

## IS THE SEPARATION OF POWERS EXPORTABLE?

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It was a great honor for both Authors to participate in this Symposium together with Professor Juan Linz.<sup>1</sup> Although Professor Linz favors parliamentary government and we both favor presidential separation of powers systems, we agree on one absolutely crucial point. We think it is a disastrous mistake to combine the French semipresidential constitutional system with a proportional representation electoral regime as some countries have unfortunately done.<sup>2</sup>

We both think American-style presidential separation of powers regimes are exportable and desirable under some carefully controlled circumstances. Like Professor Linz, we would not recommend such a regime for a country polarized into two hostile religious or ethnic camps.<sup>3</sup> We also would not recommend a presidential separation of powers regime for third-world countries suffering from a history of dictatorship or rule by caudillos or strongmen like Russia. But we do recommend a presidential separation of powers regime for federal polities that have multiple cross-cutting cleavages, a recent history of democratic rule, a majoritarian electoral system, strong member states within the federation, and a need for a more assertive

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1. We dedicate this Essay to Professor Linz with enormous gratitude and admiration. Professor Linz was one of the very best teachers Professor Calabresi had at any point during his education, and the course Professor Calabresi took from Professor Linz on the Crisis and Breakdown of Democratic Regimes in 1976 profoundly altered his thinking. Although Professor Linz participated in the Symposium, his remarks do not appear in this Issue of the *Harvard Journal of Law and Public Policy*.

2. See Juan J. Linz, *Presidential or Parliamentary Democracy: Does it Make a Difference*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 34 (Juan J. Linz & Arturo Valenzuela eds., 1994) (discussing problems in Uruguay and Bolivia); see also CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS* 50–60, 78 (2005) (discussing problems in semipresidential Germany during the Weimar Republic).

3. See Linz, *supra* note 2, at 42–44.

federal foreign policymaking apparatus. We want in this Essay to make the perhaps startling argument that the European Union is such a polity and that it needs a presidential separation of powers system like the one in the United States if it is to become a successful federation rather than merely a confederation.<sup>4</sup> In so arguing, we realize of course that there is no chance at all of such a presidential separation of powers system being adopted. Nonetheless, if we can show that it would be a good thing for the people of the European Union to elect a president directly that would surely be relevant to the question of whether it is ever desirable for a presidential separation of powers system to be exported.

The European Union is a confederation of twenty-seven member states with a population of almost five hundred million citizens that generates more gross domestic product than the United States.<sup>5</sup> The EU has an annual budget of 141 billion

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4. Vernon Bogdanor has previously proposed that the entire European Commission be directly elected. See Vernon Bogdanor, *The Future of the European Community: Two Models of Democracy*, 21 *GOV'T & OPPOSITION* 161–76 (1986). Bogdanor's proposal provided few details and did not address questions dealing with appointment and removal powers, length of tenure in office, or mode of election. Simon Hix also proposed a mechanism for electing the EU executive. See SIMON HIX, *WHAT'S WRONG WITH THE EUROPEAN UNION AND HOW TO FIX IT* 160–63 (2008). Hix proposed that each national party should put forth its preference for Commission President, that the respective candidates should lay out their platforms and debate live on TV, and, finally, that the European Parliament should pick the President in an election. Our proposal differs from Bogdanor's and Hix's in that we call for the election of a single President of the European Union by all of the voters of the EU member countries.

5. See EUROPEAN COMM'N, *KEY FACTS AND FIGURES ABOUT EUROPE AND THE EUROPEANS* 6, 9, 46 (2007), available at <http://ec.europa.eu/publications/booklets/euglance/66/en.pdf>. Under the Treaty of Rome, the European Union is structured around three different competencies. See, e.g., KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 53–55 (Robert Bray ed., 2d ed. 2005). First, actions taken under the Community Pillar, which encompasses the European Parliament (EP), the Council of the European Union (Council), the European Commission (Commission), and the European Court of Justice (ECJ), are binding on all member states. As to these actions, the EU acts as a supranational entity. The second and third pillars concern, respectively, the Common Foreign and Security Policy pillar and the Justice and Home Affairs (JHA) pillar. See *id.* at 53. Actions taken by the EU under these two pillars are not binding on the member states, but instead are actions solely taken at the agreement of the member states in the Council. Under these two pillars, the member states operate more like an intergovernmental, instead of a supranational, institution. Actions taken under these two pillars are not enforceable in the European Court of Justice. See *id.* at 54.

Euros and 24,000 employees serving as career civil servants.<sup>6</sup> The EU, in effect, has a bicameral legislature like the United States. There is a Parliament<sup>7</sup> with 785 members<sup>8</sup> chosen by proportional representation from closed party lists in elections where turnout is low.<sup>9</sup> There is also a Council of the European Union<sup>10</sup> with twenty-seven members—one from each state—

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6. For budget figures, see European Comm'n, Financial Programming and Budget, [http://ec.europa.eu/budget/budget\\_detail/next\\_year\\_en.htm](http://ec.europa.eu/budget/budget_detail/next_year_en.htm) (last visited Nov. 6, 2009). For an approximation of the number of persons employed by the EU, see IAN BACHE & STEPHEN GEORGE, *POLITICS IN THE EUROPEAN UNION* 261 (2d ed. 2006).

7. The European Parliament is the only directly elected EU institution. BACHE & GEORGE, *supra* note 6, at 299. National political parties propose candidates on party lists, and the Treaty of Rome calls for seats to be allocated by proportional representation. *Id.* Recently the European Parliament's legislative power has been catching up to its democratic mandate. Under the co-decision procedure, the European Parliament can amend or reject a proposal that the Council passes by a Qualified Majority Vote (QMV). *Id.* at 243; *see also infra* note 10. Although the Council does not pass legislation by QMV in all fields, the number of covered fields is expanding. *See id.* at 242. Further, the Commission President and the twenty-seven commissioners cannot take office without the Parliament's approval, which usually comes after United States Senate-style hearings. *See id.* at 302–03. The Parliament can also censure (remove) the Commission in toto, but it cannot remove individual commissioners or a Commission President.

8. Hervé Bribosia, *The Main Institutional Innovations of the Lisbon Treaty*, in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* 62 (Stefan Griller & Jacques Ziller eds., 2008).

9. LENAERTS & VAN NUFFEL, *supra* note 5, at 401, 401 n.92.

10. The Council of the European Union, referred to in this Essay as the Council, and the European Council are two distinct entities: The former is the official European community institution authorized to pass legislation, whereas the latter is an informal meeting of the heads of state and the ministers of foreign affairs of the member states that takes only nonbinding actions. BACHE & GEORGE, *supra* note 6, at 277–80. The European Council is headed by a President who chairs the biennial meeting. *Id.* at 277. Right now, the presidency for the European Council is filled on a rotating basis, with a new country and president every six months. *See id.* at 278. The Council of the European Union is an ambassadorial body, elected by the members of the European Parliament. *See id.* The Council of the European Union is led ostensibly by the European Council, which is an informal agenda-setting group, comprised of the heads of state or government, that meets at least biannually to set the agenda for the European Community. *Id.* at 277–80. The Council of the European Union, also sometimes called the Council of Ministers, sits in “more than twenty different forms” with cabinet ministers from the member states, depending on the matter being discussed, sitting per their policy area. *Id.* at 277. Concerns about the Council of the European Union being overwhelmed with mundane business have led to a qualified majority vote (QMV) procedure being used with increased frequency. *Id.* at 280. With QMV, each country's vote receives a weight correlated with population size. HIX, *supra* note 4, at 33 tbl.3.1 (detailing the weighted votes allotted to member nations). The Council's information and meetings are prepared by a permanent committee-like staff known as COREPER

that votes by a qualified majority and in which more populous nations cast more votes than less populous ones.<sup>11</sup> The executive power is in the hands of a twenty-seven member European Commission<sup>12</sup>—one member from each nation state—and the Commission is headed by a President who is picked by the Council and Parliament.<sup>13</sup> The Commission is subject to substantial direction and control by the Council, which is the most powerful entity in the EU.<sup>14</sup> Finally, there is a judicial branch headed by the European Court of Justice.<sup>15</sup>

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(Committee of Permanent Representatives). BACHE & GEORGE, *supra* note 6, at 276–77.

11. See HIX, *supra* note 4, at 33 tbl.3.1 (detailing the weighted votes allotted to member nations).

12. The European Commission is comprised of twenty-seven commissioners, one from each EU nation (since 2005), and is led by a Commission President who is elected for a renewable five-year term by the heads of the member governments sitting in the informal European Council. See BACHE & GEORGE, *supra* note 6, at 261–62. The Commission President assigns portfolios, called Directorates-General, which correspond to different cabinet responsibilities (External Relations, Budget, Energy, and so forth), to each commissioner. *Id.* The commissioners monitor the implementation of legislation under their respective portfolios. See *id.* Although the ostensible executive arm of the EU, the Commission also possesses a legislative function, as it alone initiates legislation in the European Union. *Id.* at 264. The Commission, however, does not implement legislation except with respect to legislation dealing with competition policy, mergers, and elements of the European Coal and Steel Community and Euratom Treaties. *Id.* at 247. Instead, the Commission ensures that the member states implement the legislation, with enforcement largely taking the form of bringing actions against member states in the European Court of Justice. *Id.* The Commission's proposed laws take three forms: (1) directives, which are laws that determine a specific policy goal and leave implementation up to the members states that must pass legislation to enact EU laws; (2) regulations, which are laws that do not need to be enacted into the laws of the member nations through national legal instruments but still require compliance; and (3) decisions, which are laws "addressed to particular individual legal actors such as companies or individual states." *Id.* at 246–47.

13. *Id.* at 261–63.

14. Final approval of all legislation, compulsory spending, international agreements, and foreign policy (through the Common Foreign and Security Policy (CFSP)) are all exclusive powers of the Council. LENAERTS & VAN NUFFEL, *supra* note 5, at 410–14.

15. *Id.* at 441–55. The European Court of Justice (ECJ) is comprised of "one judge for each member state"—by "common accord" each national government assembled in the Council of the European Union appoints one judge to a six-year term. *Id.* at 450–52. The ECJ's jurisdiction extends to four areas: disputes between EU institutions, disputes between the EU and the member states, disputes between member states, and disputes brought by private parties involving an EU act. See *id.* at 443–46.

The European Union suffers from a severe democracy deficit because the cumbersome twenty-seven member Council and Commission and their presidents only imperfectly control the 24,000 or so civil servants of the European Union.<sup>16</sup> More important, the people of Europe do not get to vote directly either for the members of the Council or for the President of the Commission, so they rightly feel that they have little say in EU policymaking.<sup>17</sup> This leads to low turnout in elections to the EU Parliament, and the splintering effects of proportional representation and a closed ballot further delegitimize that body.<sup>18</sup> The EU is unable to make its weight felt in foreign policy, and it is almost completely dependent on the United States to provide for its national defense.<sup>19</sup> In short, the governance structure of the EU is a mess. It is suitable for the governance of a confederation but not for the federation that many hope Europe will become.

The EU needs a democratically elected President chosen for a four-year term by a 51% majority of Europeans with only one re-election allowed. The two-stage election should include a primary followed at least two months later by a majoritarian runoff between the top two candidates in the primary election. The President of the EU should be the chief executive officer of the federation with the power to fire all policymaking person-

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16. See SIMON HIX, ABDUL G. NOURY & GÉRARD ROLAND, *DEMOCRATIC POLITICS IN THE EUROPEAN PARLIAMENT* 26–29 (2007).

17. European voters are inadequately informed about EP elections due to a lack of continental media outlets (in the same vein as CNN or MSNBC) dedicated to European issues and politics. National issues, we conjecture, are simply more salient. Additionally, voters do not think that the EP elections are consequential and worth participating in because of the EP's limited influence on the European agenda, among other reasons. See *id.*

18. See *id.* at 27–29.

19. The second pillar of the European Union is largely a forum in which the foreign policy ministers from the member states can take positions on issues where they share similar interests. See LENAERTS & VAN NUFFEL, *supra* note 5, at 261. The Treaty requires members to avoid acting in contravention of an adopted stance, but the member countries are not bound to implement any agreed upon legislation emanating from the Common Foreign Security Policy (CFSP) pillar. See *generally id.* at 53–54 (highlighting the relative autonomy of the member states in this arena by noting that the European Court of Justice lacks jurisdiction over disputes falling beneath the CFSP penumbra). The recent reforms proposed in the European Draft Constitution and the pending Lisbon Treaty attempt to solidify the direction of the CFSP under one person, similar to the U.S. President's explicit and implied authority in the realm of foreign affairs.

nel. The President ought not to have any decree lawmaking power, power to declare states of emergency, or power to call for new legislative elections. The President should appoint EU cabinet officers subject to the advice and consent of the twenty-seven member Council,<sup>20</sup> which ought to have the staff and the power to hold oversight hearings. Parliament should be reduced in size by one half—to no more than three hundred members—with representation based on population. Members of Parliament should be elected, not through party list proportional representation as they are now, but by the majoritarian two-stage electoral system currently used by the French Fifth Republic to pick its Assembly. Lawmaking should require the concurrence of both Parliament and the Council, but the President ought to have a veto which can be overridden by a two-thirds vote of both the Council and the Parliament.

Consider ten reasons why the emerging constitutional order in the EU ought to be an American presidential separation of powers regime rather than a German or Italian-style parliamentary system like the one towards which the EU is currently moving.<sup>21</sup>

First, a presidential separation of powers system with separate elections for President, for the Council, and for Parliament would do a better job of sampling European public opinion

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20. A democratically elected Council is not discussed as a possible option here because we believe such a reform is impracticable or, even if it is possible, unnecessary. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 680–83 (2000) (suggesting that the European Parliament may be “less legitimate than are the ministers [on the Council] who derive their authority from their respective national electorates”). Hix, Noury, and Roland, however, offer a notable counterargument. See HIX, NOURY, & ROLAND, *supra* note 16, at 26–29.

21. Although the European Parliament’s ability to censure the Commission by a double majority vote (absolute majority of parliamentary members and a majority of the votes cast) may reek of parliamentarism, it differs from the Westminster style of parliamentarism because the European Parliament’s fragmented party structure makes it difficult for the Parliament to amass the double majority required for a censure motion unless the Commission’s acts were worthy of universal reproach. See FRANK DECKER & JARED SONNICKSEN, *THE DIRECT ELECTION OF THE COMMISSION PRESIDENT: A PRESIDENTIAL APPROACH TO DEMOCRATISING THE EUROPEAN UNION* 16 (2009), available at [http://www.zei.de/download/zei\\_dp/dp\\_c192\\_Decker\\_Sonnicksen.pdf](http://www.zei.de/download/zei_dp/dp_c192_Decker_Sonnicksen.pdf) (articulating the procedural hurdles that must be surmounted in order to censure the Commission). Mere policy disagreements will not lead to removal of the Commission. See *id.* A majority in the European Parliament will not likely have a coherent platform due to parties being based on territorial cleavages. See SIMON HIX, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 133–38 (1999).

than would one all-or-nothing election for a German or Italian-style Parliament held every five years. Europeans would be forced to make a choice as a federation for President, as nation-states for the Council, and as localities for the geographical districts in Parliament. Choices for three offices picked over a rolling cycle would do a better job of sampling European public opinion than would one election with one choice every five years. This is the case for the same reason a tracking poll in an election works better than a monthly or weekly poll.<sup>22</sup> More elections, more often, in more units, offer more democratic and popular control.

Second, the EU needs a lot more energy and stability in its executive governance structure than it currently has. One cannot have 24,000 civil servants running around doing things while controlled by the President of a twenty-seven member commission or council and not have a lack of energy and stability. A popularly elected President with a fixed term of office would offer energy and stability that no parliamentary government chosen with proportional representation can provide.<sup>23</sup> The experience of Italy, Japan, and Israel today—and of France under the Third and Fourth Republics—shows why a regime d’assemblee type of weak, revolving door cabinet delegitimizes democracy. Such systems simply fail to provide for energy and stability in the executive.<sup>24</sup>

Third, the EU needs a democratically elected chief executive because having the member countries pick the executive causes people to feel divorced from the EU. The current EU leadership lacks a direct popular democratic mandate. It suffers from a democracy deficit because it is picked by political leaders in today’s equivalent of a smoke filled room when the President ought to be picked by the people. This system weakens and

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22. See Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 58–59 (2001).

23. See *id.* at 59–66 (arguing that parliamentary regimes like those of the third and fourth French Republics and of Weimar Germany are unstable because multiparty systems lead to weak and unstable coalition governments); see also SKACH, *supra* note 2, at 50–60 (discussing in detail the defects in the Weimar Republic’s “semi-presidential government”).

24. See THE FEDERALIST NO. 72 (Alexander Hamilton) (discussing the importance of maintaining a stable executive because of the numerous duties given to that branch).

delegitimizes the EU. The holding of a Europe-wide presidential election would electrify European public opinion and enthusiasm in a way that elections for the European Parliament have not done. European wide presidential election campaigns would lead to the assembling of transnational electoral coalitions and would cause more people to think of themselves as Europeans first and as Italians or Englishmen second. Today's elections for the weak, proportionally representative European Parliament are usually just a referendum on the popularity of the various nation-state governments.<sup>25</sup> Direct election of a President of Europe by all the people of the European Union, however, would totally transform the EU regime.

Fourth, the European Union needs a democratically elected chief executive because having such an executive would make it possible to rein in and control the Brussels bureaucracy. There is a severe democracy deficit in the current EU institutions, and over the long term a popularly elected president is more likely to be able to correct this than an Italian-style prime minister dependent on a fragile multi-party coalition in Parliament to stay in power. European presidents should be able to appoint cabinet members subject to confirmation by the Council, and they should construct an administration of political appointees as U.S. presidents do. This would enhance democratic control over the bureaucracy, make interest group capture of cabinet departments harder, and foster a sense of European citizenship.<sup>26</sup>

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25. See HIX, *supra* note 4, at 70 ("European Parliament elections are also not really about EU office holders or EU policy issues, because national parties and the national media treat these elections as mid-term contests in the national electoral cycle."); see also *id.* at 78–84. Hix goes so far as to call elections to the EU parliament "second-order elections." Simon Hix, *Elections, Parties and Institutional Design: A Comparative Perspective on European Union Democracy*, W. EUR. POL., July 1998, at 19, 34 (1998).

26. Through the Comitology procedure, the EU has attempted to prevent interest group capture and other agency problems associated with the Commission. See generally HIX, *supra* note 21, at 41–45 (outlining how the Comitology procedure operates); LENAERTS & VAN NUFFEL, *supra* note 5, at 614–17 (dissecting the various Comitology procedures). Under the Comitology procedure, three Council committees (advisory, management, and regulatory) exercise oversight of the Commission's proposed legislation. HIX, *supra* note 21, at 43. The three committees decide which proposals will ultimately be submitted to the full Council for a vote. See *id.* at 42–44.

A fifth advantage to democratic election of the EU president paired with a French-style majoritarian electoral district system for the EU Parliament is that it would give Europe a moderate two-party system with one moderately left-of-center party and one moderately right-of-center party. Majoritarian electoral regimes of this kind would empower the center against both extremes and would shove to the sidelines fringe elements like those represented by Jean-Marie LePen and Jorg Haider.<sup>27</sup> Successful democracy requires mainstream parties on both the left and on the right that are loyal to the regime and that can alternate in power. Presidentialism and majoritarian electoral regimes will produce two such parties and proportional representation will not.<sup>28</sup>

A sixth advantage to democratic election of the EU President is that to win fifty-one percent of the vote in twenty-seven countries such a candidate would have to eschew ideology in favor of a politics that would place a premium on assembling Europe-wide fifty-one percent electoral coalitions. Elections would occur arbitrarily every four years without regard to what was happening in the political world, which would also make those elections less ideological. If ideological, factional politics is dangerous,<sup>29</sup> then one ought to favor separation of powers presidentialism and two-party systems because they deemphasize ideology. The election would not be a winner-take-all event because so much power would still be vested in the twenty-seven member nation-states, in the Council, in Parliament, and in the European Court of Justice.

A seventh advantage of a presidential separation of powers system for the EU is that it would strengthen the position of the European Court of Justice, which should be explicitly empow-

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27. See generally RICHARD WOLIN, *THE SEDUCTION OF UNREASON: THE INTELLECTUAL ROMANCE WITH FASCISM FROM NIETZSCHE TO POSTMODERNISM* 256–77 (2004) (discussing the revival of the far-right parties in domestic European elections).

28. See Arend Lijphart, *Presidentialism and Majoritarian Democracy: Theoretical Observations*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 97–99 (Juan J. Linz & Arturo Valenzuela eds., 1994) (positing that the high stakes involved in presidential elections provide incentives to parties to form wide coalitions that can capture a plurality or majority, unlike proportional representation systems, where multiple parties are encouraged because even small factions will win a seat in the Parliament and could possibly reap huge political rewards, such as a cabinet position, for maintaining a ruling coalition's majority).

29. See *THE FEDERALIST NO. 10* (James Madison) (discussing the dangers of factionalized politics).

ered to play umpire between the Council, the Parliament, the independently elected President and the twenty-seven member states.<sup>30</sup> Such a role would further augment EU judicial power. Judicial power grows when a court is empowered to police federalism and separation of powers boundary lines as a constitutional umpire, as happened historically in both the United States and in the French Fifth Republic.<sup>31</sup>

An eighth advantage of a presidential, separation of powers system for the EU is that it would allow for a fully bicameral legislature with two coequal houses, which Europe desperately needs. Europe in effect has a bicameral structure today with the European Parliament and the twenty-seven member Council.<sup>32</sup> But, it is the Council which makes most of the decisions and which for the most part controls the executive structures. So long as the Council plays this role, the EU will always be first and foremost a weak confederation of nation states. Giving the European Parliament control over the European Commission, its President, and the other executive structures<sup>33</sup> would not adequately respect the federal nature of the EU as a union of twenty-seven semi-sovereign nation-states.<sup>34</sup> Bicameralism is

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30. Cf. Martin Shapiro, *The US Supreme Court and the European Court of Justice Compared*, in *COMPARATIVE FEDERALISM: THE EUROPEAN UNION AND UNITED STATES IN COMPARATIVE PERSPECTIVE* 212–13 (Anand Menon & Martin Schain eds., 2006) (“[C]onstitutional judicial review will be an obvious but not absolutely necessary feature of constitutional separation of powers regimes.”).

31. See Calabresi, *supra* note 22, at 85–86.

32. See HIX, *supra* note 4, at 32–33 (noting the bicameral nature of the European Union in his analysis of the shift in the EU from a consensual to a majoritarian form of government due to three reforms in the last two decades: “(1) the extension of qualified-majority voting in the Council; (2) the increases in the legislative powers of the European Parliament; and (3) the changes to the way the European Commission is chosen”).

33. See LENAERTS & VAN NUFFEL, *supra* note 5, at 584–92 (noting that the Single European Act, the Maastricht Treaty, and the Amsterdam Treaty augmented the powers of the European Parliament through several procedures: co-decision, cooperation, and assent). These treaties collectively worked to extend QMV voting to major policy areas while also extending the co-decision procedure to most areas with required QMV voting. See HIX, *supra* note 4, at 34–37. Co-decision requires acquiring the approval of both the Council and the Parliament before an act is passed. See LENAERTS & VAN NUFFEL, *supra* note 5, at 595 fig.4.

34. The term federalism defines a vertical division of power that brings political subdivisions into the decision-making process of a central authority, unlike the situation that exists in a unitary state where political subdivisions have little to no control over the policy decisions of the central authority. See Vivien Schmidt, *Federalism and State Governance in the European Union and the United States: An Institutional Perspective*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERN-*

thus essential for the EU, and bicameralism points the way toward presidentialism. One cannot have true coequal bicameralism and have a parliamentary executive. Either one house or the other has to pick the prime minister and whichever house is so empowered will always emerge on top. Presidentialism is essential for bicameralism and bicameralism is essential to the future of the EU and to federalism more generally.

A ninth advantage of a presidential separation of powers system for the EU is that presidents are uniquely strong figures in foreign policy and in warmaking.<sup>35</sup> It is thus not an accident that the United States has been referred to as the “great arsenal of . . . democracy.”<sup>36</sup> It is also not an accident that after World War II the United States imposed weak parliamentary governments on its defeated German and Japanese adversaries. The EU wants to and ought to play a bigger role in foreign policy than it currently plays.<sup>37</sup> It ought also to play a bigger role in its own defense and in keeping the peace; the experience in Bosnia showed how weak the EU really is.<sup>38</sup> A presidential separation of powers system would allow the EU to play a bigger role in

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ANCE IN THE UNITED STATES AND THE EUROPEAN UNION 337 (Kalypso Nicolaidis & Robert Howse eds., 2001). Schmidt describes the EU as a “collection of unitary states acting in supranational concert.” *Id.*

35. Compare President Franklin Delano Roosevelt, Fireside Chat On National Security (Dec. 29, 1940) (transcript available at <http://www.ibiblio.org/pha/7-2-188/188-21.html>) (declaring that the “nub of the whole purpose” of the presidency is to be the protector of the people of the United States and maintain the national security), with LENAERTS & VAN NUFFEL, *supra* note 5, at 864–72. Lenaerts and Van Nuffel explain the complex decision process of the Common Foreign and Security Policy (CFSP) in Article V of the European Treaty, which provides a framework in which member states can take joint action in response to external events, but only when the member states agree. Even then the decision is not actually binding on the European Union as a whole and only restricts member states from passing acts in opposition to the CFSP. LENAERTS & VAN NUFFEL, *supra* note 5, at 864–72.

36. Roosevelt, *supra* note 35.

37. See Council Decision 2005/395/CFSP, 2005 O.J. (L 132).

38. See Sergio Baches Opi & Ryan Floyd, *A Shaky Pillar of Global Stability: The Evolution of the European Union’s Common Foreign and Security Policy*, 9 COLUM. J. EUR. L. 299, 304–07 (2002) (discussing the failure of the European Union to adopt a unified stance with regard to which countries to recognize after the dissolution of the Socialist Federal Republic of Yugoslavia and the EU’s inability to offer substantial military aid during the Gulf War, leaving the United States alone to take the leadership position). It should be noted that following the failures of EU foreign policymaking during the Gulf War and Balkan conflict, the EU passed the Treaty of Amsterdam, which did introduce a High Representative of the CFSP, who is the representative of CFSP policy. He is, however, in no way comparable to a U.S. President’s reach over foreign policy. See *id.* at 322.

foreign policy while an Italian-style parliamentary proportional representation system would not.

Tenth, and finally, the European Union needs a system for making European law that is more federal and democratic than the current system of issuance of directives by Brussels bureaucrats. Vesting lawmaking and regulatory powers jointly in both the Council and in the European Parliament subject to a presidential veto would help achieve such a system. EU bureaucrats currently do too much lawmaking under the radar screen and not through a lawmaking process with bicameralism and presentment. That is a grave mistake both because it is unfederal and because it is undemocratic.

In conclusion, a presidential separation of powers system for the EU would have many positive features even if there is no chance that one will emerge any time soon. We would emphasize that no president should have the power to decree laws, the power to declare states of emergency, the powers to dissolve the legislature and call for new elections, the power to propose referenda, the power to appoint cabinet ministers without senatorial consent, or the ability to serve for more than two four-year terms. It is also vital that independent federal subunits with considerable power continue to exist with their own armies and with elections at times of their own choosing, and that there be independent judicial review. Presidential government in the United States, subject to these vital constraints, has been highly successful and is insufficiently appreciated. We hope this discussion helps to illustrate some of the virtues in some circumstances of presidential separation of powers systems. A presidential separation of powers is exportable in some circumstances even if, as Professor Linz has conclusively shown, it is not exportable in other circumstances.<sup>39</sup>

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39. See Linz, *supra* note 2, at 42–44.