cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned. In the absence of explicit provisions one cannot assume that the Treaty, which prohibits in Article 85 certain decisions or ordinary associations of undertakings restricting competition without eliminating it, permits in Article 86 that undertakings after merging into an organic unity, should reach such a dominant position that any serious chance of
competition is practically rendered impossible. (Case 6/72
[1973] ECR: 244-5)

Essentially, where the Treaty had not expressly acted, the Court was able to ‘fill in the gaps’ by adopting its own interpretation of the signatories’ intent according to other provisions contained in the Treaty. As Goyder’s comments noted earlier clearly suggest, the extension of merger control to the Commission via Article 86 was not the member states’ intent.

As a result of the Continental Can judgement, the Council requested DG-IV to draft a merger control regulation. The judgement may have confirmed DG-IV’s interpretation of Article 86, but it could not take the place of defined merger policy and procedures. The judgement did not allow DG-IV to prevent the creation of a new dominant position and could not address the host of merger issues which lay outside the facts of the case before it. The 1973 draft regulation rested on the less contentious Article 235 for its authority, which allowed the Council to take action in order to attain one of the objectives of the Treaty but for which the Treaty had not provided the necessary powers. The draft regulation included prior notification, a threshold under which mergers would be excluded from Community control, the possibility of exemptions and administration procedures similar to those found in Regulation 17. The member states failed to agree on the draft and merger control was left to the precarious and restricted use of Article 86. Despite numerous draft proposals put forward by the Commission to the Council through the 1970s and 1980s, the lack of consensus within the Council prevented any agreement until 1989. Even that agreement was made in the light of another Court judgement on merger control which emphatically underlined the ability of the Commission to act in this regard.

There were a number of cases decided during the 1970s which further defined elements of competition policy. The Hoffman-La Roche case (Case 85/76 [1979] ECR 461) provided an extended definition of a dominant
position; and the judgement in the Belgian Wallpapers case (Case 73/74 [1975] ECR 1491) sharply criticised DG-IV for flawed economic analysis. The dominance of the Court in defining competition policy is, to some extent, an inevitable outcome of an overwhelmingly regulative approach to competition. But by the late 1970s and early 1980s there was growing recognition by DG-IV and others that competition policy was more than regulating restrictive practices and abuse of dominant positions. To be truly effective it had to be linked to other Community policies such as industry policy. Competition had to move from a purely regulatory focus to a broader policy making approach. A conference report dating from 1983 is illuminating in its revelation of what DG-IV and business representatives thought were the problems and challenges facing competition policy. Frans Andriessen, the Competition Commissioner, referred to the role competition policy could play in industrial policy when he stated that competition could revitalise Europe’s industrial malaise by protecting existing competition, regulating state aids to industry, prohibiting restrictive practices and controlling mergers. Andriessen rejected the protectionism of some member states and industries and instead advocated greater flexibility in industry and a commitment to modernisation (Smellie 1983: 270-1). Some criticism was made of the Commission’s ‘half-hearted’ response to crisis management moves by certain industries and suggestions were made the Commission should do more to consider the industrial and social circumstances of the case with more thorough economic analyses (Smellie 1983: 275-7). As Smellie noted,

A critical consideration which underlay all of the discussions at this conference, but which received little direct attention, was the fact that…the European Community remains a weak quasi-confederation of sovereign states. Although the Community has established a customs union it has yet to eliminate many of the…barriers to free and fair competition
in trade between the member states...It is the very character of the Community which makes the work of the Commission on competition policy at once both necessary and difficult. (Smellie 1983: 277-8)

At one and the same time, the Commission’s freedom of movement and the restrictions placed on it are displayed. Where the target of its activity were mainly private corporations and the effect on member states somewhat intangible (defining areas of competence, promoting free competition in the private sector), the Commission was able to push its decision-making boundaries to the limits. These limits were bounded by resource restrictions and a reluctance to engage with the member states on the issue of state aids which could not only lead to rancorous legal action but also adversely affect the working relationship between the Commission and member states in other areas of EC activities. Additionally, the Commission had been constrained by member states’ failure to define and implement an industrial policy, by their attempts to maintain state aids and their failure to pass a merger control regulation. By the early 1980s competition policy had become more mature and established, led by Court judgements defining the limits and principles of the policy. DG-IV was beginning to feel constrained from developing a truly effective competition policy by Council inaction and by resistance to the full implications of state aids policy.

THE EUROPEAN PARLIAMENT

The functions and capacity of the EP at the beginning of the 1970s were quite limited. Its legislative function was consultative only and it had no influence over the development of the EC budget. The move to a system of ‘own resources’ for the budget of the EC necessitated changes to its budgetary function and the role of the EP in that process. Changes in 1972 allowed a slight expansion of the role of the EP, while in 1975 the conciliation procedure was introduced to formalise the EP’s involvement in
the budgetary process. But as the Report of the Working Party examining the problem of the enlargement of the powers of the European Parliament argued,

If Parliament is representative, it also works in a vacuum. Its debates and other work and the tension which arises and which bear witness to its nature as a political institution, have almost no impact on the press, public opinion and the life of the political parties. The Parliament thus falls far short of fulfilling its normal tasks of expressing and shaping policy option. This state of affairs can be explained basically by its limited powers...the role of the Assembly [sic] is something less than that of a parliament and Community decisions acquire democratic legitimacy almost exclusively through national channels. (Bull-EC April 1971, no. 4).

The EP spent much of the 1960s and 1970s pressuring the Council to allow direct elections to proceed after an in-principle agreement in 1963; in 1969 it threatened action through the Court of Justice. This campaign for direct elections was centred on claims of democratic legitimacy and accountability, with enlargement of the powers of the EC necessarily requiring an expansion of its accountability to a democratic and directly elected institution (OJ C 37, 2/6/1960: 834/60; OJ C 41, 1/4/1969: 12; OJ C 32, 11/02/1975: 15).

The member states finally approved direct elections at the Copenhagen summit in April 1978, setting the date for 7-10 June 1979. On 17 July 1979, Simone Veil was elected as the President of the first directly elected European Parliament. Her opening speech declared the intentions of the new Parliament:

Because it has been elected by universal suffrage and will derive a new authority from that election, this Parliament [will] be able fully to perform its function of democratic control, which is the prime function of any elected
Assembly… Let us not be deluded into believing that the strictly institutional limitation on its powers can prevent a Parliament such as ours from speaking out at all times, and in every field of Community action, with the political authority conferred on it by its election…Our Parliament must also be a motive force in European integration (Debates of the European Parliament, 1979: 20-24).

From this statement and the declarations made previously, one could expect utility maximising behaviour from the EP motivated by its concern for federal European integration and the fulfilment of its normative role in democratic accountability. Achievement of its goals lay almost entirely with other institutions, namely the Council of Ministers and the Commission. Although the Commission could and did act to include the EP in the legislative process as fully as possible (as noted in the discussion of environment policy), such accommodating behaviour did not always apply across all policy areas. The expansion of the EP’s authority and remit lay in the hands of others.

The Court of Justice played some part in embedding the role of the EP in the legislative process. Although the conciliation procedure outlined the roles and responsibilities of the Council, Commission and EP during the drafting of legislation which required the EP’s opinion, practice did not always reflect the spirit of conciliation. Implicit prior agreements between the Council and Commission made the EP’s opinion redundant and in some cases the Council did not feel it necessary to wait for the EP’s opinion before taking a decision. It was this situation which prompted *SA Roquette Frères v. Council of the European Communities* (Case 138/79), also known as the isoglucose case. In the facts of the case, the appellants requested that Council Regulation No. 1293/79 of 25 June 1979 relating to production quotas for isoglucose be declared void. One of the arguments presented was that the Council had taken its decision before receiving the EP’s opinion,
was thus in violation of Article 43(2) of the EEC Treaty and that as a consequence, the Regulation was void. The Court of Justice found in favour of the appellants on the grounds of infringement of essential procedural requirements. It declared:

The consultation provided for in the third subparagraph of Article 43 (2), as in other similar provisions of the Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community, such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality, disregard of which means that the measure concerned is void.

In that respect it is pertinent to point out that observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council’s simply asking for the opinion. The Council is, therefore, wrong to include in the references in the preamble to Regulation No. 1293/79 a statement to the effect that the Parliament has been consulted. The Council has not denied that consultation of the Parliament was in the nature of an essential procedural requirement. It maintains however that in the circumstances of the present case the Parliament, by its own conduct, made observance of that requirement impossible and that it is therefore not proper to rely on the infringement thereof.
Without prejudice to the questions of principle raised by that argument of the Council, it suffices to observe that in the present case on 25 June 1979 when the Council adopted Regulation No. 1293/79…without the opinion of the Assembly [sic] the Council had not exhausted all the possibilities of obtaining the preliminary opinion of the Parliament…It follows that in the absence of the opinion of the Parliament required by Article 43 of the Treaty, Regulation non 1293/79…must be declared void (ECR 1980 page 3333, Case 138/79).

The effect of this decision was to enforce the role of the EP in the legislative process and thus enable the EP to strategically intervene by delaying the delivery of its opinion. It was a blunt instrument but one the EP had not had previously. Such a tactic would not be useful in all circumstances but where decision making had become time critical and the issues were of high salience to the member states, then the EP would have some ability to negotiate some legislative changes.

The EP had consistently advocated for the constitutionalisation of the EC as a federation. In 1984, the EP approved and submitted for consideration the Draft Treaty establishing the European Union. The project began in July 1979 when a group of pro-federal MEPs under the leadership of Spinelli and calling themselves the Crocodile Club began lobbying the EP and transnational political groups to endorse an initiative to develop a draft treaty establishing a European Union. It was formally launched in June 1980 when Altiero Spinelli, as a Member of the European Parliament (MEP), urged other MEPs to support his initiative, which meant the EP taking upon itself a constituent role on behalf of the people of Europe. Spinelli’s commitment to the goal of a federal European Union had seen him adopt a number of roles in order to influence the developments within the EC — as activist before its inception, as critic during its formation, and as

The Committee on Institutional Affairs (the formalised Crocodile Club) which oversaw the drafting of the document and the EP itself did not expect the Draft Treaty to be adopted by the EC. It was, however, a serious attempt at redesigning the institutional structure of the EC and was considered a part of the discussion on EC reform. Its premise was that only the EP was in a position to develop a comprehensive plan for the redevelopment of the EC (Bieber et al 1985:10). In its first term as a directly elected parliament, the EP was keen to demonstrate its relevance as an EC institution and initiate a role for itself in the integration process. The proposed European Union was to be an organic outgrowth of the EC and the treaty which formed it was intended to be a workable document, if ratified. An overtly federal and supranational emphasis was avoided:

Good care was taken, however, not to try and recreate the context of the 1950s. All talk of federalism and supranationality was shunned and broad compromises were arrived at with those political groups that wanted to see the rights of Member States affirmed (provisional upholding of the right of veto, caution in integrating political cooperation into the scope of the Union etc). (Jacqué in Bieber et al 1985: 17)

Despite these sentiments the final document did present a federal Union. It is this latter aspect which represents a significant development in the course of European federalism. It was the first time a plan for a federal European Union had been drawn up and thorough deliberation given to its institutions and structures, based on the Treaties of Rome and the acquis communautaire. European federalism had remained dormant for two decades
because of the reluctance of its adherents (even Spinelli) to accept that an intergovernmental organisation could form the basis of a federation. The EC had finally been accepted as a legitimate instrument through which to lobby for European federation.

The Union envisioned by the EP was not as revolutionary as might have been expected. Since the EP was working on the premise that the final document should be one acceptable to the majority of MEPs and member states, it did not propose radical changes to the policies or institutional structure. It also presumed the continued evolution of the EC which, when based on a treaty such as the Draft Treaty, would develop into a more comprehensive federation (Burgess 1989: 12-13). As a natural outgrowth of the EC, the Union (should it have come into existence) was to supersede the EC, although member states could decide to remain in the EC and negotiate a special relationship with the Union. In his analysis of the Draft Treaty, Jean-Paul Jacqué stressed the continued sovereignty of the member states through the principles of subordination (action by the Union is subordinate to that of member states) and subsidiarity (action should be taken by the Union only when necessary, due to scope and size of that action) (Bieber et al 1985: 20). In addition to this, the Union would only come into being gradually with a transition period of ten years. During this time a form of national veto would still be allowed and continue beyond that period for external relations.

The most explicitly federal aspect of the Draft Treaty was contained in the actions of the Union which could be ‘common action’ or ‘cooperation’. Within the technical meaning of the Draft Treaty, common action referred to any action taken under the responsibility of the Union’s institutions. It is here that the Draft Treaty distinguishes between exclusive and concurrent competence, a practice peculiar to federations. Policies may be assigned exclusively to the Union and only the Union has the authority to act. All other policy areas are concurrent, indicating that member states may act in
that area if the Union has not. The principle of subsidiarity comes into play when deciding whether Union action is appropriate:

The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers. (Art. 12)

Cooperation refers to the decisions or actions by the European Council and such actions would not necessarily become Union policy, as the European Council would remain largely external to the Union. The intention was to associate political cooperation with the Draft Treaty without changing the operation of the European Council. The Draft Treaty did not enter into extensive institutional restructuring although the balance is altered. The European Council remains unchanged, though brought into the treaty structure. The EP would have its power extended from involvement in the budgetary process to becoming an arm of the legislative process. It would continue to monitor the Commission with the additional power of investiture of the Commission. The Council of the Union would be composed of specialist Ministers for European Affairs in the interests of establishing a permanent Council and introducing stability and consistency in the decision making process.

The Draft Treaty was sent to all national parliaments and member states, not in the hope of ratification but in the interest of stimulating debate on institutional reform in the EC. In his analysis of EC development between 1972 and 1987, Michael Burgess argued strenuously that the ‘federal impulse’ had a remarkable impact on the EC and that

By dint of efficiency, self-interest, the need to democratise the EC and an assortment of other short- and long-term imperatives the member states had been compelled
gradually, and often reluctantly, to take steps which lent increasing credence to the federalist argument. (Burgess 1989: 8)

He assigns to Spinelli and the Draft Treaty a pivotal role in this change and in prompting the drafting of the Single European Act (SEA). Although there can be little doubt about the renewed support for a federal European Union, Burgess tends to overstate the importance of actors and events such as Spinelli and the Draft Treaty. His statement that the SEA grew out of the Draft Treaty because the latter was a ‘basis for agreement between member states’ (Burgess 1989: 13) is a misleading analysis of the relationship between the EP’s proposals for reform and those researched and adopted by the European Council and the Commission. Certainly the Draft Treaty was a contribution to the debate but it cannot be held solely responsible for the member states’ renewed interest in EC reform. As has been noted above, there was general movement within and outside the EC which recognised the need to seriously consider the future of the EC and the type of institutional reform required to meet that future.

The Single European Act

With the resolution of the British budgetary question at the Fontainebleau summit in February 1984, the European Council was in a position to consider the increasing calls from the Commission, business and the EP for the completion of the internal market. As a result of French President Mitterrand’s prompting, two *ad hoc* committees were established to prepare reports on European union. One committee, chaired by the former Italian MEP Pietro Adonnino, considered the impact of the Community on the individual in the areas of education, training and travel. The second committee, chaired by Irish senator and former foreign minister James Dooge, investigated institutional reform. The political significance of the latter was recognised immediately, particularly in the context of renewed interest in the EC and spurred on by the activities of the EP and the
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imminent Iberian enlargement. The Dooge Committee rapidly acquired the nickname of Spaak II, a reference to the committee led by Paul-Henri Spaak which brought about the EEC and Euratom.

The Dooge Committee focused its efforts on the task of completing the internal market by 1990 or 1992 at the latest. The pressures of such a timetable together with an increased awareness of the necessity of institutional reform meant that the Committee studied issues not immediately connected with the internal market. The Committee canvassed options for improving the legislative process, strengthening the role of the EP and Commission, removing the decision making deadlock in the Council of Ministers and restraining the role of Coreper. Extending the formal competencies of the Commission in the areas of competition, research and development, consumer affairs and monetary policy was considered, as was reform to EPC and the introduction of security and defence discussions. The final report of the Committee was presented to the Brussels summit in March 1985 but was deferred to the Milan summit in June. It outlined priority objectives, including a ‘homogenous internal economic area’, restrictions on unanimity in the Council of Ministers, a greater legislative role for the EP and increased executive power for the Commission. The representatives of Britain, Denmark and Greece disagreed with the most important of the Committee’s recommendations, which was to establish an Intergovernmental Conference (IGC) to negotiate a treaty on European union based on the acquis communautaire, the Solemn Declaration on greater foreign policy cooperation, the Dooge Report itself and finally ‘guided by the spirit and method of the [EP’s] Draft Treaty’ (Bull-EC (3) 1985).

The Commission’s enthusiasm for the completion of the internal market had become more marked with the beginning of the new decade. Desmond Dinan has noted the role of Commissioner Étienne Davignon in recruiting the top business leaders in high technology to the cause of the internal
market (Dinan 1994: 11–7). Through a Round Table discussion group and a low-key bureaucratic approach, Davignon emerged from a series of discussions with the European Strategic Program for Research and Development in Information Technology, a research program involving large manufacturers, smaller firms and universities throughout the EC. In supporting this technical collaboration, Davignon and the Commission were effectively demonstrating the limits of current integration and building support within a key constituency for the completion of the internal market. The Commission also lobbied for the single market within the EC by informing the European Council during 1981 of the deplorable state of the common market and urging the Council of Ministers to adopt various proposals which related to the single market and to simplify border formalities, particularly involving customs and taxation. The Commission continued to pursue its strategy of active promotion by submitting proposals to the European Council and, by 1984, submitted a detailed paper on the internal market covering issues such as the abolition of customs barriers and the free movement of people, capital and services.

In these efforts, the Commission had been bolstered by the 1979 Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein (also known as Cassis de Dijon) case in which the Court of Justice struck down a German ban on imports of some alcoholic beverages from other member states because they did not meet German minimum alcohol content requirements. The Court recognised the ability of member states to regulate in the absence of Community regulation but then declared that such national regulation had to comply with the Community demand for free trade:

Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being
necessary in order to satisfy mandatory requirements. (Case 120/78 ECR 649 1979)

In response to this judgement, the Commission developed its policy of mutual recognition whereby

Any product imported from another member state must in principle be admitted...if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter. (OJ, C256, 3/10/80: 2-3)

Instead of the complicated process of harmonisation whereby national technical rules were modified in conformity with a common EC rule, mutual recognition would prevail in most areas. The Commission could restrict its harmonisation policy to those areas which remained lawful under the Court’s judgement: public health, consumer protection, fairness of competition and fiscal supervision. With the Cassis de Dijon judgement the workload of the Commission was lightened enormously and the way was cleared for faster progress in achieving a free trade internal market.

Also presented to the Milan summit was the Commission’s White Paper on the completion of the internal market (COM (85) 210 Final). It was a comprehensive report, the writing of which had involved nearly all of the directorates-general. The White Paper’s most notable feature was the appendix listing almost three hundred Commission proposals requiring decisions by the Council of Ministers before the internal market could be completed. It was compiled by Lord Cockfield who had arranged them, in order of priority, according to a timetable ending on December 31, 1992. It also included the Commission’s approach to mutual recognition and harmonisation, developed in response to the Cassis de Dijon judgement. Its ‘new approach’ sought to create basic Community standards and leaving their precise elaboration to private standards-making bodies. Unwarranted
EC intervention would be avoided and leave standards decision making to the most efficient level, i.e. the manufacturers.

As a precise account of the tasks required to complete the internal market, the Commission’s White Paper had not sought to elaborate the impact of such decisions on other areas of EC activity. This work was undertaken by the Dooge Committee. The European Council thus had before it two reports which combined to give a clear picture of the internal market project. While the White Paper was accepted unanimously and without argument, the report of the Dooge Committee was not as calmly received. Margaret Thatcher favoured informal arrangements as a means of streamlining voting in the Council of Ministers. The Italian Prime Minister Bettino Craxi responded by proposing an IGC to draft a treaty on foreign policy and security cooperation and to revise the Treaty of Rome to improve decision making and extend Community competence. Britain and Denmark resisted on the grounds of national sovereignty, with the support of Greece. Fearful of losing the momentum behind Community reform and with the support of the Commission, Craxi forced a vote under the provisions of Art. 236 which allows an IGC to be called if a majority of member states agree. The only dissenting voices were those of Britain, Denmark and Greece. The vote received majority support and the IGC which eventually produced the Single European Act formally began in Luxembourg on 9 September, 1985.

The SEA was the final result of the Commission and European Council response to Lord Cockfield’s White Paper, the report of the Dooge Committee and the Draft Treaty on European Union. It is not, and was not intended to be, a treaty which would have the effect of establishing a union. Not only did it mark the beginning of a wider, EC approach to the question of union but it also introduced some federal arrangements which were later developed and extended in the TEU and the Treaty of Amsterdam. The implications of the SEA were felt far more strongly by the institutions and
members states than was originally intended: at the time of its ratification, Commission President Jacques Delors and the EP in particular were quite disappointed at its limited scope and there was some doubt as to whether the SEA was capable of reigniting the push for completion of the internal market.

The function of the SEA was a series of amendments to the existing treaties rather than a qualitatively new renegotiation of the EC bargain. It was designed to facilitate the completion of the internal market by 31 December 1992, the goal of the market being ‘an area without internal frontiers in which the freedom of movement of goods, persons, services and capital is ensured’ (Article 13). Qualified majority voting was introduced for the common customs tariff and the freedom of services for third country nationals established in the EC. Informally, majority voting was urged in most matters relation to the SIM in order to complete it by the self-imposed deadline. The SEA also established cooperation in economic and monetary policy to ensure policy convergence and allowed for an IGC ‘insofar as further development in the field of economic and monetary policy necessitates institutional changes’ (Article 20). Expectations of the SEA, once signed and ratified, were limited. Jacques Delors was said to be disappointed with the lack of progress on economic and monetary union; the Danes and British were concerned over the extent of the SEA’s institutional provisions whilst the Italians felt that those provisions were not extensive enough (Dinan 1994, Urwin 1995).

The SEA did introduce new elements into the institutional balance of the EC, though they did not go so far as to address all of the concerns about a democratic deficit. The cooperation procedure and the assent requirements bolstered the role of the EP and strengthened its position to a limited extent vis-à-vis the Council of Ministers and the Commission. The provision concerning environment policy, Article 130r, is also important because it is here that the principle of subsidiarity is first enunciated in an official
Community document, though in limited form. Article 130r simply stated that ‘The Community shall take action relating to the environment to the extent to which the objectives referred to…can be attained better at the Community level than at the level of individual member states.’ Though the subsidiarity principle is in reference to one policy area and only two levels of government (Community and member state, disregarding the local or regional levels), its use indicates an acknowledgement of horizontal division of authority in which the supranational Community acts above and across the national member states. With the SEA, the possibility of a more complex federal system is present, although this was not its purpose.

The cooperation procedure was introduced to increase the efficiency of decision making in the Council of Ministers and, to a lesser extent, increase the powers of the EP. The assent procedure was also introduced, whereby the assent of the EP by an absolute majority became necessary for agreements between the Community and third countries and for the accession of new members. The provisions of the cooperation procedure were set out in Article 7 of the SEA and sought to give the EP some input into the legislative process. In its first reading the EP examined the text and issued an Opinion after which the Council adopted a Common Position. This Common Position was then submitted to the EP which could decide to approve, reject or amend it. The Council’s second reading was a rather complicated affair and depended on the EP’s course of action. Corresponding to the four courses of action open to the EP, the Council could (a) adopt the Common Position as a Community legislative act; (b) adopt the proposal by acting unanimously within 3 months; (c) if EP amendments were added to the final text by the Commission, the Council could approve them by a qualified majority; if not, the Council could only approve those amendments by acting unanimously. All EP amendments not approved by the Commission were forwarded to the Council. If the Council failed to act within 3 months of receiving the re-examined text from the
Commission, the proposal was considered not to have been adopted or (d) the Council could adopt the proposal in accordance with the Common Position.

The SEA formally expanded the number of policy areas in which the EC was active to include discrimination on the basis of nationality, freedom of movement for workers, approximation of laws, mutual recognition, research and development, economic and social cohesion (regional policy), social policy, cooperation in economic and monetary policy, and research and technological development. Environment policy was formally introduced into the treaty. The extension of policy competencies was in reaction to the demands of the SIM project, in that a truly internal market in the freedom of goods, services, capital and people could not be established without reference to a broader policy environment. The approximation of laws, mutual recognition and bans on discrimination on the basis of nationality were necessary to ensure the participation of all member states and their citizens. Redistributive policies such as regional and social policy were recognition of the uneven development of markets within the EC and were put in place to prevent distortion of competition and to aid the development of poorer regions. The extension of competencies expanded EC activity further into traditionally domestic policy making areas and formally acknowledged the role of the regions for the first time. EC competencies were not intended to override national decision making but to complement it and provide a common European framework where policies impinged on the implementation and operation of the SIM.

The SEA also gave legal basis to EPC in Title III ‘Treaty provisions on European Cooperation in the sphere of foreign policy’. Title III did not advance the institutional structure of EPC, nor incorporate it into the institutional structure of the EC; rather it codified current practice and the approaches defined in the Davignon, Copenhagen and London reports and the Solemn Declaration. However, EPC was given a legal basis and the
relationship between EPC and the EC formalised. Paragraph 5 of Title III enunciated this relationship:

The external policies of the European Community and the policies agreed in the European Political Cooperation must be consistent.

The Presidency and the Commission, each within its own sphere of competence, shall have special responsibility for ensuring that such consistency is sought and maintained.

A permanent secretariat for the Presidency was established and the scope of EPC was extended slightly and previous practices were clarified:

2a. The High Contracting Parties undertake to inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through coordination, the convergence of their positions and the implementation of joint action…

6a. The High Contracting Parties consider that closer cooperation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters. They are ready to coordinate their positions more closely on the political and economic aspects of security.

The reference to the implementation of joint action was a progression on the previous focus on common attitudes as a basis for individual member state action. It extended the possibility of a pro-active and possibly interventionist policy on behalf of the Twelve.

The reference to the political and economic aspects of security is generally interpreted as affirming past practice within the EC, though Renaud Dehousse and Joseph Weiler present a different thesis. They refer to the
decision by the Irish Supreme court that Ireland’s constitution required modification in order to accommodate the SEA. From the perspective of the Irish Supreme Court, Title III went beyond supplying a legal basis to EPC to legally binding member states, thereby bringing about a conflict with Ireland’s constitutionally based policy of neutrality:

There does not appear to be any constitutional bar to a non-binding arrangement by the State to consult with other states in the conduct of its foreign policy. It is quite a different matter when, as here, it is proposed that the State be bound by an international treaty which requires the State to act in the sphere of foreign relations in a manner which would be inconsistent with constitutional requirements. (Judgement of the Irish Supreme Court as quoted in Dehousse & Weiler 1991: 131).

Dehousse and Weiler point to this as an example of the transition of EPC from ‘soft’ law to ‘hard’ law; from the norm-binding nature of international law which imposes no legal obligation, to the ‘hard’ law of legal obligation and enforcement. They noted the absence of direct enforcement mechanisms (the Court of Justice was not given jurisdiction over Title III) which complete the definition of hard law, but they also point to the possibilities for the Commission to sue the member states for action taken under EPC that should have been taken within the EC. For these authors, the significance of Title III lies in the formalisation of procedures which provide ‘enhanced stability’, ‘greater acceptability’ and may make decision-making easier and facilitate increased cooperation (Dehousse & Weiler 1991: 131-6).

The extent of change to EPC brought about by the SEA is largely a matter of perception. It is factually true that the only innovation was the establishment of a legal basis. It simply put in a legal form the procedures and machinery that had been adopted over the previous sixteen years. But it
did present, in treaty form, a commitment to joint action and to a consideration of some aspects of security. It created internal and external expectation of further progress in EPC and this tends to create its own pressure. It became a yardstick against which to measure future action. It was a normative expectation of increased policy activity by the Twelve and the effective expression of European political identity.

The SEA’s role as facilitator for the introduction of the SIM meant that the Act itself did not inspire much enthusiasm. Business commentators were not convinced that the SEA could bring about significant change: in a comment in June 1986, The Economist referred to the ‘tiny changes that were agreed upon in Luxembourg last December’ (28 December 1986: 50) while the Financial Times speculated in April 1987 ‘whether [the SEA] will change anything in the real world, other than introduce complex new negotiations between the member states and the Parliament’ (11 April 1987: 2). The SIM project, however, generated a great deal of interest in European business circles. By February 1988, The Economist was declaring that ‘Italian businessmen talk about it, the French have visionary dreams about it, the West Germans plan quietly for it’, referring to the deadline of 31 December 1991 for the completion of the internal market. The momentum behind the SIM was increasing during this time and the Commission began to talk about the process being ‘irreversible’: the point in the legislative programme to implement the SIM beyond which there could be no turning back and the SIM could be nothing other than reality. When the deadline passed, some of the minor pieces of legislation had not been passed, though there was no doubt about the existence of a true common market.

**Federalisation**

For much of this period, member state activity centred on cooperative or coordinating action which was formally outside of the EC even though that activity was a direct result of their association in the EC. The development of the European Council, the EPC mechanism and EMS and ERM were
limited and confederal in their nature. It is important to understand these developments, as they can be interpreted as a step away from the Community method and a reluctance to engage in further substantive integration. In such an interpretation, federalisation, whether a deliberate strategy or an unforeseen consequence, is highly unlikely.

The first question is whether these developments constitute institutionalisation of collective action. The European Council emerged from summit meetings that provided political direction to the EC through high level exchange of views and development of strategies to deal with complex policy problems. To this extent, it formalised the exchange of views and ideas on integration that had previously been a part of the informal exchanges between the previous generation of political leaders. European integration as a *force idée* was strongly supported and reproduced by the first generation of post-war political leaders in the Six and the particular circumstances of post-war reconstruction. The demands of the integration project itself meant regular contact between the leaders and the development of close relationships. Not surprisingly, changes in political leadership and the decline in the saliency of European integration in domestic politics weakened those relationships. Simultaneously, the political problems faced by the EC did not decrease; as the EC increased its functions and membership, formal leadership of the project of Europe integration became necessary.

The emergence of the European Council must be considered the institutionalisation of collective action, since the member states recognized the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe...[it is] essential to ensure progress and overall consistency in the activities of the Communities and in the work on political cooperation (Bull-EC, December 1974, n. 12: 7).
Given the political sensitivity of the matters likely to be considered by the European Council its institutionalisation was limited and closed to the direct influence of the institutions of the EC. The European Council was not incorporated into the structure of the EC at this time and the Commission was only ‘associated’ with the work of the European Council so as to ensure the provision of technical advice and the smooth operation of work programmes. The conduct of the European Council encouraged direct conversation between political leaders, and emphasis was placed on consensus agreements. However, it is crucial to note that divergence of opinion within the European Council on the matter of institutional reform did not prevent the intergovernmental conference which negotiated the SEA. Even minimal institutionalisation of collective action can contribute to the federalisation process if there is recourse to majoritarian voting.

The performance of the European Council and the experience of EPC, ERM and EMS demonstrate that ‘extra-institutionality’ does not itself constitute a denial of collective action. It may represent the initial step in collective action and contribution to the integration process. Extra-institutionality decisively limited the input of EC institutions into the shape and rate of progress of these policies. However, their influence could not be excluded entirely, due to the need for institutional efficiency and the demands of democratic norms and values. Institutional efficiency required the association of the Commission in the European Council and with ERM and EMS; norms of democratic representation led to accountability processes with the EP.

The Commission’s involvement in environment and competition policy are interesting examples of its role in the integration process. With regard to environment policy, it is important to note that the Commission recommended the development of environment policy which was endorsed by the member states. The member states, through the Council of Ministers and the European Council, approved the contours of the policy but it was
the Commission which defined the agenda in this period. The Commission consistently applied a utility maximising position with its legislative proposals, endorsing the involvement of the EP and relying on judicial activism to legitimise its behaviour. The pro-integrative decisions of the Court of Justice could not be guaranteed but the Commission was relying on the Court’s history of enforcing bargains between the member states and the federal sentiment of the founding treaties. This initial period of environment policy established Commission initiative, maximum institutional involvement and a concern with decision-making at appropriate levels of government. The member states evidently shaped policy outcomes: they did not approve all of the Commission’s legislative proposals and the prospect of success or failure may have played a part in the Commission’s strategy for pursuing an environmental policy. Yet even at this stage an enduring and federalising web of inter-institutional relationships was being woven.

Having granted the Commission, through DG-IV, exclusive federal competence in competition policy, the Council delegated its policy and legislative authority in that field. DG-IV and the Court did not simply adhere to a 1960s interpretation of the requirements of competition policy. DG-IV used its competence to develop a competition policy which met the demands of its times, pursuing the goal of market integration and exercising its competence to do so. The Court of Justice maintained its commitment to the integrative spirit of the founding treaties and reinforced the development of federal governance in competition policy.

This phase of the Union’s development is intriguing for the long period of structural stability which ended with a commitment to complete the common market that was outlined in the founding treaties. In this we see the third federalisation hypothesis in action: that it is a mutually constitutive process whereby the emerging institutional environment shapes the actors within that environment. That is, actors will learn by doing.
The 1970s and early 1980s demonstrated integration without formality – the implementation by the institutions of policies agreed in the previous decade and the work of member states to proceed with politically difficult aspects of integration without formal institutionalisation. Yet there was still institutionalisation of collective action which structured the integration process. The work of the Commission and the Court of Justice embedded federal governance mechanisms and federal principles of law. The EP held significantly less autonomy but was able to capitalise on its limited functions to anchor its place in the legislative process and to influence the integration debate in the lead up to the SEA. These developments solidified the institutional structure within which member states worked and required them to work with, or respond to, these soft developments. The isoglucose case was one example where the EP was able to enforce legislative procedures which the member states had trivialised; the Court of Justice constructed a federal legal framework which bound the member states in a manner unforeseen by them.

It is particularly interesting to apply this federalisation hypothesis to the European Council. As was argued earlier in the chapter, the European Council replaced the informal and personal relationships that had developed between the post-war leadership of the Six. In order to underline its political leadership role it was necessary to institutionalise it; in order to limit the policy access of other EC institutions it was established outside the EC’s institutional framework. The collective action of leading the EC required some formal institutionalisation, and even this minimal amount established a normative framework of cooperation and consultation. This, combined with the demands of institutional efficiency outlined above and the weight of democracy norms, led to the closer association of the European Council with the institutions of the EC. By the time of the SEA, this association was confirmed by Treaty reference, though the member states retained
restrictions on institutional access by refusing the option of treaty incorporation.

The period from 1970-1989 is not the most glamorous period in the Union’s development and it may even seem that very little was achieved. What this period did achieve was a solidification of the formal institutional structure and the political relationships between the member states themselves, inter-institutional relationships and, of course, between the institutions and the member states. This period confirmed the conduct of the élite and incremental integration process and the necessity of collective action and formal agreements to secure bargains.
The political changes of the late 1980s and early 1990s redefined ‘Europe’ with dramatic social, political and economic effects. The Union spent much of the 1990s trying to catch up with political developments and to understand its role in a wider Europe. In stark contrast to the previous two decades, the last fifteen years have seen immense change to the Union through increased membership, three rounds of treaty reform and the draft Constitutional Treaty for Europe. The demands for policy development, expansion of its membership and increased institutional capacity taxed the member states and the institutions heavily. It suppressed their ability to renew the European idea so as to reflect contemporary, popular sensibilities. The last five years have seen the member states and the Union struggle to articulate their vision of Europe and to share this with their citizens in response to citizen disillusion with the Union.

During this period, the Union has endeavoured to cope with two trends – the deepening of the Union with the extension of its policy competencies, and the widening of the Union, as its membership expanded from twelve in 1990 to its current membership of 25. This has resulted in the federalisation of the Union to the extent that it is appropriately described and analysed as a supranational federation. In order to adequately assess the nature of the institutional reform undertaken by the Union, this chapter will analyse the three treaties signed during the 1990s (TEU, Amsterdam and Nice) and the Constitutional Treaty for Europe (CTE, 2004 – not yet ratified). It will examine the negotiations for each treaty, its results and the consequences for member states and institutions. In doing so, it will continue to focus on the three federalising hypotheses. Tracing the three treaties demonstrates not only the formal institutional changes brought about in the last fifteen
years but also the changing topics of concern and the emergence of new debates within the Union.

The Treaty on European Union (TEU, 1992) attended to the institutional reform made necessary by the commitment to Economic and Monetary Union (EMU) and the increasing attention paid to political union. It addressed the Union’s internal issues rather than the external issues of the collapse of communism in Eastern Europe and the Soviet Union, the reunification of Germany and the position of the Union in this changed landscape. As such, it perpetuated the internally-focused nature of treaty reform in the Union. The ratification process revealed that such an approach could no longer guarantee success: the citizens of the Union revealed that they were willing to risk the failure of the treaty in order to make their protest known. The perilous nature of the ratification process led directly to a declaration on subsidiarity and marked the beginning of debate on accountability, legitimacy and democracy.

The Treaty of Amsterdam (1997) dealt with the new geopolitical landscape to a limited extent in that it adjusted legislative processes, attempted to clarify competencies and enable the Union to efficiently deal with an increased policy and legislative load. It was intended to deal also with the prospect of enlargement to Eastern and Central Europe. The member states decided to defer the issue of the balance of member state representation within the Union until 2000 when membership was predicted to reach 20. Given the experience of the TEU, the Treaty of Amsterdam was a more cautious affair and managed to survive domestic ratification despite initial rejection by the Irish. The Treaty of Nice was concerned with managing significant enlargement and its impact on member state representation, institutional balance and fiscal redistribution. For this reason, negotiations were long and intense with agreement by the deadline (December 2000) no certainty. The Treaty of Nice was ratified after a continuation of national debates about democracy and citizen input into the Union. Responding to
these concerns, the European Council announced a constitutional convention to prepare the work of the next IGC, opening up the work of the IGC in quite a novel way. The text of that convention was the working document of the 2002 IGC and the Constitutional Treaty for Europe the ultimate outcome. The changed process and the CTE did not meet with universal approval; its ratification process was suspended after the French and Dutch referenda failed.

Analysis of this period reveals the point at which the Union can be formally designated a supranational federation (TEU) and how the institutions and member states have responded to federal governance. Having instituted a supranational federation by the early 1990s, the member states found themselves challenged by citizens’ protests against the Union and ratification crises. The élite-driven federalisation process was being challenged to provide greater and more effective citizen input – to justify the scale of integration and to open the integration process and supranational federal governance to its citizens. The last five years of Union development have seen the Union’s élite actors become more concerned with democratic and open governance in order to protect the integration process and its bargains.

Chapter Seven shifts focus from the informal federalisation of the 1970s and 1980s to the formal federalisation of the 1990s and the new century. It does so not because of a decline in the contribution of the Union institutions to the integration process but because the context of that contribution was altered considerably during this period as a result of numerous treaty revisions. There is significantly less focus on the activities of the Commission, EP and Court of Justice, though their thoughts on integration will not go unheard. However, the actions of the member states in concluding four treaties demands scrutiny for the systemic change to the governance of the Union that was wrought and the shift in public and élite debate about the Union and integration. Informal, institution-sponsored
integration did not cease after 1989. Changes to the policy and legislative processes were adopted where treaty negotiation was not required. The open method of coordination was developed to smooth the operation of EMU and to avoid unnecessary regulation and has developed to mean common guidelines for national policy, combined with periodic monitoring, evaluation and peer review as a mutual learning exercise and exposition of best practice. The Commission produced the lengthy White Paper on Governance that examined its own approach to the development and implementation of Union policies and legislation. The EP continued to develop and promote the further integration and democratisation of the Union. In 1994, it marked the tenth anniversary of its Draft Treaty by issuing an upgraded version that took into account the changes brought about by the SEA and TEU. The EP has matured as legislator with the introduction of the codecision procedure and with its later expansion to more areas of Union policy, and inter-institutional agreements have been concluded that support efficient legislative processes. Union policies were enacted and expanded and there is much material for an examination of the role and impact of institutional actors in that process. However, a priority should be placed on the changing institutional framework in which these developments took place.

**The Treaty on European Union**

The initial response of the EC was to capitalise on the success of the SIM project and, at the Hanover summit in June 1988, the European Council was persuaded to establish a committee chaired by Commission President Jacques Delors and composed of member state central bankers that would examine and propose changes that could result in Economic and Monetary Union (EMU). The committee’s final report, issued in April 1989, proposed a three-stage process with the first stage involving increased coordination of member states’ macroeconomic policies, establishment of free capital movement and membership of EC currencies in the EMS. The European
Council summit in Madrid in the following June accepted the committee’s proposals and agreed that Stage I should begin on 1 June 1990. Furthermore, the European Council decided that an IGC should be convened to determine treaty revisions required for Stages Two and Three. Both the Commission and the EP strongly supported a parallel IGC on political union. The Belgian and Italian governments explicitly supported much of the EP’s resolutions on the IGC and a letter by President Mitterrand and Chancellor Kohl calling for a parallel IGC also increased the pressure. A meeting of the European Council in June 1990 announced that the IGC on political union would be conducted simultaneously with the IGC on EMU. The IGC negotiations took place at a number of levels: Heads of Government and State (European Councils), at ministerial level (monthly meetings of Finance and Foreign Ministers) and with finance and foreign affairs officials (fortnightly meetings of finance ministry and central bank officials for EMU and weekly meetings of Foreign Ministers’ personal representatives). Although the Commission actively participated in both IGCs, it was not in a position to veto any decisions. The EP was consulted but was not formally included in the negotiation process and the member states were under no requirement to adopt proposals put forward by the EP.

One of the more remarkable features of the IGCs on Economic and Monetary Union and European Political Union was the prevalence of federal terms during the course of the negotiations and the adoption of federal structures and processes in the final draft of the TEU. The commitment of the Commission and the EP to the establishment of a federal European Union was clear, as were the pro-federal sentiments of some member states, notably Benelux, Italy and Germany. Equally apparent was the resistance of other member states such as the United Kingdom and Denmark to a supranational and federal regime. Notwithstanding the division of opinion on the matter, it represented the first time since the
Schuman Declaration that a federal vocation for the EC was stated explicitly during the preparatory work and negotiations. The following discussion emphasises the various proposals put forward by the institutions and member states, leading to a detailed analysis of the TEU and its federal nature in this context of disagreement.

The conclusions of the European Council meeting in Rome gave some shape to what was understood by the phrase ‘political union’. Specifically, the European Council requested the IGC to pay ‘particular attention’ to democratic legitimacy, common foreign and security policy, citizenship, extension and strengthening of EC action and the effectiveness and efficiency of the EC. With regard to democratic legitimacy, the Council noted the need to consider the extension and improvement of the cooperation and assent procedures, consolidation of the EP’s rights of petition and inquiry, involvement of the EP in the appointment of the Commission and its President, increased powers on budget control and financial accountability and closer monitoring of the implementation of EC policies. Codecision was described as a ‘further-reaching reform’, while arrangements for the involvement of national parliaments were also mentioned. The European Council also referred to the importance some member states attached to the adoption of arrangements that would take into account the competence of regional and local authorities in some EC policies and then would allow for consultation with such authorities (European Council, (12) 1990: 1).

Any common foreign and security policy which might result from the IGC was set clearly on the intergovernmental basis of EPC:

The European Council welcomes the broad agreement on basic principles concerning the vocation of the Union to deal with aspects of foreign and security policy, on the basis of general objectives laid down in the Treaty. (European Council, (12) 1990: 2–3)
The European Council clearly indicated its preferences for intergovernmental harmonisation of views, the Commission’s non-exclusive right of initiation and the rule of consensus. The security arm of any such policy should consider the ‘gradual extension’ of the Union’s role in those ‘areas debated in international organisations’. European citizenship was also mooted in the conclusions, together with an articulation of rights which ‘might give substance to the concept’. Extension of the EC competencies was also recommended in the areas of economic and social cohesion, environment, health, energy, research and development, infrastructure and culture. The European Council explicitly mentioned the principle of subsidiarity in reference to the extension of EC competencies and the implementation of EC policies and decisions. In order to increase effectiveness and efficiency, the European Council confirmed its role in maintaining the ‘political momentum’ of the EC and recommended the general application of majority voting in the Council of Ministers (European Council, (12) 1990: 2–3).

The Commission’s Communication of 21 August 1990 on economic and monetary union illustrates its view of the inevitability of EMU and its intrinsic links to political union. The Commission argued that

A single currency is the natural complement of a single market. The full potential of the latter will not be achieved without the former. Going further, there is a need for economic and monetary union in part to consolidate the potential gains from completing the internal market… Economic and monetary union therefore offers the prospect of consolidating the single market as well as bringing its own value-added to the performance of the Community. (Bull-EC 1991: 16)

Such developments, it argued, required an institutional structure which ‘meets the two imperatives of efficiency of action and of democratization of
the decision making process’ (1991: 13). There is no doubt that the Commission preferred outcomes from the IGC which confirmed EMU alongside an effective political union with internal legitimacy and external responsibilities.

The Commission defined monetary union as ‘either irrevocably fixed exchange rates or a single currency’ the latter being the preferred option, though both would require a single monetary policy. Economic union would require common economic objectives, and ‘close coordination of economic policies’ (including budgetary policies), but would be less centralised than monetary policy and could therefore be guided by the subsidiarity principle (1991: 16). Political union was defined far less explicitly, with the Commission opting to refer to ‘a single Community with a single institutional structure’. Such a structure should be sensitive to public opinion, the probability of further institutional change to cope with enlargement and it should be aware of

the need for caution, which militates against defining the final shape of European union at this early stage in favour of keeping to the course charted by the Treaty of Rome, leading eventually to a federal-type organization. (1991: 76)

The Commission further supplied draft text and an explanatory memorandum as part of its EMU and EPU proposals.

In its explanation of the EMU draft text, the Commission made clear the necessity of a federal structure for the new monetary institution required by a single currency and monetary policy. This European System of Central Banks (referred to as the Eurofed) would encompass the existing central banks of member states and a central body. The Eurofed would be responsible for internal (i.e. Community) monetary policy and the role of the national central banks would be to implement such policy under the Eurofed’s direction. Consistent with the principle of subsidiarity, the national central banks would be responsible for maintaining relations with
national financial institutions and other nationally based systems. With regard to external monetary policy, the Commission clearly intended an international role for the Eurofed as the EC’s representative. As previously noted, the Commission did not feel that economic union demanded the same centralisation of policy and decision making as monetary union. In this context the Commission observed that:

Even in mature federations economic policy is made up of different functions and is conducted at different levels of government. In such federations, the principle of subsidiarity is an important criterion for assigning functions to the different levels of governments implying that it has not only a theoretical but also a solid empirical foundation …The Community’s involvement in economic decision-making should be based on a balance between subsidiarity and parallelism. (1991:21–2)

In the interests of efficiency, the Commission noted the need for extended EC competence in a range of policy areas and also noted the need to coordinate policy making at different levels to avoid overlap and to ensure effectiveness of the policy concerned. This had obvious implications for balance between the institutions of the EC and for the conduct of relations between the Commission and national bodies.

With reference to EPU, the Commission offered draft text on matters ranging from Union citizenship to the policies of the Union, addressing itself to the issues defined by the Rome European Council. Citizenship of the Union and accompanying guarantees of human rights were recommended primarily to strengthen democratic legitimacy and to supplement and transcend national citizenship. The granting of citizenship, rights and freedoms, the Commission argued, establishes an elementary relationship between the proposed government of the Union and its people. Common external policy as proposed by the Commission would be
extended to cover CFSP and external relations in fields falling under Union responsibility. In the matter of CFSP, it would be one of the functions of the European Council to determine ‘vital common interest’ and extend the Union’s power in this area as the need arises. The Commission contended that this approach would involve the application of the principle of subsidiarity as it would leave member states with full power to act in areas where there is no need for Union intervention. Intergovernmental cooperation on matters of common interest would continue, but would not restrict the foreign policy of member states. In respect of external economic policy, the Union would have exclusive competence over common commercial policy and the external aspects of EMU. In this area the Commission alone would represent the Union, particularly in dealings with international organisations.

The section of text concerned with democratic legitimacy outlines the hierarchy of norms, executive powers and legislative procedure. The Commission proposed formal recognition of European law and recommended that codecision be made the standard legislative procedure. The codecision procedure was intended to improve the communication between all three institutions but with the Council remaining at the centre of the process. The Commission argued for the extension of own resources through the adoption of one or more Community taxes. With regard to the social dimension and the development of human resources, the Commission committed itself to subsidiarity, but the principle is not mentioned elsewhere in EPU, with the exception of common external policy and environmental policy.

The potential for federal processes emerged most strongly in the Commission’s EMU proposals. The organisation of the Eurofed and the requirement to manage complex relationships between EC and national institutions encouraged the use of subsidiarity to define the boundaries of such relationships. The extension of Community competencies into areas
indirectly affected by EMU also prompts consideration of relationships between authorities at all levels of governance. The EPU proposals were, in the main, designed to facilitate the implementation and development of EMU and to maintain a balance between the Council of Ministers, the Commission and the EP. The effects of creating a citizenship of the Union were more abstract than real. There is little doubt that a technical or legal relationship would exist between the EC and its citizens – had already developed – but the proposed EP reforms did not appear to encourage or reinforce the role of the citizens of Europe. In keeping with its own warning on defining political union, the Commission put forward a set of reforms which would not only introduce basic federal elements (comprehensive economic and monetary union) but would allow for the extension and development of those federal elements in other policy areas.

The EP’s Committee on Institutional Affairs authored a series of reports ‘on the Intergovernmental Conference in the context of Parliament’s strategy for European Union’. Its rapporteur, Mr. David Martin, issued three interim reports in the lead up to the IGCs, each containing detailed proposals for Treaty amendment. In the first instance, the EP requested a pre-Conference meeting involving the EP, the Commission and the Council in order prepare the mandate of the IGC and decide upon the nature of the EP’s involvement in the IGC. The EP won the right to be informed of the IGCs’ progress but did not succeed in its request to be able to amend, reject or adopt proposals. Each report maintained a commitment to the following principles (PE A3-0047/90; PE A3-166/90; PE A3-270/90):

- creation of EMU according to a specific, automatic and mandatory time-table;
- integration of EPC into the Community framework with full Commission powers;
- increased Community effectiveness in the social and environmental sectors;
• incorporation into the treaties of provisions promoting a citizens’ Europe, including fundamental rights;
• institutional reform with the adoption of systematic majority voting in the Council, strengthening the Commission’s ability to implement EC legislation and conferring additional powers to the EP (codecision, right to initiate legislative proposals, assent to the appointment of the Commission, the Court of Justice and Court of Auditors, right of inquiry, ratification of decision which also require ratification by member states, ratification of all important international agreements and conventions before the entry into force in the Community);
• reform of the own-resources system; and
• instructing the EP to finalise a draft constitution for Europe in consultation with national parliaments.

The second interim report presented the EP’s proposed amendments to the EC Treaty. It advocated common policies in social affairs and employment, environment, research and technological development, economic and social cohesion, transport and a Community policy in foreign policy. The amendments included European citizenship and the protection of fundamental rights and freedoms. It recommended a co-decision procedure to replace the cooperation procedure, full involvement of the EP in the budgetary process and the EP’s right to initiate legislation. The EP’s amendments would allow the Court of Justice to impose financial sanctions on member states. The EP also recommended the creation of a Committee of the Regions and Municipalities. The third interim report maintained these proposals and clarified what the EP felt to be the essential elements of political union: EMU with a single currency and autonomous central bank; CFSP including arms control; a completed single market; common citizenship; a democratic institutional set up including the EP’s right of initiative, codecision and the right to ratify agreements and conventions and
to elect the President of the Commission. The EP believed ‘that a reform of the Treaties that would achieve these objectives would bring the European Community closer to the European Union of federal type’ (PE A3-270/90: 7).

There were certainly broad areas of agreement between the Commission’s and the EP’s proposals. A number of communications from the governments of France, Germany, Greece, Belgium, and the parliament of Italy supported many of the initiatives contained in the EP’s reports (PE A3-166/90: 5–6). What existed prior to the negotiation of the TEU was general agreement on the need to expand Community competencies in a range of areas in order to cope with the demands of the SIM projects. There was also strong recognition that the institutional structure which had served a membership of six states could not support the present twelve nor the projected membership of twenty or more by the year 2000. Decision making had to be made more efficient or the Community would be incapable of carrying out its responsibilities. The more complex decision making at the Community level became, the greater the pressure to clarify the roles and responsibilities of each institution and the member states.

The preferences and arguments of the Commission and EP were reinforced by the actions of member states that supported a federal structure. What was crucial in the negotiation of the TEU was the agreement of more sceptical member states to federalising governance measures on the basis of efficiency and effectiveness. Rather than the relatively meagre changes made with the SEA, the parallel IGCs were considering the most extensive institutional reform since the Treaties were first drafted. In this situation, what was emerging was a consensus on a federal structure for the Community: not necessarily because this was an ideal ‘good’ to which it had always aspired but because the federal structure offered the strength to complete the goals the Community had set for itself while still affirming the necessity of member states.
Though the TEU offered more direction and more detailed goals (such as EMU), it was similar to the SEA in its approach to European Union. It did not propose or assume that the process of integration was complete, nor did it offer a definitive structure of a European Union. Indeed a timetable was set for treaty revision, and the purpose of the mandated 1996–7 IGC was to consider progress made under the TEU and to propose a future direction. With this working method in mind, the Luxembourg Presidency produced a draft treaty text on political union known as the ‘non-paper’ for its status as a basis for negotiations rather than the preferences of the Luxembourg Presidency. Produced in April 1991, it was based on confidential bilateral negotiations between Luxembourg and other member states and observations on what would be acceptable to member states at that stage of the IGC. At the European Council meeting in June 1991, the non-paper was declared to form the basis of negotiations for the forthcoming Dutch Presidency.

The conduct of negotiations under the Dutch Presidency clearly demonstrated the differences between member states on the matter of European federalism. The Dutch Presidency retained the non-paper and produced its own proposed draft text which was radically different in that it proposed a unitary structure for the Union, applying the supranational method of integration to all policies, including foreign and security policies, and internal affairs. The Luxembourg non-paper suggested little radical change to the overall structure of the EC. It advocated a three pillar structure comprising the EC, Common Foreign and Security Policy and cooperation in Justice and Home Affairs. All three would be encompassed by the entablature of the new ‘European Union’. This proposal did mean the formal incorporation of associated intergovernmental policies in the Treaties and the governance regime of the Union without transforming those policies into supranational policies. Although it proposed this cautious approach the paper also included in its opening Common Provisions the
statement that the Union ‘marks a new stage in a process leading gradually to a Union with a federal goal’ and outlined the Union’s need to act coherently and consistently on the international scene (Agence Europe, no. 1722–3, 5 July 1991). It was this approach which found general support.

The Dutch paper is attributed to Piet Dankert, the junior Foreign Minister at the time, a former President of the EP and a committed federalist. Despite warnings from other member states, particularly the UK, the Dutch insisted that their proposed unitary structure would be the basis for negotiations (The Financial Times: 1991: 1). At the next IGC meeting on 30 September 1991, the Dutch paper was rejected by all member states except Luxembourg. Not even Germany, a consistent supporter of the federal vocation for Europe, felt able to support the Dutch proposals. The final negotiations were based on the Luxembourg non-paper and the TEU bears a remarkable resemblance to it.

The Common Provisions of the TEU established a European Union described as ‘marking a new stage in the process of creating an ever closer Union’. The phrase ‘ever closer’ replaced the term ‘federal’ after last minute objections by the British Prime Minister John Major. Some reservations about the term ‘federal’ were also expressed by Denmark and Greece. The majority of member states had no difficulty with the term, accepting it as an appropriate description of the treaty and the integration process. The concession was made to Major primarily on account of the precarious mood in the UK towards the TEU and the prospect that it might not be ratified by the UK. It was in addition to the opt-out of the Social Charter granted the UK. As had been the case with the Luxembourg Compromise in the 1960s, the federal telos was disconnected from federal techne in order to secure the continued development of the Union.

The purpose of the Union was clearly set out as representing and asserting the interests of the Union on the international scene, particularly through CFSP and possibly through a Common Defence Policy. The Union clearly
asserted its commitment to economic and social cohesion and to the establishment of an economic and monetary union. The European Council is brought into the Union’s institutional structure, charged with providing the Union with ‘the necessary impetus for its development and shall define the general political guidelines thereof’ (Article D). In these paragraphs, the aims and functions of a federation are implied — the representation of a number of states in one, central figure so as to more effectively further their interest and influence. The reluctance of some member states to describe the Union as federal does not negate the fact of its federation.

Article 3b of Title II is significant because it applied the principle of subsidiarity to all policy areas, rather than environmental policy as had been the case previously:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

It must be reiterated here that the inclusion of the principle of subsidiarity was recognition of a federal-type division of powers. It explicitly recognised the horizontal and overlapping competencies of the Union and the member states and provided guidelines for policy action. There has been much debate about the purposes of subsidiarity, whether it is a means of extending Union competence by stealth or is a bulwark against further erosion of member state competence. Whichever way it is interpreted, it is an explicit recognition of the division of competencies between the member states and the Union. Such a guide for the allocation of authority between different levels of government would be unthinkable in a standard international organisation or even a confederation.
Part Two of the TEU created citizenship of the Union, a further recognition of the supranational tier of authority. In conferring rights and responsibilities (Articles 8a–e), this section established a direct political link between the Union and the citizens of the member states, in addition to the legally established relationship wrought by the Court of Justice. Of note is the extension of the right of citizens of the Union who are members of one member state to stand for local government and European elections in another member state (where they are resident) in accordance with the rights of citizens of that member state. The transnationalisation of the political community in this manner is a commendable extension of political rights and delineated a separate political ‘territory’ for the Union from the member states. This development further supports the interpretation of the Union as a federation.

Articles 137–84 deal with institutional reform, covering the Commission, EP and the Council of Ministers. The TEU granted to the EP involvement in the appointment and investiture of the Commission. Nominations for President of the Commission would continue to be made by the member states but in consultation with the EP. After the selection of the Commissioners, the whole body would be approved by the EP on the basis of its program. The areas subject to QMV in the Council were increased. Although the EP did not gain the right of initiation, the introduction of the codecision procedure gave it the right to negotiate directly with the Council and apply a veto on certain types of legislation. There were four new areas where parliamentary assent would be required: the objectives of the Structural Funds (an instrument of fiscal equalisation, refer to pp. 64-5 for discussion), the rights of European citizenship created by the TEU, the harmonisation of electoral systems for European elections, and international agreements such as the free trade zone treaty between the Community and European Free Trade Area countries. The EP was also given an increased role in the implementation of Community legislation and the right to
impose a method common to all states for the election of MEPs. An ombudsman was empowered to investigate complaints against Community institutions, and the EP was granted a small consultative role in EMU and CFSP, a right to approve appointments to the European Central Bank and greater budgetary powers and control over the Commission and other Community institutions. In Title II, the Union increased its competencies by including a common commercial policy, entry and movement of persons in the internal market, common fisheries policy, social policy, a ‘strengthening’ of economic and social cohesion, environment policy, vocational training and youth, culture, public health, consumer protection, trans-European networks, industry, research and technological development, and development cooperation.

The CFSP aimed to go further than simply cooperation, as was the case with EPC, and create a true common policy. Title V, Article A (para. 4) states that

The member states shall support the Union’s external and security policy actively and unfailingly in a spirit of loyalty and mutual solidarity. They shall refrain from any action which is contrary to the interest of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council shall ensure that these principles are complied with.

The Council was established as the executive organ of the CFSP acting under guidelines set by the European Council. The Council could decide by unanimity which matters were to be decided by majority voting. Member states were discouraged from splitting the Council by preventing a unanimous decision when it was clear that a qualified majority in favour of the decision existed. The objectives of the CFSP were to be pursued through systematic cooperation in the conduct of policy and the gradual implementation of joint action in areas in which member states ‘have
important interests in common’ (Article J.1). The Commission was given the right to be informed of the policy developments in the CFSP but played no part in it in those developments. Similar cooperative measures applied for the provisions in the fields of justice and home affairs (JHA). These measures requiring the Commission be informed were simply an acknowledgment that action in the fields of CFSP and JHA were likely to have an impact on policy development and implementation in other areas of the Union. The member states were to regard as matters of common interest asylum policy regarding external borders, immigration policy regarding nationals of third countries, drug addiction, fraud, judicial cooperation in civil and criminal matters, customs and police cooperation. The measures for implementing such cooperation and collaboration were joint action, joint positions and conventions. As with CFSP, the Commission was associated with the work undertaken in JHA but had no part in decision making. Similarly, the Court of Justice had restricted access to JHA, being empowered to review the implementation of conventions agreed to by the member states only if those conventions stipulated judicial review (Art. K.3).

We see in these IGCs and the resulting TEU the willingness of member states to agree to federal governance mechanisms that achieved their policy objectives in an efficient and effective manner – thus the introduction of the codecision procedure and increased use of QMV in order to speed the decision making process. EMU was necessary to complete the earlier objective of the internal market and required the delegation of authority to the Union and a considerable commitment to a single European currency. The CFSP and cooperation in JHA indicated member state acceptance of the need for greater coherency and coordination in these matters so that the Union could present a unified face on international issues of common interest. The development of CFSP was a response to the reflex of coordination developed in EPC and a recognition that third countries and
international organisations were increasingly likely to deal with the Union on certain matters and that this process needed to be institutionally supported. The JHA pillar, which built on earlier and small agreements on cross-border and immigration matters, was significant for its movement into policing.

The ratification of the TEU was marked by extremely high public awareness of the treaty and intense interest in its ramifications. In a spectacular demonstration of popular discontent with the treaty, the Danes rejected the TEU by a narrow margin of 50.7% to 49.3% in June 1992. The result sent shock waves throughout the EC, putting the future of the TEU into doubt and well as calling into question Denmark's position in the EC, given its constitutional ban on resubmitting a failed referendum question. In response to the Danish crisis, French President Mitterrand staked his presidency on a treaty referendum which was not constitutionally required and almost lost when the result was far closer than predicted: 51.05% to 48.95%. The Irish showed none of this equivocation and unsurprisingly, given the enormous amount of EC financial aid poured into Ireland, voted 69% to 31% in favour of the treaty. In the remaining member states referenda were not constitutionally required though debate in some states was still vociferous. The ratification debate in the UK was delayed until July 1993 and demonstrated considerable tensions within the domestic political parties, particularly the Conservatives. German ratification of the treaty was seriously delayed by a Constitutional Court challenge which argued that the TEU infringed the German constitution. The Court rejected the challenge in October 1993, but not without reservations regarding future amendments to the Treaty. The Danish question was resolved through a twin strategy of opt-outs (single currency and possibly the defence aspects of the CFSP) and a change in the language of integration. Subsidiarity and transparency became the new catchwords — so much so that the Birmingham European Council devoted much of its efforts to explaining its understanding of the
terms and committing the Union to putting these understandings into effect. A second Danish referendum, held on 18 May 1993, produced a favourable result with 56.8% voting in favour and 43.2% against.

Opposition to the TEU was not widespread but since the Danish rejection was the first popular vote against the Union by a member state, it assumed great political significance. Parliamentary ratification in the other member states secured comfortable majorities, with opposition confined to Communist parties, some environmental parties and the ethnic minorities of Belgium and the Basques in Spain. Domestic political pressure forced British Prime Minister John Major to defer the parliamentary vote until after the second Danish referendum, even though the concessions granted to the UK during negotiations ensured parliamentary support. Desmond Dinan, in his survey of the period, summed up popular perception of the Union quite neatly when he stated that ‘the Council of Ministers seemed secretive and self-serving, the Commission remote and technocratic, and the Parliament expensive and irrelevant…In most cases, a perusal of the treaty’s unintelligible text merely reinforced popular antipathy toward it’ (Dinan 1994: 185). It was to this mood the member states found themselves responding.

The lasting impact of the TEU ratification process was felt in the commitment to subsidiarity, previously confined to limited policy areas (notably environment) and very vaguely defined. Prior to 1992, subsidiarity was a loosely interpreted term which paid lip service to the appropriate level of decision making within the Union, whether it be at the regional, member state or Union level. The Birmingham Declaration stated that

We reaffirm that decisions must be taken as closely as possible to the citizen. Greater unity can be achieved without excessive centralization. It is for each Member State to decide how its powers should be exercised domestically. The Community can only act where Member States have
given it the power to do so in the treaties. Action at the Community level should happen only when proper and necessary: The Maastricht Treaty provides the right framework and objectives for this. Bringing to life this principle — ‘subsidarity’, or ‘nearness’ — is essential if the Community is to develop with the support of its citizens.

(*Agence Presse Europe*, 18 October 1992)

The Declaration supported the work of the EP and its association with national parliaments and called upon the Commission to consult more widely with the public over its legislative proposals, to simplify legislation and to propose working guidelines for assessing the appropriateness of Union action according to the principle of subsidiarity.

This Declaration was followed by the publication of Council guidelines titled ‘Overall approach to the application by the Council of the subsidiarity principle and Article 3b of the Treaty on European Union’. It very clearly set out the Council’s understanding of Article 3b of the TEU which applied subsidiarity as a principle applicable to the entirety of the Union. The full text of Article 3b reads:

1. The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
2. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore by reason of the scale of effects of the proposed action, be better achieved by the Community.
3. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

According to these guidelines, the first paragraph imposes a ‘strict limit’ on Community action; the second provides a rule to answer the question
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‘should the Community act?’ (applying to areas which do not fall within the Community’s exclusive competence); and the third paragraph provides a rule to answer the question ‘What should be the intensity or nature of the Community’s action?’ (applying to action outside the Community’s exclusive competence). The paragraphs coincide with three legal concepts developed by the case law of the Court of Justice: the principle of the attribution of powers; the principle of subsidiarity in a strict legal sense; and the principle of proportionality. Of course, the Council and the guidelines could not directly instruct the Court in determining its judgement, but it was clearly intended to inform the Court’s assessment of any proceedings brought before it which rely on interpretation of Article 3b.

The guidelines also enunciated the procedures and practices to be followed by other institutions. The Commission was requested to consult more widely, or at least in a more public fashion, and to justify in a recital the relevance of its proposed action. Additionally it was required to submit an Annual Report on the application of the Treaty in this area to the European Council and the EP. As for the Council itself, it undertook to incorporate consideration of the subsidiarity principle in its overall examination. It also incorporated into working group and Coreper reports an assessment of how Article 3b had been applied in the action under consideration, particularly in cases involving the co-decision and cooperation procedures.

The effects of this increased sensitivity to subsidiarity and an obvious pro-member state interpretation of its implementation have not had serious consequences for the legislative programme of the Union. In the wake of Commission requirements to assess legislative proposals for their adherence to the principle of subsidiarity, some proposals were amended and a very few were dropped from the agenda. Figures in a later Council report (refer to the account of the preparation for the 1996–7 IGC given below) show a decline in the number of legislative proposals submitted by the Commission between 1990 and 1994 from 190 to approximately 50. Although the
Council infers that such a decline is attributable to the more conscientious application of the subsidiarity principle, the decline in proposals in the period 1992–4 in which the guidelines for subsidiarity were applied is from approximately 80 to 50 per year. The largest drop in legislative proposals (from 190 to 100) was recorded in the period prior to the subsidiarity debate, 1990–93 (General Report 1995: 20). A more plausible explanation stems from the expected decline in legislative activity as the completion of the SIM project drew near. There has been no other indication that the subsidiarity debate has been used by the member states to stall or reject Union action.

It is clear that from the Council’s point of view, at least, subsidiarity may be a means of preventing further encroachment of the Union into domestic affairs. However, even in their efforts to limit the interpretation of Article 3b, they had to acknowledge the Court’s definitive role in treaty interpretation, and the wording of Article 3b does still allow an expansionist reading. The terms of the debate were conducted within the framework of an informally acknowledged federal system with reference to exclusive competence and the right of the Union to act in areas already defined for it in the treaties. Considering the TEU itself committed the majority of member states to complete economic federation, the development of a CFSP and further action in other policy areas, subsidiarity can be expected to have an informal impact on the manner of action proposed rather than its substance.

The extension of competencies brought about by the TEU and the changes to the legislative procedures definitively mark the Union as a federation from this point. It is helpful at this point to recall the definition of federation provided in Chapter Four:

A *federation* is the concrete expression of a written commitment made by a group of sovereign states who form together to transfer a degree of their sovereignty to a
common body who now represents, internally and externally, the totality of those states. This common body is charged with the implementation and enforcement of the written commitment. The degree of sovereignty transfer is such that the federation establishes a political relationship with the citizens of the states, which sits alongside the citizen’s political relationship with the states.

The totality of the Union now covered foreign and security policy, internal and external trade, and economic and social cohesion. The designation of Union citizenship in the TEU formalised a political and legal relationship that was already well developed. This federation had been achieved through a slow and incremental process; was not even named as a federation by its members; and had limited and indirect approval of its population. Nevertheless, the Union was now in operation, and in effect, a federation.

The Treaty of Amsterdam

The approach taken to the 1996-7 IGC by the member states and the Commission was designed to minimise controversy as far as possible. The lead-up to the beginning of the conference saw unprecedented dissemination of information and opinion to the public. All of this was in reaction to the turbulent ratification process to which the TEU was subject and as a part of the new commitment to transparency developed after the TEU. In accordance with the mandate of the Corfu European Council (June 1994), each institution prepared a report on the functioning of the TEU and the areas it regarded as requiring further amendment in the upcoming IGC. The European Council also established a Reflection Group consisting of the representatives of foreign ministers of the member states and the President of the Commission, with two MEPs taking part in its activities. Its purpose was to prepare for the IGC by examining the TEU and proposing possible changes, institutional changes (whether through treaty amendment or not), and considering the questions of transparency,
the strengthening of the provisions for CFSP and JHA and the progress made towards a citizen’s Europe. The Reflection Group was not established to negotiate in advance of the IGC but to arrive at an assessment of the problems confronting the Union and to present to the IGC an annotated agenda.

The final report of the Reflection Group was presented to the Madrid European Council (December 1995) and demonstrated consensus on the need to prepare the Union for eventual enlargement into Central and Eastern Europe, the Baltic states, Cyprus and Malta. Institutional arrangements would need to be developed that protected the single institutional framework and the acquis communautaire whilst remaining effective and efficient (Bull-EU 12/95: 49). After the difficult ratification process for the TEU, it was also agreed that the European project be made more relevant to its citizens and that the Union’s capacity to take external action be strengthened (Bull-EU 12/95: 47). True to its mandate, the Reflection Group did not offer specific proposals for negotiation but measured the mood of member states and put forward broad options. Its emphasis was on making the Union more relevant to its citizens through a focus on unemployment, the incorporation of human rights into the treaty and the adoption of a process which would allow the participation of national parliaments in the work of the Union. Institutional efficiencies were also important for the Reflection Group and they suggested changes to membership of the Commission to avoid unwieldy and inefficient collegial decision making, the simplification of legislative procedures and some favoured increasing the powers of the EP. The Reflection Group also considered differentiated integration, a phenomenon which grants exemptions to some member states from common action (the UK from the Social Charter, the Danes from the single currency etc). It rejected the notion of Europe à la carte and expressed a large majority view that flexibility should be used as a last resort, that differences in the degree of integration
should only be temporary, that a single institutional framework must be
respected, and that when flexibility is allowed, the *acquis communautaire* must
be preserved and a common position maintained in order to prevent a
retreat from common principles and objectives.

Each of the main institutions prepared their own reviews of the TEU and
their assessment of the need for further reform. The Commission’s *Report on
the operation of the Treaty on European Union* (SEC[95] 731 final) gave a mixed
assessment of the TEU, though it conceded that some problems were
merely those associated with the short run-in period of the treaty before
further amendment was being considered. The Commission regarded the
TEU as having produced some substantial benefits such as the successful
timetable for EMU and the increased democratic functioning of the Union
as a result of the enhanced role for the EP. The requirement that the EP
approve the membership of the Commission had also served to promote
the legitimacy of the Commission (Commission 1995: 60). The Commission
expressed its concerns about the limitations of the CFSP arguing that it
demanded more effective decision making, the development and
representation of a common Union interest for the purposes of policy
making and presenting a coherent force to the outside world, and the
development of ‘concerted practices’. The Commission was disappointed
with the failure of member states to make full use of the provisions in the
TEU and lamented that ‘The loss in terms of impact and identity on the
international scene is considerable and the cost in public opinion far too
high’ (General Report 1995: 61). This can be understood as a particular
reference to the response of the Union to the Balkan wars, where the
international response was led by the United States and NATO rather than
by the Union. Other structural weaknesses the Commission identified were
in the myriad procedures for decision making, the precedent established by
the opt-out for the UK from the Social Charter, and the ‘serious
inadequacies’ of the JHA provisions. Finally, the two major concerns of the


Commission involved the disappointing outcomes of intergovernmental cooperation in CFSP and JHA suggesting that ‘There can be no question of trying to accommodate further enlargements with the present arrangements for their operation’ and doubts over whether the professed intention of the TEU to bring the Union closer to its citizens had actually worked (Report 1995: 61).

The EP forwarded its Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference — Implementation and development of the Union (17/5/95, Resolution A4-0102/95) to the Council, the Commission, members of the Reflection Group and the governments and parliaments of the member states for their consideration. The report was less an account of the functioning of the treaty than a list of the EP’s proposals for future amendment. It advocated a ‘treaty for the citizens of the Union’ by simplifying the text and including provisions concerning citizens’ rights in order to strengthen the rights of Union citizens and to give more meaning to the concept of Union citizenship. With regard to the CFSP it called for the incorporation of other aspects of Union external policy into the CFSP, action by a majority of member states where one or a few dissent, and the granting of the right of initiative to the Commission. In the field of JHA, the EP argued for its inclusion into the Community domain. It also suggested that EMU needed to have a more balanced focus with a greater emphasis on economic and social cohesion among member states. The EP called for a strengthening of the Union’s existing policies and clarification of competencies through the ‘correct’ application of the principle of subsidiarity and recommending the use of Article 235 (covering action not covered by the treaties) as a last resort and with the assent of the EP, not simply after consultation.

The institutional system was understandably a focus of the EP’s resolution with strong calls for a unified system and the abolition of separate pillars for CFSP and JHA. It recognised that ‘in view of the increasing diversity of the
EU, further flexible arrangements may well be required in the future’ (Resolution A4-0102/95: 10) but in agreement with the Reflection Group established by the European Council, stated that such flexibility should not undermine the *acquis communautaire* nor lead to a Europe à la carte, where further integrative measures could be pursued by some and not by others. The EP advocated the direct election of the President of the Commission by the EP and the extension of QMV in the Council. For its own, the EP argued for equal status with the Council in all fields of Union legislative and budgetary competence and that the codecision procedure be simplified and the cooperation procedure abolished.

The *Report of the Council of Ministers on the functioning of the Treaty on European Union* was adopted in April 1995 and was presented as a factual account of the implementation of the TEU only and offered no value judgements or opinions on reform of the TEU (General Report 1995). The report noted difficulties in agreeing on the interpretation of subsidiarity, progress in greater transparency in Council deliberations and decisions and expressed reservations about the appropriateness of full implementation of the TEU’s provisions for visas and immigration. The comments contained in the report largely refer to technical difficulties in implementing provisions of the TEU. Overall the report tended to the view that such problems which had arisen could be resolved either through continued negotiation or through minor amendments to the procedures involved.

The Treaty of Amsterdam did not bring about major structural change to the Union but it did much to clarify its competencies and legislative processes. It was not at an outward looking document in that the member states deferred until 2000 consideration of the structural adjustments that would be required with the expansion of its membership. The changes made with this Treaty refined the operation of the supranational federation that had been formally established with the TEU and reinforced the transfer of domestic policy concerns to the supranational arena. The Treaty was also
concerned with ‘increasing’ the democratic legitimacy of the Union as a whole and its decision making procedures. Thus there are two motivations for the bargain reached at Amsterdam: the need for member states to clarify policy responsibilities, and to make decision making and implementation more efficient (first federalising hypothesis) and the need to confirm the democratic credentials of the Union in order to secure citizen affirmation of the bargain (the emergence of second order concerns, as detailed in the first federalising hypothesis).

The Treaty of Amsterdam contains three sections plus an annexe. The first part contains the substantive amendments (Articles 1-5); the second part deals with treaty simplification (Articles 6-11); the third part contains the general and final provisions of the Treaty (Articles 12-14); and the annexe holds the tables of equivalence for renumbering of the Treaties and thirteen protocols. Three policy areas experienced major reform (freedom, security and justice; citizenship; external policy) while changes to institutional arrangements were also made. The protocols deal with a range of matters and include the convening of an IGC one year prior to membership reaching or exceeding twenty, and the application of the principles of subsidiarity and proportionality in the Union.

In the area of freedom, security and justice, the Treaty extended protection against discrimination to include sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Additional provisions were inserted with regard to equal treatment for men and women, while citizens were granted further protections in the processing and dissemination of personal data. The most significant reform came with the clarification on human rights in the Union with Article 6 now stating that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’. The Court of Justice was granted the power to decide whether the institutions of the Union have failed to respect
fundamental rights. The Treaty reformed cooperation in JHA by establishing an ‘area of freedom, security and justice’ under Title IV and it encompasses the free movement of persons, checks at external border, asylum, immigration and protection for the rights of third country nationals, and judicial cooperation in criminal matters. Whereas these matters had come under the intergovernmental pillar of the Union, this Treaty brought them into the Community pillar and now involves the Commission in legislative proposals and consultation with the EP. The Court of Justice was brought into the policy via the system of national referrals, whereby a national appellate court may refer decisions to the Court of Justice for its ruling on the interpretation of the Title or on the validity and interpretation of acts by the Union based on that Title. The Treaty of Amsterdam elaborated on the citizenship of the Union that had been established by the TEU. It clarified the nature of Union citizenship as tied to national citizenship and a complement to it, not a replacement. This replaces the economic notion of citizenship that had defined the limits of Union citizenship prior to the TEU.

Employment was adopted as a new policy of the Union and a ‘matter of common concern’. It sets out the guidelines for a ‘coordinated strategy’ among member states which includes employment policy guidelines established each year. These guidelines are developed by the European Council on the basis of a joint report by the Commission and the Council and after consultation with the EP, Committee of the Regions, the Economic and Social Committee and the newly established Employment Committee. Social policy (employment, living and working conditions, social protections, social dialogue and combating exclusion) merges the previous legal bases into one (Title IX) and the Union now shares concurrent competence with the member states in the following areas:

- improvement of the working environment to protect workers’ health and safety;
Federal Governance in the European Union

- working conditions;
- information and consultation of workers;
- integration of persons excluded from the labour market; and
- equality between men and women.

The codecision procedure with QMV in the Council applies to these matters. The Council has maintained unanimous voting on matters relating to social security, legal protection of workers, collective representation of workers and employers, employment conditions for third country nationals and financial contribution for the promotion of employment and job creation. Remuneration, the right of association and the right to strike remain exclusive member state competencies. In the field of environment policy codecision replaced the cooperation procedure, though the Council retained unanimous voting in some instances. Codecision was also extended to measures relating to public health. Common commercial policy was extended to cover intellectual property rights and services and the Council may now extend the Union’s powers in trade matters without the need for an IGC. Changes to CFSP and the emergence of European Security and Defence Policy were discussed in Chapter Four.

The Treaty considerably extended the application of the codecision procedure (refer to the division of competencies, Chapter Four) and simplified the procedure by removing the third reading. Not only did this have the effect of shortening the procedure, it now ensures that the Council seeks a compromise with the EP if it wishes to see a proposal adopted. QMV was also extended, though the member states did not reach agreement on the re-weighting of votes and instead deferred this matter for a later IGC. The Commission, specifically the nomination and investiture of the College of Commissioners, was reformed. Previously, the College of Commissioners and its President were selected by the member states acting in accord. The President of the Commission had no formal input into the selection of Commissioners and the EP had no role to play in the process.
The nomination of the President would now be confirmed by the EP and the College selected by ‘common accord’ between the President-elect and the European Council. The Protocol on the principles of subsidiarity and proportionality codified and gave force of law to the previously established guidelines (the Edinburgh guidelines developed after the Birmingham Declaration, 1992). Transparency of decision making was increased, with citizens able to request access to documents including the results and distribution of votes in the Council and any minuted statements made during Council meetings.

Commentators noted with disappointment the failure to reform the Union in preparation for the next enlargement (Palmer 1997; L’Europe en formation 1999). However, they also acknowledged the Maastricht hangover. As John Palmer reported at the end of the Amsterdam summit in July 1997, the IGC ‘revealed a flagging momentum on closer political union and exposed the extent to which EU governments are paralysed by their fear of a widening gap between the political élite and popular opinion’ (Palmer 1997: 16). The decision to defer contentious issues until 2000 may have been proved astute when ratification was completed without difficulty and the Treaty entered into force on 1 May 1999.

The Treaty of Nice

The 2000 IGC was convened to resolve matters surrounding member state and institutional balance within an expanded (from 15 to 25) membership of the Union. These concerns are central to questions of federal governance and the maintenance of federal relationships and will be part of this analysis. The previous two Treaties had confirmed the Union as a federation and the Treaty of Nice demonstrated the implications of that development. The Treaty of Amsterdam had included a ‘Protocol on the institutions in the context of EU enlargement’ which stated that ‘at least one year before the membership of the European Union exceeds twenty, a conference of representative of the governments of the Member States shall be convened
in order to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions’. The Helsinki European Council (December 1999) confirmed the agenda of the IGC as the size and composition of the Commission, the weighting of votes in the Council of the Union (formerly the Council of Ministers), the extension of QMV, and other institutional matters arising. The Feira European Council (June 2000) added enhanced cooperation to the agenda. The IGC opened on 14 February and concluded on 11 December, after all night negotiations in order to reach the deadline. It was signed on 26 February 2001 and came into force on 1 February 2003 with the completion of the ratification process in all of the member states.

Article 48 of the TEU requires that the opinions of the Commission and EP be sought prior to the convening of an IGC. The Commission delivered its Opinion, Adapting the institutions to make a success of enlargement (COM 2000 34) which emphasised the role, operation and composition of the institutions and an effective decision making process. The EP contributed its Report on the European Parliament’s Proposals for the Intergovernmental Conference prepared by the Committee on Constitutional Affairs (A5-0086/200 FINAL, formerly the Committee on Institutional Affairs). This Report included the opinions of all the Parliamentary Committees and its Resolution on the matter called for a significantly expanded agenda for the IGC.

The EP opened its Report with a call for a more democratic and effective Union, declaring that the EP reaffirmed that

The composition, functioning and balance between the institutions of the Union, the European Parliament, the council and the Commission, must reflect its dual legitimacy as a union of peoples and a union of States and that an overall equilibrium must be struck between the small and large States and peoples; considers therefore that the
constitutional principle that the Union of the Peoples is represented by the European Parliament and the Union of the States is represented by the Council, has to be taken account of (A5-0086/200 FINAL: 6).

The recommendations which followed this statement sought to amend the relationship between the EP and the Council so that in effect they might operate as a bicameral legislature. The EP argued that the Council should be divided into a legislative Council and an executive Council; this in turn would be complemented by a Commission as a true co-executive, without limitation on its legislative initiative. This type of structural reform would necessitate the involvement of the EP in every aspect of Union decision-making, whether in the form of codecision or assent. Additionally, the EP recommended discarding unanimous voting in the Council where the codecision procedure applied, and changing the super majority needed in the Council to a simple majority. The Court of Justice would be included in this institutional rebalancing, having the authority to hear cases across all areas of Union decision making.

The relationship between the Commission and the EP came under scrutiny with recommendations that the EP elect the President of the Commission from among the candidates proposed by the Council, EP hearings into Commissioners-designate, and the resignation of individual Commissioners rather than the entire College. The EP further proposed the simplification of the Treaties, including a hierarchy of legal acts and the incorporation into the Treaties of the European Charter of Fundamental Rights. It argued for the gradual diminution of the distinction between the pillars of the Union so that Common Foreign and Security Policy and police and judicial cooperation would come under the institutional and legislative framework of the Union (A5-0086/200 FINAL: 4-18).

The ambitious nature of these proposals reflected the EP’s distance from the negotiations as well as its self-perception as a democratically legitimate
institutions whose responsibility it was to pursue an open, transparent and effective Union. Not surprisingly, the EP chose to emphasize its own role in addressing the democratic deficiencies of the Union and promoted the place of other Union institutions. The reforms suggested by the EP would mean a bicameral federation with a unique co-executive between the Commission and the executive form of the Council. This structure reflects the EP’s concern for ‘dual legitimacy’ of a union of peoples and of states. The European Council would remain; the EP made little comment about its function and nature. Given the nature of other proposed changes, the European Council could be expected to operate in a manner and form similar to formal intergovernmental mechanisms in other federations.

In contrast to the EP’s quite ambitious goals, the Commission advocated a more conservative approach. The Commission’s Opinion emphasized effective and efficient decision-making. Indeed, the Commission recognized and accepted the limits of the Conference as determined by the Member States:

There is a consensus to the effect that the purpose of the Conference is not to alter the functions of and powers of the institutions: the current institutional balance must be maintained. (COM 2000 34: 6)

By ‘institutional balance’ we must infer the balance of the relationship between the institutions of the Union and the Member States and not the balance between the institutions of the Union. The Commission did not seek the expansion of Union competencies; it made no comment on the operation or effectiveness of the Council and limited its comments on the membership of the Commission to a brief discussion of either limiting the number of Commissioners or restructuring the Commission (COM 2000 34: 7-14). The Commission advocated limiting the use of unanimity in the Council to instances where there are ‘serious and lasting reasons for doing so’ and confirming QMV as the general rule. It argues that the link between
QMV and codecision with the EP be firmly established by removing unanimity from Articles 18, 42, 47 and 151 of the Treaty establishing the EC and by abolishing the cooperation procedure, which was the predecessor of the codecision procedure (COM 2000 34:21-26).

Even though the Commission adopted a cautious approach to reform, it demonstrated its awareness of the importance of democratic legitimacy:

The Commission believes that the Conference should undertake general thinking on the democratic legitimacy of the European system, and in particular, on the nature of its executive so it must be assured that the amendments that the Conference approves, respond without ambiguity to a major democratisation of the institutional framework of the Union. (COM 2000 34: 6).

Its proposals centred on its own ability to contribute to the Union’s democratic legitimacy and it supported the extension of the EP’s role in Union decision making. The Commission’s proposals reflected its position as co-executive with the member states: it did not seek to interrupt the balance decided by the member states though it endeavoured to promote the ability of Union institutions and federal procedures to solve the problems of legitimate and efficient rule-making.

In the lead up to the IGC, member states submitted documents to the conference broadly outlining their positions on negotiations and the agenda. The Finnish, Portuguese and French delegations avoided extended comment due to their involvement in either the preparation of the IGC or the conduct of negotiations. Among the remaining member states, opinions varied on whether to extend the agenda beyond the ‘Amsterdam leftovers’ – the size and composition of the Commission, vote weighting in the Council and the extension of QMV. The Greek, Danish and UK governments were prepared to discuss additional issues such as individual responsibility of Commissioners, composition and working methods of the Court of Justice,
ESDP and increased cooperation but only on the condition that the Amsterdam issues were resolved in a timely manner (CONF 4719/00, CONF 4733/00, Cm 4595 2000). The Austrian and Benelux governments argued strongly for expansion of the agenda so as to protect the interests of smaller and medium-sized member states and to avoid further treaty negotiations later in the enlargement process (CONF 4721/00, 4720/00, 4712/00). Austria in particular called for efficient and transparent institutions and stated that it would not countenance the weakening of the current state of integration. This can be interpreted as a reticence to consider differentiated rates of integration that may be suggested under the rubric of ‘flexibility’ or ‘increased cooperation’ (CONF 4712/00). The remaining member states – Sweden, Spain and Italy – supported a limited agenda in the interests of completing the IGC by the December 2000 deadline and in preparation for enlargement.

Joschka Fischer, the German Foreign Minister, made an unofficial contribution to the IGC debate in May 2000. Speaking at the Humboldt University in Berlin, Fischer offered his thoughts on the ‘finality of European integration’ from the position of a ‘staunch European and a German parliamentarian’. Given the scope of the proposed membership of the Union, Fischer was prompted to pose the question, how is the Union to preserve its capacity to act? For Fischer,

‘There is a very simple answer: the transition from a union of states to full parliamentarisation as a European federation, something Robert Schuman demanded fifty years ago. And that means nothing less than a European Parliament and European government which really do exercise legislative and executive power within the federation. This Federation will have to be based on a constitutive treaty’ (Fischer 2000: 6).
Fischer argued for dual representation in the parliament – ‘Europe of the states and Europe of the citizens’ – and suggested options for restructuring the executive. Fischer then pondered whether the existing method of integration, the ‘Monnet method’, was capable of bringing about such a federation. He declared it to be of limited use for the purposes of political integration and the democratisation of the Union. Fischer concluded that only a constituent treaty could effectively establish such a federation, and he did not think this a possibility for some years; indeed, he saw it as the last step in the completion of the integration of Europe (Fischer 2000: 7-10).

There were various responses to Fischer’s speech from civil society (for an excellent collection, refer to Joerges, Mény et al., 2000). One official response came from the French Prime Minister, Lionel Jospin, in May 2001 after the signing of the Treaty of Nice. Jospin directly addressed the question of what may be meant by ‘federation’ in the Union:

Federation - a word which appears simple and appeals by its coherence, but which in fact has a great variety of meanings. For some the term means a European executive branch deriving its legitimacy solely from the European Parliament. That executive branch would have exclusive jurisdiction in matters of diplomacy and defence. In the new entity, today’s States would have the status of the Länder in Germany and States in the United States. France, and indeed other European nations, could not accept that status or that interpretation of ‘federation’. If, on the other hand, ‘federation’ is taken to mean a gradual controlled process of sharing competences or transferring competences to the Union level, then the term refers to the ‘federation of Nation States’, the term coined by Jacques Delors. This is a concept which I fully support. From the legal point of view it may seem ambiguous. But I believe it
is politically sound, because Europe is an original political structure, a unique precipitate of an indissoluble mixture of two different elements: the federalist ideal and the reality of European Nation States (Jospin 2001: 7).

Jospin is arguing against a federation based on a constituent treaty. For Jospin, the purpose of the European federation is not the dual representation of states and citizens as Fischer argued, but rather the representation of states alone. This echoes the consistent French demand for a confederation of European states. Yet what Jospin has described as the ‘gradual controlled process of sharing competences’ is the federalisation process that began with the signing of the Treaty of Paris in 1951. Jospin observes the tension between union and intergovernmentalism and sees resolution in the classification of competencies and increasing the involvement of national parliaments. This is a federal solution – but Jospin draws comfort from it because it does not arise from a popular, constitutive assembly.

Fischer and Jospin represent two forms of the arguments about how to solve the Union’s legitimacy crisis. One sees the eventual democratization though the citizens while the other sees resolution through the agency of the member states. As stark as the differences between them may appear, in reality both accept the gradual and ongoing federalisation of the Union and differ only in how the final step will be affirmed: through the citizens of Europe or through the constituent units of the federation. This is the difference between Madisonian and Althusian federalism – whether the relationship between the citizen and the federal polity must be direct, independent of, and alongside state citizenship, or whether that relationship is mediated through state identity and citizenship.

As extensively discussed in Chapter Four, the Treaty was not intended to restructure the Union and, in that aim, it succeeded. It did little to amend the inter-institutional balance – extensions to the codecision procedure
notwithstanding – but it did refashion the balance of member state representation. It managed to extend the agenda and address the issues of enhanced cooperation, ESDP, the composition and responsibility of the Commission, and the composition and working of the Court of Justice, Court of First Instance, Court of Auditors, the Committee of the Regions and the ESC. The Treaty was accepted by all member states, though in Ireland it required a second referendum as the first had produced a ‘no’ vote of 53.87%. Fifteen months later and after amendments to the financial aid package to Ireland, that result was reversed with a 62.89% ‘yes’ vote.

**The Constitutional Treaty for Europe**

In response to growing citizen concerns about the legitimacy and transparency of Union decisions and the extent of democracy within the Union, the member states issued a Declaration at the Laeken European Council in December 2001 that announced the convening of a ‘convention on the future of Europe’. This convention would precede the next IGC and its final document would be the starting point of that IGC. The Declaration named the two most important matters facing the Union – Europe’s role in the world and the expectations of its citizens. The European Council stated that

> The Union needs to become more democratic, more transparent and more efficient. It also has to resolve three basic challenges: how to bring citizens, and primarily the young, closer to the European design and the European institutions, how to organise politics and the European political arena in an enlarged Union and how to develop the Union into a stabilising factor and a model in the new, multipolar world.
It then nominated four tasks for the Union:

1. A better division and definition of competence in the Union – making the division of competence more transparent between exclusive Union competence, member state competence and shared competence and how the principle of subsidiarity should be applied; whether a reorganisation of competence is necessary; and how to protect exclusive competencies while maintaining the ‘dynamic’ of European integration;

2. Simplification of the Union’s instruments – that is, better definitions of the Union’s various instruments and a possible reduction in their number;

3. More democracy, transparency and efficiency in the Union – the Declaration affirmed the indirect legitimacy of the Union but posed the question of how the democratic legitimacy and transparency of the Commission, Court of Justice and EP could be increased; the role of national parliaments; and the efficiency of decision making and operation of the institutions in a Union in excess of thirty members; and

4. A constitution for European citizens, by which was meant the simplification and reorganisation of the Treaties, the inclusion of a Charter of Fundamental Rights and the possibility (in the long term) of a constitutional text for European citizens.

In conclusion, the Declaration announced the appointment of Valéry Giscard d’Estaing (former French President) as Chairman of the Convention and Giuliano Amato (former Italian Prime Minister) and Jean-Luc Dahaene (former Belgian Prime Minister) as Vice-Chairmen. The Convention itself would be composed of 15 representatives of the Heads of State or Government of each member state, 30 members of national parliaments (two from each member state), 16 MEPs and two Commission
representatives. The accession candidate countries would be fully involved in the proceedings (represented in the same manner as member states), though they would not be able to act to prevent a consensus from emerging. Three representatives from the ESC with three representatives of the European social partners, six representatives from the Committee of the Regions and the European Ombudsman would be invited as observers. The Presidents of the Court of Justice and of the Court of Auditors could be invited to address the Convention. The Convention Praesidium would be composed of the Chair, Vice-Chairs, and nine members drawn from the Convention – the representatives of all the governments holding the council Presidency during the Convention, two national parliament representatives, two MEPs and two Commission representatives. This represented an extraordinary expansion of the people and institutions associated with the work of the IGC, though it must be noted clearly that this was not intended to be a constitutive assembly – its work would form the basis of the IGC’s work and the preferences of the member states would prevail.

The Convention began its work on 1 March 2002 and intended to conclude its work in one year so that it might present its final document to the European Council meeting in June 2003 at Thessaloniki. The Praesidium was permitted to consult Commission officials and experts of its choice on any technical aspects and to establish ad hoc working parties to consider specific issues. The Convention was provided with secretariat support from Coreper with possible additional assistance from the Commission and EP. Importantly, all of the Convention’s discussions and documents would be in the public domain and a forum would be established to allow ‘organisations representing civil society’ to receive regular information and to make structured contributions to the debates of the Convention.

The two previous Treaties had permitted greater public access to the positions of the member states, Commission and the EP, as well as the broad progress of the negotiations. The Convention represented a
significant departure from the previous treaty methods and was clearly intended to allay fears about the lack of democratic legitimacy in the Union. Convention membership was still defined by member state and institutional representation, but the scope of institutional representation and the inclusion of national parliament representatives was a considerable innovation. It is worth detailing the working methods of the Convention in order to appreciate the breadth of its debate and its commitment to providing the European Council with a document representative of the member states, institutions and (indirectly) the citizens of the Union.

The Convention chose to divide its work into three phases of listening, studying and drafting. The listening phase involved extensive contacts with civil society and a trans-European debate. This was facilitated by a website directed towards individual citizens and conferences launching national debates in member states and accession candidate countries. A Youth Convention was held during July 2002 and its proposals submitted to the Praesidium. At the conclusion of this phase, the Praesidium began studying the various proposals. Eleven ad hoc working groups were established to prepare texts on particular subjects:

- the role of the principle of subsidiarity;
- the future of the European Charter of Fundamental Rights;
- the legal personality of the Union;
- the role of national parliaments;
- complementary powers;
- economic governance;
- external action;
- defence;
- the simplification of procedures and instruments;
- the area of freedom, security and justice; and
- social Europe.
The working groups were asked to develop a consensus on these issues and bring to the Convention issues on which consensus could not be reached. It was the intention of the Praesidium to present to the European Council and the IGC a single, final document reached in consensus and without the need for voting. The preliminary structure of the constitutional text was submitted to the Brussels European Council in October 2002 and by February 2003 the Convention had begun drafting articles. The Convention was unable to comply with the June 2003 deadline but by 18 July 2003 the final text, a single document without options, was submitted in Rome to the Italian Presidency.

The draft CTE proposed incorporation of the European Charter of Fundamental rights into the Constitution and a single structure for the Union, abandoning the pillared structure established by the TEU. It referred explicitly to competences and declared that exclusive, shared and supporting competences be defined and their distribution between the Union and the member states clearly and permanently declared. The document also included clauses permitting the voluntary withdrawal of a member states (Title IX, Art. 59) and an acknowledging the central place of representative democracy in the Union (Title VI, Art. 45).

The draft Constitution for Europe proposed extensive institutional changes designed to provide a permanent situation for the recent and proposed enlargements. Seats in the EP would be distributed on degressively proportional bases, the European Council would be formally institutionalised, and the rotating presidency discarded and replaced by an elected President for a term of two and a half years. The Council of Minister would convene as the Legislative Council when adopting legal acts and a Minister for Foreign Affairs would be attached to the Council, replacing the External Affairs Minister and High Representative for the CFSP. The Commission would be reduced in size (15-member College), with a system
of non-voting Commissioners and subject to ‘a fair system of rotation between these groups’.

The Constitutional Convention also reformed the decision making process by recalculating the qualified majority (any combination of member states representing three-fifths of the population) and extending QMV to a further 20 legal bases for internal policies and actions. It proposed that the joint adoption of European laws and framework laws by the EP and the Council become the norm. With regard to Union policies, the Convention proposed improved economic coordination in the Eurozone and that a ‘genuine’ area of freedom, security and justice be created through common policies on asylum, immigration and external border control, the development of Europol and Eurojust actions and the formation of a European Public Prosecutor’s Office. Finally, the CFSP would be strengthened through the gradual implementation of a Common Defence Policy and the creation of a European Armaments Agency (European Commission, July 2006).

The 2003/2004 IGC conducted its negotiations between 4 October 2003 and 18 June 2004. After a particularly intensive effort by the Irish Presidency between January and June 2004, agreement was reached on the Constitutional Treaty for Europe during the European Council meeting on 18 June 2004. It was signed on 29 October 2004 and presented to the member states for ratification. The major points of contention during the IGC concerned the composition of the EP and the Commission, the definition and application of QMV within the Council, and the configuration of the Council.

The smaller member states demanded a higher minimum threshold of seats in the EP, fearing the loss of adequate democratic representation. Informal agreement was reached relatively early in the IGC, but a formal agreement was not reached until the final European Council meeting. This was due to the bargaining relationship between Council voting and EP representation – as had been the case with the negotiation of the Treaty of Nice, smaller
member states were only willing to consider changes to their representation in the EP in relation to their vote weighting in the Council of Ministers. In the end, the European Council agree to raise the minimum threshold of MEPs to five and to increase the total number of MEPs above 736, despite the EP’s preference that its membership not exceed 700.

In view of the increasing workload of the Council Presidency, there was a consensus on the general principle of rotation at the head of the Council of Ministers and of a collective presidency. Arguments centred on the conduct of the system – how many member states would be involved and the duration of such a collective Presidency. A variation of the familiar troika system was adopted whereby three member states would hold the Presidency for eighteen months, each holding the post for a full six months with the other member states acting as vice-presidents. A common programme would ensure the smooth and consistent operation of the Presidency.

The definition and application of QMV in the Council prompted the most disagreement and required delicate negotiations. The decisions of the French Presidency during the Nice European Council regarding vote weighting had significant ramifications for this IGC. Under the Treaty of Nice, Spain and Poland had been given particular advantages in the QMV system which was not in proportion to their population. Both of these member states strongly defended the status quo throughout the negotiations. After many bilateral meetings, the Irish Presidency proposed a double majority based on a threshold of 55% of the member states and 65% of the population. It also mentioned the possibility of including clauses allowing a blocking minority and requests for continuation of negotiations under certain conditions. As for the extension of QMV, the IGC decided to allow a national veto in the Council of Ministers when such an extension was being considered.
The composition of the Commission proved to be even more sensitive than the provisions for QMV. The Convention’s proposal of non-voting Commissioners could not be made acceptable to the member states and the Irish Presidency decided to revert to the Treaty of Nice formulation of one Commissioner per member state, with the reorganisation of the College of Commissioners to ensure the most efficient decision making possible. This proposal received support from the smaller member states who insisted on their representation in the Commission, as did the new member states (acceded in May 2004), who argued that the Commission should reflect the newly enlarged Union. The Commission maintained its insistence on the importance of one Commissioner per member state in order to maintain collegiality. Larger member states argued that equal representation in the College of Commissioners meant the possibility of the largest member states being place in a minority and also indicated the difficulty in managing a College of 27 or more members. Three options were discussed for the date of the changeover to a streamlined Commission: the Convention’s proposal for an entry into force in 2009, a postponement until 2014, or the introduction of a ‘rendezvous’ clause. Additionally, a number of options were proposed for the number of Commissioners in the streamlined Commission: a reduction to 15 or 18 Commissioners or a reduction to two thirds of the number of member states, which would see member states represented in two out of three Commissions. However, the member states were reluctant to commit to a formulation and the decision was deferred.

The CTE has not yet completed the ratification process and so will not come into force on the anticipated date of 1 November 2006. Austria, Belgium, Cyprus, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Slovakia, Slovenia and Spain have all approved the Treaty. In popular referenda, France and the Netherlands rejected the text of the Constitution on 29 May and 1 June respectively. Consequently, the ratification process in the remaining member states – Czech Republic,
Denmark, Ireland, Poland, Portugal, Sweden and the UK – has been postponed or suspended. Finland is expected to ratify the Constitution during the course of its Presidency in 2006. A period of reflection, explanation and discussion is currently underway in all member states, whether or not they have ratified the Constitution. The state of discussions on ratification of the Constitutional Treaty will be examined by the European Council under the Austrian Presidency in the first half of 2006.

In response to the rejection of the Constitution and considerable doubt about its reception in the remaining member states, the Commission released a communication to the institutions of the Union, *The Commission’s contribution to the period of reflection and beyond: Plan-D for democracy, Dialogue and Debate* (COM 494 final, 2005). It is intended to supplement national debates and outlines the activity of Commissioners in participating in those debates and presenting explanations of the Union’s activities. It has a focus on mass and new media, and reaching groups that were not targeted during the referendum campaigns, notably youth and minority groups. The Commission describes Plan-D as a ‘long term plan to reinvigorate a European democracy and help the emergence of a European public sphere.’ It also argues that ‘the current crisis can be overcome only by creating a new consensus on the European projects, anchored in citizens’ expectations’ (COM 494 final 2005: 2-3).

**FEDERALISATION 1990-2005**

The previous chapters marked the initial conditions of the Union (1945-1969) and its first phase of development and growth (1970-1989). The initial phase of the Union is remarkable for the role of European unity as a *force idée* and the motivation it provided to establish the ECSC as the first step in a federal Europe. Ideas and innovation were necessary to establish the limits of what was possible and necessary in order to secure peace, security and post-war economic recovery. Consensus on these matters did not emerge until the 1960s. The next fifteen years perpetuated this consensus and saw
the cautious exploration of political cooperation and the gradual embedding of Community institutions and methods. By the mid 1980s, member states realised that progress in economic integration required institutionalised collective action – to support and enforce the bargain between member states and to maintain equality between them. The SIM bargain built on the previously established EEC bargain and so did not require drastic institutional change. However, the SEA did alter the inter-institutional balance that, together with the informal changes that had taken place in the intervening period, strengthened the role of the institutions in the integration process.

As the member states sought to extend their bargain and enlarge their membership, the institutionalisation of collective action became path dependent on previous decisions and the first order concerns of the member states – enforcement of the bargain, relative equality etc – deepened the formal federalisation of the Union. The increased capacity of the institutions to develop and implement endogenously formed preferences further shaped this federalisation process. By 1992 and the conclusion of the TEU, the newly declared European Union had become a supranational federation. As the federalisation process continued, particularly with the Treaties of Amsterdam and Nice, another factor emerged to shape member state and institutional behaviour – the response of the citizens of the Union.

The European constitutional convention and the draft Constitutional Treaty for Europe attempted to democratise the Union through the constitutionalisation of the Treaties. However well intentioned, the very nature of the convention did not satisfy the citizens of the Union. The constitutional convention sought to cater to competing demands: from the public, who wanted direct involvement in the process of integration and from the member states, who wanted continued control over the form and pace of integration. The public was given unprecedented access to the
delegates in an effort to hear many views, but the public could not directly shape the outcome of the convention. The balance of member state and institutional representation, and the consensus working method of the convention, ensured the IGC received a workable document; it seems to have done little to overcome the disconnection between the Union and its citizens. The suspension of the CTE’s ratification process and the Union’s acknowledgment that further debate and dialogue will be necessary indicates the seriousness of the problem. The role of democracy in a supranational federation has become a matter of public and institutional concern and it demands a response based in federal political thought. It is not possible to develop a full theoretical response here, but this thesis proposes that this issue needs to be framed as a conflict between the community-based Althusian federation that the Union has become, and the citizen-based Madisonian federalism upon which many proposed solutions are premised.

Institutionalisation of collective action has occurred more rapidly during the last fifteen years than at any other point in the Union’s history. The demands for this have been both exogenous and endogenous. The exogenous demands were mainly political, and pressured the Union into adopting more consistent and coherent external policies; towards the collapse of communism, the Balkans conflicts, the first Gulf War and, latterly, an increase in refugee flows and illegal immigration. Thus CFSP and ESDP have emerged as institutionally and financially supported policies of the Union intended to coordinate policy development and implementation. As proposed in the federalising hypothesis, the member states have prioritised bargain implementation and member state representation. In this instance, it has been achieved by removing obstacles in the decision making process that prevented the development of joint actions and common strategies, and by delegating some authority to Union institutions in order to support these policies. CFSP and ESDP do not include sanctions for defection from agreement, but the ‘constructive abstention’ clauses allow
member states to absent themselves from certain decisions or policies without impeding other member states.

The endogenous demands placed on the Union in the last fifteen years have been concerned with institutional efficiency and democratisation. The member states’ desire to complete EMU necessitated political union; the desire to fully implement EMU meant that such political union had to be representative of the member states’ interests as well as efficient in its decision making. The TEU completed the transition from confederation to federation, and from this point, the first federalising hypothesis is permanently linked to the third federalising hypothesis that refers to a mutually constitutive process. That is, ‘in the absence of a self-imposed teleology of political development, the process itself becomes crucial: the institutional structure, inter-institutional relationships, the place of reflection and reaction.’ Consequently, ‘new arrangements for institutional efficiency are more likely to reinforce existing confederal or federal governance mechanisms; that is, the federalisation process may become path dependent.’

Presentation of the development of the Union in this form may imply inevitability about the process, though this is certainly not the intention. Neither the expansion of the Union’s activities or its federal form could be taken for granted prior to the TEU. Had integration stopped at any point before that agreement, then the Union could be appropriately analysed in terms of a confederal international organisation. It would have been unique in certain aspects of its legal system, but this would not have justified its inclusion in a list of federal systems. The SEA marked a turning point by enabling future cooperation that was later confirmed by the TEU. The SEA’s inclusion of the EP in the legislative process, and the step away from unanimity in decision-making, were a significant move away from the norm of intergovernmental, state-to-state bargaining that characterises standard international agreements. The TEU confirmed this transition with its
A Supranational Federation

recognition of European citizenship, EMU and consolidation of Union competencies. With the TEU, it is difficult to consider the Union as anything other than federal, regardless of some member states’ reluctance to use the term. The federation that is the Union continued to evolve in significant measure with the Treaties of Amsterdam and Nice.

The impact of the second federalising hypothesis has not been as evident in this period due to the almost constant treaty negotiations. The short interval between each reform step has limited the opportunities of the commission, EP and the Court of Justice to shape the integration process. Nevertheless, it remains an aspect of the federalisation process. The codecision procedure has increased the influence of the EP to the extent that it is appropriately described as a co-legislator. The Commission has been able to expand its activities and responsibilities as a consequence of member states’ delegation of authority. It seeks consistently to promote its own expertise and pursues maximum utility interpretations of agreed outcomes through its right of legislative initiative. The Commission’s role in the constitutional convention and its sponsorship of the debate about the ‘future of Europe’ are compelling examples of its self-perception as the embodiment of Europe. The Court of Justice saw an increase in its competence to review certain policies of the Union, particularly in the area of visa and asylum policy, and fundamental rights.

The future of the European integration process is in limbo. The result of that integration, the Union, will continue to operate and will do so for some time without jeopardising its acquis or the proper execution of its functions. The Union will not collapse if the current CTE is not ratified. But what the Union will lose is the dynamic of the integration process – a reflexive process that has constructed a web of federal institutions and governance through the interaction of member states and the institutions of the Union. What has been revealed through the experience of the CTE is that the integration process is no longer the provenance of only the member states
and institutions. In an almost furtive way, the citizens of the Union have intervened, and it is only by resolving the place of the citizen in the Union that it will be able to take up the integration process again.
This thesis has argued that there are two ‘faces’ of federalism – techne and telos. In reviewing confederal and federal political thought it noted the presence of federal principles (telos) and federal governance (techne). When it compared the experience of seven modern federations it noted how techne and telos were entwined and given expression in the form most appropriate to the federalising community. When it examined the European Union in the light of federal political thought and in comparison to other federations, it found no bar to the inclusion of the Union. What it did find was unique to the Union – the apparent separation of federal techne and telos. It was this observation that spurred further analysis of the Union’s federalising, integration process.

Rather than creating a federation in a single and definitive act, the member states have created one over time, and not necessarily deliberately. Through institutional innovation, judicial interpretation as well as member states’ preferences, the Union has been granted an increasing area of action. In seeking to perform and enforce those prerogatives the Union instituted federal structures and processes. Given the strength and permanence of the member states, the institutions of the Union could not reasonably expect to displace them as the primary source of legislation, policy and political activity. It had to work with them in the same way the member states found themselves constrained by the enforcement of their agreements and bound to work within a Union political structure. What has been created is a supranational federation. This thesis has proposed a unique analysis of the Union’s political development that has drawn upon federal theory, historical institutionalism and the Althusian model of federation.
The case of the Union places considerable demands on the theories and methods utilised by this thesis. Rather than adopt a Union-specific integration theory or an international relations theory, this thesis has selected federal theory; a theory dominated by consideration of political structures at the national level. Although the federal governance structure of the Union are sufficient reason to apply federal theory, the formation and membership of the Union are unorthodox features. The Union was formed over time without recourse to a popular constitutive act; its members are not sub-national states but nation states themselves. These features required delving into federal theory and political philosophy as it stood prior to the creation of the archetypal modern federation, the United States of America. This thesis consequently argued that Johannes Althusius’ premodern model of federation fitted the Union’s development and operation.

Having resolved the theoretical model of government appropriate to the Union, it was then necessary to choose the method of inquiry most suited to the task of analysing incremental federal development. As a part of the new institutionalist approach, historical institutionalism provided the ability to analyse institutional development, change and stasis over time. This method suited the incremental nature of the Union’s formation, enabled the analysis of institutional agency and analysis of the political space created by the interaction between national political actors and the institutions of the Union.

The first step was to confirm whether or not the Union could be classified as a federation. This was achieved through a comparison of the Union with known federations: Australia, Belgium, Canada, Spain, Switzerland and the United States. This comparison confirmed the validity of the classification as well as highlighting the particularities of the Union. The Union had not been popularly constituted and the participation of sovereign nation states posed theoretical difficulties, although the Union clearly functioned as a federation. Thus, Chapter Two concluded that theorising the Union as a
federation was possible, but required special consideration of sovereignty, democracy and the absence of an agreed federal teleology.

The review of the federal literature conducted in Chapter Three elucidated the principles and structures of confederation and federations and led to a review of the treatment of the Union within federal writing. The first two issues that demanded attention were sovereignty and democracy. The use of sovereignty within the Union needed to be clarified before a federal analysis could go any further. The theory of contemporary federations is dominated by the view that the federated nation-state assumes the sovereignty of the previously independent constituent units. Less common are those interpretations which accept some vestige of subnational autonomy. Carl Friedrich wrote extensively on this matter and argued convincingly that national and subnational sovereignty were not zero-sum games. With Friedrich’s analysis of the federal philosophy of Althusius and this thesis’ analysis of the Althusian concept of sovereignty, it was demonstrated that the retention of significant sovereignty by constituent units was not antithetical to federal government. Thus enabled, the thesis proposed new definitions of confederation and federation that identified federal government without a priori assumptions about the location and use of sovereignty.

This treatment of sovereignty provided an avenue for reconsidering the place of democracy in federation. Being a premodern theory of government, Althusius described a federal government that was collegial rather than democratic. This contrasted significantly with the approach of James Madison and the founding fathers of the federation of the United States of America. Madison drew on John Locke’s theory of government to transform the American confederation into a republican federation, preserving the identity of its constituent states while basing the legitimacy of the federal government in its citizens. The case of the Union presented a clear challenge to this archetypal model of modern federations. As with
sovereignty, however, democracy can be reconsidered and its role on the formation of federations removed without prejudice to the federal form of government. This thesis argued, and later demonstrated, that a new analysis of the Union's development would reveal an elite-driven federalising process which did not consider popular, democratic governance necessary to the project of European union. Democracy, and its practice in the Union, has only come under widespread expert and popular scrutiny in the last fifteen years, after the Union had evolved into a federation. Given the nature of the Union, democratic practices will need to be inserted if the leaders and citizens of the Union so agree. This raises further argument about what type of democracy is appropriate for the Union. This is already a vigorous debate; confirmation of the form of governance within the Union as federal can be the basis for the adoption of creative and innovative democratic practices.

The most significant theoretical consideration that came out of this separation of democracy and federation was identifying the impetus of federalisation. If there was not popular support for a European federation, and not all European leaders favoured federation, how had the Union federalised? In answering this question, this thesis departed from standard interpretations of federalism in the Union. It was not convinced that an ideological commitment to federalism had produced federal governance; there was little evidence to suggest that a strong and persistent commitment to federal ideals had motivated the member states to federalise. The thesis recognised, however, that ideas about federation had informed the origins of the Union. It was dissatisfied with federal explanations of aspects of Union governance that lacked accompanying analysis of how that form of governance came about. It recognised in these analyses that the structure of federal governance may be appealing to member states and to the institutions of the Union, while they disassociated themselves from the idea
Conclusion

of federalism. Current writing on federalism and the Union does not recognise this division and is, perforce, unable to explain it.

In recognising that federal writing on the Union had separated the techne and telos aspects of federalism, this thesis recognised it in the integration process itself. It argued that although federal ideas had been persuasive in the establishment and initial development of the Union, what had most prompted the adoption of federal governance mechanisms were their utility to the member states and the institutions. From this came the three federalising hypotheses:

**Hypothesis I**: The member states will prioritise bargain implementation, sanction for defection from agreement, and the relative equality of member states when institutionalizing collective action.

**Hypothesis II**: The creation of institutions by member states has the effect of creating new actors involved in the integration process.

**Hypothesis III**: Federalisation is a mutually constitutive process.

This federalisation process has resulted in the Union forming a supranational and concurrent federation, wherein two or more levels of government (supranational, national, regional) occupy policy fields. Rather than a coordinate model that emphasises discrete and independent jurisdiction for both levels of government with little or no overlap, concurrency recognises the legitimacy of jurisdictional overlap and the involvement of more than one level of government in policy areas. With a few exceptions, the Union holds concurrent competence with member states over most policy areas. This is simply a consequence of the persistence of member states as political entities: a phenomenon which may at times be lamented by ardent Europeanists but one which can hardly be at
odds with the federal project. The nature of member states as nation-states gives them a far stronger identity and role within the federation than is usual, but this does not imply a weak or inconsequential federal level of government. As member states have negotiated the development of the Union and as the Union has strengthened to have its own independent voice, a concurrent system of federation has emerged which has granted the Union greater authority to make policy and to legislate in areas that were previously the exclusive domain of the member states, while simultaneously accepting the domestic political authority of the member states.

These hypotheses were examined over Chapters Five, Six and Seven, covering the period 1945-2005. The historical institutionalist methodology employed for this analysis made possible the examination of institutional origins, development, change and stasis. It accommodated the idea of a European federation without diminishing the central role of the member states in the integration process. These chapters confirmed the federalising hypotheses through the analysis of formal and informal institutional change and the role of the member states and the institutions of the Union.

What was highlighted by this temporal analysis was the changing behaviour of the member states as integration proceeded. The initial phase of development was remarkable for the strength of the idea of ‘Europe’ in the aftermath of another devastating war and the political division of the continent. Equally remarkable was the consistency of a federal vision for Europe and the tenacity with which the object of unity was pursued. Even as we examined the founding institutions and their initial operation, we saw the idea of federal integration begin to fade as the demands of fostering and managing integration became apparent. By the late 1960s, a working consensus seemed to have emerged about the scope and pace of integration. The next period from 1970-1989 was a period of institutional consolidation and one in which the member states discovered the benefits and constraints of extra-institutional integration. From that point, the Union and its
member states began to acknowledge the demands of a broader constituency affected by the Union – its own citizens and the world beyond its borders – and turned to regular and formal cycles of institutional reform in order to manage those demands. The Union has grown from an internal customs union to a supranational federal polity, and the demands placed upon the Union have grown commensurately. It has not been able to meet all of those demands to the satisfaction of all its constituents.

Since the TEU in 1992, and its formal development into a federal polity, the Union has come under the scrutiny of its citizens more often and, on occasion, has been found wanting. Greater transparency in decision making, the transformation of the EP into a co-legislator, and greater attention to the distribution of competencies does mean that the Union is more democratic and responsive than ever before. But this democratisation has taken place in isolation. The Union and its member states have not developed for themselves or their citizens a common and contemporary vision of Europe. Having reached no decision on the finalité of Europe, there can be no consensus on how to reach it. The construction of the Union, however, provides answers. Incrementally, the member states have created a supranational federation that recalls premodern Althusian federalism in its accumulation of communities. This accumulation – of regions, member states, the Union – offers numerous avenues for the articulation of democratic values. The Union was able to federalise in the absence of strong and consensual support for federalism as telos; but it was able to federalise in the presence of federalism as techne.

If we wish to conduct debate about issues that are fundamental to a polity – sovereignty, democracy, legitimacy, governance – some specificity about the nature of the Union as a polity is not only desirable, it is necessary. Sovereignty and democracy give shape to the polity in which they reside; legitimacy and governance only exist in the form given to them by that polity and the actors within it. The literature of federal governance in the
EU is growing and contains many insights into its operation and structure. The full explanatory power of federal theory will remain untapped and federalism’s contribution to the ongoing debate about democracy in the EU will be limited until a theoretically based account of the EU’s origins, development and structure is developed.

This thesis has sought to demonstrate how such an account may be constructed. Certain difficulties in particular have been addressed: the model appropriate for analysis of the EU; understanding its contested federalisation process; sovereignty; and democracy. The Althusian model has been adopted for the manner in which it constructs its federal relationship that is based on an idea of communal sovereignty. Three federalisation hypotheses have been proposed to explain the EU’s incremental federalisation. Finally, the place and form of democracy in the EU has been analysed as a process separate from federalisation, in recognition of the particular circumstances of the EU’s development.

A broad framework for the further investigation of the EU as a federation has been established. Analysis of its federalisation and current structure has meant that it will be possible to continue research into its internal, federal-state relationships, where the levels of analysis can be expanded to include meaningfully European, national, regional and local governments. It also allows for consideration of the role of democracy in the Union in a manner that is relevant to the Union. In its examination of the current state of the Union, this thesis suggests that it is necessary for the Union to reintegrate the practice of federal government (federalism as *technē*) with the ideas and values of federalism (federalism as *telos*) so that it might develop more suitable and acceptable forms of democracy for its citizens. The virtue of federation in conserving a hard fought peace may seem largely irrelevant now, but the virtue of federation in the resolution of common problems may be the basis for future development.
APPENDIX I: REPRESENTATION OF MEMBER STATES IN THE INSTITUTIONS OF THE EUROPEAN UNION

Commission

While the Union has 25 member states, each member state will have one national on the Commission. When the Union reaches 27 member states with the accession of Romania and Bulgaria, there will be fewer Commissioners than member states and new arrangements will be made based on a rotation system. Refer to Annex I, Protocol on the Enlargement of the European Union, Art. 4, Treaty of Nice.

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Total 25
European Parliament

The number of MEPs per member states is weighted according to population. There is not a direct relationship between population and the number of MEPs (for example, 1 MEP per million head of population) since this would lead to an over-representation of large member states and the under-representation of small member states.

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Total 732
Appendix I: Representation of Member States

The Council of Ministers

The Council consists of one representative of each member state at ministerial level. When qualified majority voting (QMV) occurs, the votes are weighted according to the population of each member state. A qualified majority is reached when a majority of member states vote in favour and the number of votes cast reaches a minimum of 232. Certain types of decisions require a two-thirds majority of member states. Additionally, a member state may request confirmation that the votes cast represent at least 62% of the total population of the Union (the demographic clause).

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**Federal Governance in the European Union**

The Economic and Social Committee and the Committee of the Regions

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*Total: 317*
Appendix I: Representation of Member States

Court of Justice

- Each member state proposes one Judge for appointment;

- Germany, France, Italy, Spain and the United Kingdom each propose an Advocate-General for appointment;

- The other member states take part in a system involving the rotation of three Advocates-General.

The Court of First Instance

Each member state proposes one member for appointment.

Court of Auditors

Each member state proposes one member for appointment.
APPENDIX II: CHRONOLOGY OF MAIN EVENTS 1945-2005

1945

- The end of the Second World War.

1946

- Union of European Federalists established in Paris.

1947

- United Europe Movement established in the United Kingdom.
- The United States announces the Marshall Plan for the recovery of Europe.
- French Council for a United Europe established, later becoming the European Movement.

1948

- The customs union between Belgium, Netherlands and Luxembourg (Benelux) comes into force.
- The Organisation for European Economic Cooperation (OEEC) in Europe is formed to coordinate the Marshall Plan.
- Europe Congress held in The Hague, sponsored by the International Coordination of Movements for the Unification of Europe Committee. The Congress establishes the Council of Europe.

1949

- The North Atlantic Treaty, established the North Atlantic Treaty Organisation, is signed.

1950

- May – Schuman Declaration announcing the intention to create the European Coal and Steel Community (ECSC).
- June – negotiations between France, Germany, Italy and Benelux begin on the ECSC.

1951

- February – first meeting to consider a European Defence Community
- April – the Treaty of Paris establishing the ECSC is signed.

1952

- May – Member states of the ECSC sign the European Defence Community Treaty.

1953

- Paul-Henri Spaak, President of the ad hoc Assembly established for the purpose, delivers to the ECSC a draft treaty establishing a European Political Community to stand alongside the European Defence Community.

1954

- August – The French National Assembly rejects the European Defence Community Treaty. As a consequence, the plans for the Defence and Political Communities fail.
Appendix II: Chronology of Main Events

- October – After modifying the Brussels Treaty, the Western European Union comes into being.
- November – Jean Monnet resigns his position in protest at the failure of the European Defence Community.
- December – The Court of Justice of the ECSC delivers its first ruling.

1955

- June – discussions on further economic integration between the member states begin at Messina, Italy.

1956

- May – Paul-Henri Spaak presents to the member states of the ECSC a draft treaty concerning economic integration and cooperation in atomic energy (also known as the Spaak Report).
- June – the Spaak Report is accepted and negotiations on the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) begin.

1957

- March – The Treaties establishing the EEC and Euratom are signed in Rome (also known as the Treaties of Rome).

1958

- January – The Treaties of Rome enter into force; the member states establish the Committee of Permanent Representatives (Coreper) to prepare the work of the Council of Ministers.
- March – The European Parliamentary Assembly, with Robert Schuman as President, replaces the ECSC Common Assembly.

1960

- The European Social Fund is established.

1961

- February – The Paris Summit proposes the idea of political cooperation between the member states.
- June – The merger of the executives of the Communities is first proposed by the Netherlands but does not proceed at this point. The member states agree to further develop proposals on political cooperation.
- October – the first Fouchet Plan for political cooperation is presented to the member states.

1962

- January – after negotiations on the Fouchet Plan fail due to its intergovernmental schema, the second Fouchet Plan is developed. This, too, is rejected.
- The Council of Ministers passes Regulation 17, giving effect to the competition policy principles outlined in Articles 85 & 86 of the EEC Treaty.

1963

- February – The Court of Justice delivers the Van Gen en Loos ruling, confirming the direct effect of EEC law in member states.

1964

- July – The Court of Justice delivers the Costa v. ENEL ruling confirming the supremacy of EEC law where the EEC holds competence.
• April – The Merger Treaty, effecting the merger of the executives of the ECSC, EEC and Euratom, is signed and will enter into effect in July 1967.
• July – The ‘empty chair crisis’ begins when France withdraws its representative from meetings discussing the Common Agricultural Policy. France withdraws its representatives from meetings of the Council of Ministers and Coreper.

1966
• January – The Luxembourg Compromise, retaining unanimity in the Council of Ministers where ‘issues of major national interest’ are at stake, resolves the empty chair crisis.
• The Court of Justice delivers its Consten and Grundig ruling, confirming Community competence with regard to vertical agreements (Article 85(1)). It determined the context of competition policy to be within the goal of attaining the single market.

1969
• December – A summit meeting of the member states in The Hague confirms their desire to move gradually towards economic and monetary integration and agreement on the principle of enlargement of the Community.

1970
• March – The Werner Report (economic and monetary integration) and Davignon Report (political cooperation) are commissioned by the member states.
• April – The Treaty of Luxembourg is signed, overseeing the gradual introduction of a system of ‘own resources’ for the Community.
• June – Accession negotiations begin with the United Kingdom, Denmark, Ireland and Norway.
• October – The member states accept the Davignon Report and establish the European Political Cooperation mechanism to encourage the harmonisation of views on foreign policy and regular consultation and exchanges of information of foreign policy issues.
• December – The Court of Justice delivers the Internationale Handelsgesellschaft ruling clarifying the supremacy of EC law over national constitutional law.

1971
• March – The member states accept the Werner Plan for the gradual coordination of economic policies, including harmonisation of budgetary policies.

1972
• January – Denmark, Ireland, Norway and the United Kingdom sign the Treaties of Accession to the EC.
• April – the European Monetary System is established.
• May – The Irish referendum on accession is approved.
• September – The Norwegian referendum on accession fails.
• October – the Danish referendum approves accession; the UK ratifies the Treaty of Accession.

1973
• January – Denmark, Ireland and the United Kingdom join the EC.

1974
• Regular summit meetings of the member states are formalised in the European Council.

1975
• March – The Community establishes the European Regional Development Fund.
• June – A UK referendum on continued membership of the Community is passed.
Appendix II: Chronology of Main Events

- December – The European Council announces its decision to allow the direct election of Members of the European Parliament by universal suffrage.

1978

- December – The European Monetary System, based on the European Currency Unit, is established.
- February – The Court of Justice delivers its Cassis de Dijon ruling, establishing the principle of mutual recognition of laws and regulations.
- March – The European Monetary System enters into force.
- May – Greece accedes to the Community.
- June – The first direct elections for the European Parliament are held.

1979

- February – The Court of Justice delivers its isoglucose ruling, confirming the requirement of the Council of Ministers to receive and consider the European Parliament’s Opinions on proposed legislation.
- November – France and Germany present the Genscher-Colombo Plan which is designed to strengthen institutional mechanisms.

1980

- June – The European Council signs a Solemn Declaration on the European Union.

1983

- June – The European Council signs a Solemn Declaration on the European Union.

1984


1985

- January – The first European passports are issued.
- February – Having reformed its political relationship with Denmark, Greenland leaves the Community but remains associated as an overseas territory.
- June – Spain and Portugal sign Treaties of Accession; the Commission submits to the European Council its White Paper on the completion of the internal market; the European Council approves the convening of an Intergovernmental Conference (IGC) to consider institutional reform.
- September – The first IGC meeting is held.
- December – The European Council agrees to the Single European Act to amend the Treaty of Rome and facilitate the completion of the internal market.

1986

- January – Spain and Portugal accede to the Community.
- February – The Single European Act is signed.

1987

- July – The Single European Act comes into force after problems in Ireland delay its ratification.

1988
June – The European Council requests the new President of the Commission, Jacques Delors, to prepare a report on economic and monetary union.

1989

• April – Jacques Delors presents the report of his committee on economic and monetary union.
• November – The Berlin Wall collapses and the German Democratic Republic opens its borders.
• December – The European Council agrees to open an IGC on Economic and Monetary Union (EMU).

1990

• April – The European Council meets and decides on a common approach to German unification.
• June – The European Council agrees to an IGC on Political Union, conducted parallel to the IGC on EMU; the Schengen Agreement eliminating border checks for some people is signed by Benelux, France and Germany. Italy signs in November.
• December – The parallel IGCs are launched.

1991

• December – The IGCs conclude with an agreement on the Treaty on European Union (TEU); Mr Gorbatchev, President of the Soviet Union, resigns.

1992

• February – The Treaty on European Union is signed in Maastricht, Netherlands (also becomes known as the Treaty of Maastricht).
• June – The Danish referendum on the TEU fails.
• October – The European Council issues the Birmingham Declaration on the application of subsidiarity in the Community.
• December – The European Council offers Denmark particular arrangements so that it may hold a second referendum on the TEU.

1993

• January – The Single Internal Market (the aim of the SEA) enters into force.
• May – The second Danish referendum approves the TEU.
• October - An inter-institutional conference is held in Luxembourg. The Council, the Commission and the Parliament adopt a declaration on democracy, transparency and subsidiarity; the TEU enters into force.

1994

• June – The European Council signs Acts of Accession with Austria, Finland, Norway and Sweden. A referendum in Austria approves accession.
• October – The Finnish referendum on accession succeeds.
• November – The Swedish referendum on accession succeeds, though the referendum in Norway fails.

1995

• January – Austria, Finland and Sweden accede to the European Union.
• June – The European Council confirms the transition to a single currency by 1 January 1999.
• December – The European Council nominates March 1996 as the beginning of the next IGC.
Appendix II: Chronology of Main Events

- March – Opening of the IGC to review the TEU.
- December – The European Council reaches agreement on the elements necessary for a single currency.

1997

- June – The European Council reaches agreement on a draft treaty.
- October – The Treaty of Amsterdam is signed.
- December – The European Council agrees on the conditions and processes for the next round of enlargement into Central and Eastern Europe.

1998

- May – The European Council, acting on recommendations from the Commission, decides that eleven countries meet the convergence criteria for the single currency.
- June – The European Central Bank is established.

1999

- January – The single currency, known as the euro, is adopted by the eleven eligible member states and operates alongside national currencies: Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain. These countries are referred to as the ‘Eurozone’.
- March – The Santer College of Commissioners resigns after the report by the Committee of Independent Experts on the allegations regarding fraud, mismanagement and nepotism in the Commission. The European Council declares Mr Romano Prodi (Italy) to be its candidate for the Presidency of the Commission.
- May – The Treaty of Amsterdam enters into force. The European Parliament approves the nomination of Mr Romano Prodi.
- September – After conducting hearings, the European Parliament approves the new College of Commissioners.
- December – The European Council agrees to an IGC revising the treaties to begin in February 2000.

2000

- February – The IGC on institutional reform opens.

2001

- January – Greece becomes the twelfth member of the Eurozone.
- February – The Treaty amending the Treaty on European Union and the Treaties establishing the European Communities is signed. It is commonly known as the Treaty of Nice.
- December – The European Council adopts the Laeken Declaration on the future of the Union and plans a convention to prepare the ground for the forthcoming Intergovernmental Conference. Declarations are adopted on the operational capability of the common European Security and Defence Policy.

2002

- January – The currency changeover takes place, with euro notes and coins replacing national currency.
- October – A second Irish referendum approves the Treaty of Nice.
2003

- February – The Treaty of Nice enters into force.
- March – The Convention on Constitution for Europe begins its work.
- April – The Treaty of Accession between the EU and the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia is signed in Athens.
- July – The Convention presents a draft constitution to the European Council.
- October – The IGC opens in Rome. Its principal task is the drawing-up and adopting of the final version of the EU’s first constitution.
- December – The Italian Presidency fails to secure agreement on the Draft Constitutional Treaty. The work is carried over to the Irish Presidency.

2004

- May – The Treaties of Accession between the Union and the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia come into force.
- October – Following successful negotiations conducted during the Irish Presidency, the Treaty establishing a Constitution for Europe is signed.

2005

- February – Spain holds the first (and successful) referendum on the new Treaty.
- June – The Dutch referendum on the Treaty fails.
- July – The Luxembourg referendum on the Treaty is successful.
Note on acronyms:
ECR – European Court Reports
OJ – Official Journal of the European Communities
OOPEC – Office for Official Publications of the European Community

Treaties and constitutions

(1789) Constitution of the United States of America
(1867) The Constitution Act (Canada)
(1901) The Constitution of Australia
(1951) Treaty establishing the European Coal and Steel Community
(1957) Treaty establishing the European Economic Community
(1978) The Constitution of Spain
(1987) Single European Act
(1992) Treaty on European Union
(1997) Treaty establishing the European Union
(2003) Treaty of Nice

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