

**Memorandum on the Electoral Law of the European Union:
Confederal and Federal Legitimacy and Turnout**

**European Parliament
Committee on Constitutional Affairs**

Hearing on Electoral Reform

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The European Parliament, on one view, is a direct descendant of its confederal precursor, which was indirectly elected from among the member-state parliaments of the ESCC and the EEC. In a very different view the Parliament is the incipient first chamber of the European federal demos, an integral component of a European federation in the making.² These contrasting confederal and federal understandings imply very different approaches to the law(s) regulating the election of the European Parliament.

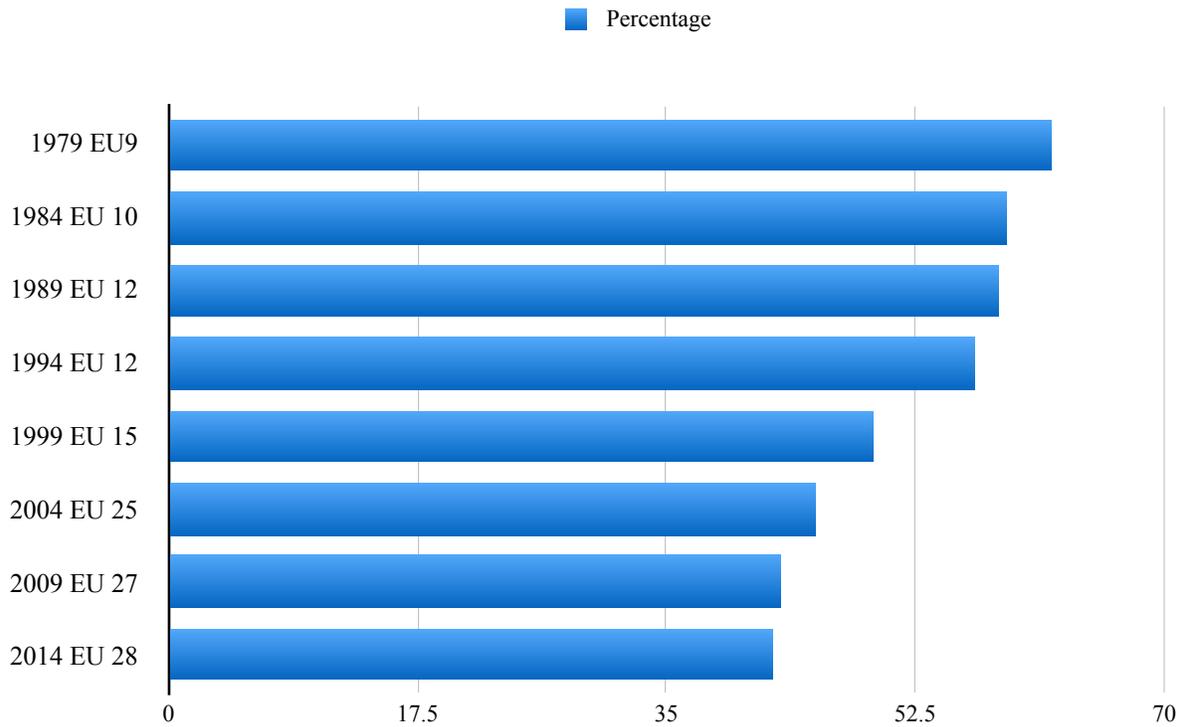
1. The Confederal Understanding

In the confederal vision of Europe as a union of sovereign member-states, each member-state should pass its own electoral laws, execute its own electoral administration, and regulate the conduct of its representatives in European institutions, who should be accountable to member-state parties and citizens, and indeed function as their “mandatable” delegates. In the strongest confederal vision, in the conduct of EU law-making and policy MEPs should have less powers and status than the ministers of member-states, and their delegated authorities (e.g., ambassadors, or functionally specialized civil servants). In most confederal visions MEPs should be indirectly elected from and accountable to their home parliaments.

Applied astringently, the confederal understanding would suggest that the current Parliament has been mis-designed, and operating beyond its appropriate functions at least since 1979. The European Parliament is directly elected; it has the formal power to legislate its own electoral law—which guides the hearings to which this memorandum is a minor contribution; it has developed extensive joint law-making powers with the Council of Ministers; and it has recently acquired power of approval over the nomination of the President and the College of Commissioners. Currently MEPs are elected solely within member-state jurisdictions, but generally under pan-European alliances, and generally sit afterwards in pan-European groupings which partially predict—certainly not always reliably—voting behavior on laws and resolutions in the Parliament. The leading candidate of each pan-European list, according to the Parliament, is now its nominee for the Presidency of the Commission (the *Spitzenkandidaten* principle).

In the confederal understanding, held by many who genuinely want to maintain pan-European co-operation, the core problem with the Parliament is therefore that it is already too federalist, and it is federalist without having undergone any distinct process of formal constitutional ratification. In this view, the European Parliament is not politically legitimate because its powers have never flowed from a systematic and reflective pan-European constitutional convention, or conventions in member-states, or from ratification referendums. The (draft) Constitutional Treaty of 2004 was not ratified after its defeat at the hands of the French and Dutch publics. The Lisbon Treaty (2009), which contained many of the latter’s provisions, had to be proposed twice and amended (and emended) before being ratified in Ireland—the sole member-state in which it was submitted for ratification by citizens.³ Treaties affecting the institutions of the Union have ratified powers that the Parliament had acquired, or obtained through Court rulings, without having had previous mandates; most treaties have numerous complex institutional and policy consequences to which member-state publics are not always alert or alerted, and on which they vote—if they vote—as a package deal; and most member-states do not ratify Union treaties through referendums, even when such referendums affect the sovereign authority of the citizens of the respective member-states.^{4 5}

Figure 1. Turnout for European Parliament Elections 1979-2014.⁶



Sources: The European Parliament's official web-site: 1979-2009 [http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-\(1979-2009\).html](http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-(1979-2009).html); 2014 <http://www.europarl.europa.eu/elections2014-results/en/election-results-2014.html>

In the confederal understanding the low—and falling—turnout for elections to the European Parliament is proof of its low—and falling—legitimacy (see Figure 1). Despite the incremental increase in its powers after more or less every European treaty, and despite the increased number and scope of laws and functions decided in European institutions, the turnout in elections to the European Parliament are a quinquennial disappointment, especially to ardent federalists. In every election to the EP since 1979 the average turnout across Europe for elections to the Parliament has fallen, a trend that has continued (and arguably worsened) as the EU incorporated new member-states from the former communist bloc, whose politicians and citizens initially appeared very enthusiastic to join European and Euro-Atlantic institutions.

The final official results of the 2014 elections to the European Parliament suggest absolutely no need to amend Giandomenico Majone's embarrassingly pertinent observation of 2009, namely, "*the perfect correlation between the growth of the EP's powers and the steadily decreasing turnout percentages at EP elections.*"⁷ No political scientist, including Professor Majone, would argue that this particular correlation should be read as causal. After all, that would reasonably imply that reducing the powers of the Parliament would increase average turnout in each member-state—a genuinely counter-intuitive, if mildly amusing, argument.

But the confederalists' challenge to the merits of the direct election of the European Parliament is bolstered by more than just the observation of this ironic correlation, and it does not justify its exponents being described as xenophobes or populists or worse. As well as lacking federal legitimation through a federal constitutional ratification process, the Parliament currently lacks credible democratic endorsement. Even when super-majorities of MEPs pass legislation or resolutions they jointly "represent" less than forty per cent of European citizens, which hardly obliges the Council of Ministers to be impressed by the Parliament's mandate.⁸ As noted, as new member-states join the Union, the participation of their citizens in EP elections is increasingly tepid, especially among the ex-communist countries. Table 1 in Annex 1 demonstrates that just eight member states recorded higher turnouts in 2014 than their average turnout since their country's accession.⁹ Differently put, nineteen member states have just had lower than average turn-outs amid the lowest average turn-out in the European Parliament's history.¹⁰

In sum, in the confederal understanding, the European Parliament may have legal legitimacy—because its powers are the outcome of numerous lawful processes, including past treaties—but it lacks authentic democratic and authentic federal standing. There is no genuine European demos, whatever the Lisbon Treaty may be read to say, partly because there is no evidence of a strong or emergent European identity, whether primary or secondary, across the Union's citizens.¹¹ In the confederal understanding, the directly elected European Parliament is a beached institutional whale, without a democratic or federalist mandate from a majority, let alone a qualified majority, of European publics.

What would follow if the European Parliament and its Constitutional Affairs Committee were to take the confederal understanding and criticism seriously regarding its control over electoral law? The answer is straightforward. The European Parliament would restore the right to elect its membership to the member-state parliaments of the Union.

And pigs might fly, the reader may wish to respond. But before the idea is dismissed as yesterday's argument it is important to register that in principle, several advantages might flow from such a restoration. One would be that MEPs, on average, would have a considerably higher level of electoral endorsement from within their respective member-states. Since the member-states' electorates would choose their governments at the same time as their parliaments, the relevant average turnouts across Europe would definitely be higher than they are currently for the European Parliament. Currently the elections to the EP within each member-state have lower turnouts than the respective elections to member-state parliaments—except where there is compulsory voting, or except when there are concurrent elections to both. Less importantly, a reduction of one every five years in the number of regular voting duties faced by the average citizen might make a minimal contribution to increasing turn-out in the remaining elections.

Another significant possible advantage might be that the mandate of member-state governments and their respective MEPs would flow from the same election, whereas currently they frequently clash. This is because of the well known fact that since their inception direct elections to the European Parliament have been "second order," i.e. seen (sometimes irresponsibly) by the relevant electorate as an opportunity to punish or reward their member-state government and (or) opposition, and not as an occasion to participate within a European demos on European Union issues.¹² Depending on the phase in the electoral cycles in particular countries, an EP election can be, and often is reported and read as, a "mid-term" opinion poll on

the performance of the member-state government and the opposition parties they face, rather than a vote upon European Union issues and policies. Consequently, it is frequently true that the balance of opinion among MEPs from within each member-state differs from the balance of opinion among the ministers of the incumbent member-state government. This fact puts into serious question the claim that MEPs (materializing from ‘second order’ elections) genuinely speak for the European people, or peoples. The Council of Ministers, often comprising member-state appointees with much higher levels of local electoral endorsement (if elected or appointed from among their respective parliaments), usually can reasonably claim, at least jointly, to have a numerically more significant mandate from their respective European peoples than do MEPs, even when the latter have a more recent mandate (which is not always the case).

Confederalists therefore have a case worth evaluating, namely, that restoring the election of MEPs to the member-state parliaments might boost the democratic legitimacy of all MEPs. Such a restoration (without changing the EP’s powers) would certainly tighten the links between member-state publics, their MEPs, and their governments’ European policies. The return to indirect elections might encourage domestic parliaments to re-organize themselves so that Union matters are appropriately processed by committees composed of sitting MEPs (a task easier, of course, for larger rather than small member-states), and some of these MEPs’ tasks could be performed in Brussels extramurally, and reported back to their member-state parliaments. Addressing the Union’s acknowledged “democratic deficit” may, in the confederal vision, be better done by holding member-state executives more accountable to their local parliaments on Union matters than they are through directly elected MEPs.

This proposal, of course, would not be trouble-free. The French and United Kingdom parliaments are not elected by any form of proportional representation, which would mean that without adjustments in their electoral formulae swings in political fortunes within these member-states would have disproportionate weight in shaping the political balance of the European Parliament. The problem is not, however, insuperable. The European Parliament and Council of Ministers could incentivize change within member-states to favor uniformity (or convergence) in procedures: member-states that do not elect their parliaments by proportional representation might be obliged to keep direct elections with proportional representation when choosing their MEPs alongside their MPs or deputies.

Another obvious difficulty is that MEPs would have extensive double duties in two locations, and would require two sets of residencies and appropriately supportive accommodation and travel expenses. Co-ordinating parliamentary sessions could certainly be organized better, e.g., through the time-tabling of European Union weeks, or months, and the problem would not be all bad. It would oblige member-state parliaments to organize themselves efficiently for European business, and it would, for example, create a strong incentive to have one locus for the European Parliament, and to terminate what most European citizens regard as a ludicrous waste of resources (the two sites of Brussels and Strasbourg).

Another difficulty, analogous to that occasioned by the Senatorial elections in the US, is that the mandates of MEPs would be staggered, and follow the electoral cycle of their member-states. Again, however, that is not an insuperable problem. It could either simply be accepted as a member-state prerogative (the “problem,” such as it is, already exists in the Council of Ministers), or the European Parliament could propose a slow consensual convergence among the

timing of the electoral cycles of member-states with each to have fixed terms (of four years, for example). One more difficulty, among the many others that can be foreseen, would be to decide whether to have similar rules of election within member-state parliaments, e.g., whether to converge on a similar rule of proportional election of MEPs within each member-state parliament (e.g., d'Hondt, Sainte-Laguë, or the Single Transferrable Vote (STV) with the Droop quota). This, of course, on the confederal vision would be a matter best left to member-state parliaments.

Decisions on apportionment of seats among member-states for the European Parliament—including the application of “regressive proportionality”—would, of course, not be resolved by a reversion to indirect elections, but they might lose some of their heated quality.

The author has no illusions that a majority of the Committee on Constitutional Affairs, or the Parliament, is likely to favor such a reversion to indirect elections—and not just because incumbents in all legislatures tend to prefer the system under which they have been elected. He believes, however, that the argument should be heard and engaged, and that it is his professional duty to ensure that it is considered fully. Complacency is a major danger within all the Union's institutions. The crises triggered by the failure of the constitutional treaty; by the financial and banking crises; by the constitutionalization of austerity and debt-reduction programs within the Eurozone; by the failure manifestly to co-ordinate foreign policy; and by the significant withdrawal of public support for traditional parties of government in many countries, are by no means over, and may yet worsen. There is no call heard for “more Europe” across the zones of Europe the author knows well. There is a call for “better Europe,” the majority view, or “no Europe,” fortunately still a minority taste.

The Committee and the Parliament, in short, may deem it wise to think prudently or defensively about confederal understandings rather than offensively and assertively. This need not mean that they have to think unimaginatively. The Committee, for example, may wish to consider testing the European public's views, perhaps through deliberative polls.¹³ Would the public(s) prefer an indirectly to a directly elected Parliament (or no Parliament)? What size of Parliament is preferred? Do the public(s) wish to bolster either member-state or European parties through public funding provisions? Under what regulations? More radically, would the public welcome applying “sortition”—along with a reversion of nomination rights to member-states—to determine a portion of the membership of the European Parliament?

If this perspective is deemed too regressive, the Committee may wish to consider answering the confederalist case—which is not just the perspective of Euro-phobes and Euro-skeptics—by making vividly clear arguments in favor of direct rather than indirect elections of the Parliament, and of the need for a uniform electoral law to bolster turnout. The Committee will need to explain exactly why the federal vision offers the right route forward in the absence of significant evidence of public support across the Union for “more Europe” as the remedy for current difficulties.

2. The Federal Understanding

In the federalist vision of Europe, whether conceived of as the “post-national,” “post-sovereign,” “supra-national,” or, more plausibly, as the “multi-national” Union of the European demos, the European Parliament does and should have sovereign jurisdiction over its own electoral laws; it should execute its own electoral administration; and it should regulate the

conduct of MEPs, who should be accountable to European parties and citizens, and function as their representatives. In the strong federalist vision, such representatives should (s)elect the entire European executive, and have the right to displace the executive in a vote of confidence, and have significant powers over matters traditionally reserved to sovereign nation-states whether in their executive or legislative branches or both.

Applied to the current Parliament, the federalist vision strongly suggests that “more Europe” not less is the remedy, among other matters, for the constitutional, currency and democratic legitimacy crises affecting the Union. The European Parliament, in particular, should, in this view, seize every opportunity, as the sole directly elected democratic body that is Union-wide, to expand its powers. In so doing it will educate voters as to the true locus of emerging power, or, alternatively, as to the sole locus of directly elected authority able to control or balance power-centers to which the member-states have already delegated their authority (e.g., the Council of Ministers, the Commission, the Court, and in the Eurozone, the ECB). That in turn, it is implied, will produce a democratic virtuous circle of increasing turnouts and accountable mandates in the elections that return MEPs. The successful confirmation as President of the College of Commissioners of the leading candidate of the “winning list”¹⁴ from the European People’s Party was initially held out as an example of this logic.

Federalists observe and applaud convergence over time in the Union’s electoral practices for the Parliament. For example, from 1979 until 1994 Great Britain elected its MEPs through winner-takes-all in single member districts,¹⁵ consistent with its domestic traditions, but in a manner that gave electoral swings in support between major parties in Great Britain disproportionate weight among the balance of blocs in the European Parliament.¹⁶ In this millennium all member-states have used proportional representation election systems—albeit with variations among the formulae employed (e.g. party-list PR, open-list PR, and the Single Transferrable Vote), variations in the district magnitude (numbers of MEPs elected per district), and, of course, with degressive proportionality across the Union, which mildly over-represents smaller states and under-represents larger states.

In the federalist vision, one task of this Committee is to consider ways of improving the electoral law for the Parliament to ensure increased turnout, preferably consistent with existing treaties, laws and conventions, and to facilitate convergence on the best practices across the Union. The burden of argument, the Committee will agree, should be on federalists to show that their preferred institutional path is likely to increase turnout, and thereby improve the standing of the Parliament, and of the Union as a whole.

Let us put aside one possibility on the grounds of very low feasibility. If a quantum leap in turnout for direct elections to the European Parliament is genuinely sought, then aside from the use of compulsory voting (treated below), it is very clear what would have to be done. The Parliament would have to obtain (or more likely seize) a major increase in its powers. Instead of being a largely co-regulatory body, it would have to (at least) co-control major redistributive politics, e.g. though raising significant taxes throughout the Union, and spending on (expanded) all-Union functions, such as common security forces (conscripted or otherwise); and within the Eurozone the Parliament would have to acquire the power to draft laws regulating the ECB, for example, obliging it to have a double mandate (price stability *and* full employment) like the US Federal Reserve Bank, as well as powers to authorize and manage pooled public debts, a

common fiscal policy, and major welfare state functions (i.e. a genuine “social Europe.”) No political scientist would deny that such a massive extension in the Parliament’s powers, especially over taxes, welfare and war, would drive up turnout in all member-states. Most, however, would also agree that since there is no mandate for such a shift that if the experiment was tried in the near future the Parliament would not survive more than one term. Instead it would preside over numerous secessions from the Union.

3. Thinking Comparatively About Turnout¹⁷

On one complacent view there is no “optimum” or “correct” level of turnout in free and fair democratic elections.¹⁸ After all, Nazi and Communist regimes in European history insisted on achieving near unanimous, and literally incredible turnouts, which significantly exceeded the levels that occur in free democracies with compulsory voting. Therefore, some reason, democrats should welcome the right that voters enjoy not to turnout. This right seems to have been endorsed by an extraordinary number of Slovaks in the 2014 European Parliament elections.

Institutions and Politics. What institutional or political factors, other than being Maltese, which apparently makes one more likely to turnout, or Slovak, which makes one less likely to turnout, explain variations in turnout? In what is widely regarded as a definitive study of turnout in roughly thirty long-established democracies, and which examined American turnout in comparative perspective, Bingham Powell persuasively argued that compulsory voting laws, automatic registration procedures, and the strength of party-organized group alignments and institutionalization boosted turnout. By contrast, turnout was depressed with the opposite variables in play, and where there was one party predominance (leaving no prospect of alternation in the executive).¹⁹

Compulsory voting does not apply to the EP in most member-states; EP elections have no single or automatic registration process; and we are widely argued to be living in a period of decay in party political alignments, memberships and institutionalization in civil society.²⁰ So these facts help explain the EP’s low turnout. The EP has never suffered from one party predominance, however. Arguably, it displays something not at all oppressive, but extremely opaque, namely rule by a permanent coalition of centrist parties, operating under unanimity or qualified majority voting, within a legislature whose powers are not widely understood or appreciated.

In follow-up work to Powell’s, investigating over ninety electoral democracies, and focusing upon turnout within the registered electorate, André Blais and A. Dobrzynska showed that compulsory voting, the voting age, a (more proportional) electoral system, the closeness of the election outcome, the number of parties, the level of economic development and the size of the polity all affected turnout.²¹ The pertinence of some of these variables are considered below.

In a distinguished monograph-length study of enduring methodological value, and which used sophisticated statistical tests and models, van der Eijk, Franklin and Oppenhuis examined survey and turnout data from EP elections in 1989 and 1994, to arrive at robust, well-reasoned and plausible conclusions.²² They found that,

“In summary, turnout is high in [member-state] political systems where voting is compulsory or where votes are translated into seats with a high degree of proportionality;

though turnout can also be raised by other means. Sunday voting helps, but more important is the question of whether political power is at stake...” [The latter was indicated in their data by the presence of concurrent or imminent member-state elections.] “Where effects that stem from systemic characteristics still leave room for individual differences, by far the most potent predictors of electoral participation are political interest, campaign mobilization, and the suitability of available political choices.... Leaving aside compulsory voting, turnout seems above all to be affected by voters’ feelings that they can with their vote contribute to desired political outcomes. This requires on the one hand predictability of the political consequences of an election result, and on the other hand the availability of parties that voters value positively. Proportionality enhances the predictable consequences of a voter's choice, which are also more apparent as national elections approach. Where such contextual characteristics leave any room for individual variation, the quality of communications between parties and voters makes up the bulk of the difference. The three variables involved are political interest, campaign mobilization and the appeal of the most attractive party.”²³

The PR Menu(s). Since van der Eijk et al’s study was published nearly twenty years ago more member-states have joined the Union,²⁴ and there has been a convergence on using proportional representation systems for the EP, albeit with variation among the systems chosen. This fact means that to raise turnout the Committee on Constitutional Affairs has much more limited room for maneuver through the further promotion of proportional representation. The questions have now become: what system of proportional representation is optimal for elections to the EP, and, relatedly, whether the EP and other Union bodies should promote one system among all member-states? A multi-part extension of these questions would address whether open-list PR, STV-PR, or Mixed-Member PR, with or without thresholds, with or without two-tier districting, and with or without *apparentement*, are optimal for the EU. If these are indeed the right questions, and they are certainly reasonable questions, one cannot expect either a scientific or political consensus. Neither reasonable political scientists nor reasonable politicians can be expected to converge on one set of answers. The required level of consensus for change across member-state parties and party families within the EP may therefore not be present.

It may be reasonable, however, to suggest that very slight improvements in turnout may follow from the use of STV-PR as opposed to (closed or open) list-PR, though the results would be sensitive to the chosen district magnitude. STV-PR is used in Malta, Ireland and Northern Ireland, so we do not have enough cases for numerous cross-sectional tests across the EU. Moreover, we have no cases of switches to STV-PR from list-PR for elections to the EP. Of the three political systems mentioned, Malta has had very robustly high-turnouts since accession to the EU, though even the Maltese have started to falter by their standards. Northern Ireland has had consistently higher electoral turn-out for the EP than Great Britain. Ireland, however, has turned from being a high turnout to a medium turnout country. It may also be reasonable to think that using open-list PR rather than closed-list PR may slightly improve turnout, again depending upon the district magnitude, but I know of no significant research base to support this conclusion. Rather, open-list PR is likely to increase the visibility and impact of “celebrity” candidates, though generally it is held it has little impact on comparative party fortunes

compared with straight list-PR. Apparent normative virtues do not always have significant empirical consequences.

The Committee may, however, wish to commission research along the lines of that conducted by Professors Farrell and Gallagher on what British voters sought from electoral reform when such reform was being considered for the Westminster Parliament at the turn of the century. Knowledge of what the public thinks, before or after deliberative polling, should inform any choice that the Committee recommends among systems.²⁵ This is not to suggest that the Committee should simply echo public opinion, but it should at least carefully find out what it is on the matters before its purview before further accusations ensue of being out of touch and of elitism.

No independent political scientist, I believe, would predict a major change in turnout to occur in any member-state simply by changing from one system of proportional representation to another. Greater proportionality, and greater opportunity for preference-ranking, should, however, mildly increase the incentive to vote within such systems. Most political scientists would abide by Rein Taagepeera's injunction to await for three elections under the same system (defined as the electoral formula, the district magnitude, the size of the parliament) before judging its long-term empirical effects because political agents and local cultures take time to operate within any new electoral order.²⁶

Efficacy. Van der Eijk et al's argument encapsulated in the lengthy quotation on pages 8-9, emphasizes the importance of the perceived efficacy of the vote among citizens. It strongly suggests that potent effects would flow from holding EU parliamentary elections on the same day as member-state parliamentary (or executive presidential) elections, an argument, of course, that can also be used by confederalist advocates of indirect elections to the EP.

Federalists who want a separate mandate for the EP typically strongly resist this idea of concurrent parliamentary member-state and EP elections. Its implementation would require Europeans *either* to live with a variable electoral cycle, with EP majorities or qualified majorities shifting annually as some member-states hold their respective four yearly elections, *or* instead for member-states to come to a (heroic) agreement to legislate to converge on a common electoral cycle for the parliaments of member-states and EP elections. The latter idea, if successful, would certainly make member state and EP elections jointly resemble presidential election years in the US, and perhaps generate a comparable boost in turnout, where is no compulsory voting, of somewhere between 10 and 20 percentage points on current levels, depending upon the member-state.

Parties, Choice & Competition. A further conclusion that may reasonably be drawn from van der Eijk et al's landmark argument, and that is still relevant today, is that what, rightly or wrongly, many Europeans see as the conjunction of a lack of perceived [policy] choice, and [policy] consequence, from the act of voting, serves to depress turnout, and may work to encourage the attrition of party identification and organization.²⁷

On this view, the sheer scope of delegation of regulation to non-elected European bodies (most famously the ECB and the Court, but there are many others); the opacity of European

decision-making structures; and the highly consensual means of making formal law; all combine to reduce voters' sense of the efficacy of their vote.

This Committee's current remit hardly extends to transforming all Union decision-making, revivifying parties, and diversifying their ideological clarity and appeal, but plainly if it is genuinely concerned to increase turnout then all mechanisms that lower barriers to entry for parties (e.g., removing thresholds), and that maintain competitiveness among parties, should be looked at carefully. Paradoxically, some will warn that such measures may serve to weaken already anemic traditional parties.

Writing in the mid-1990s, van der Eijk et al. were by today's standards of appraisal remarkably optimistic. They wrote, "There is no reason to doubt that proper European elections, fought by European parties on European issues and deciding the allocation of power within the European Union would quickly turn the Dutch (and the French and the British, and all the rest) into Europeans..." The authors probably would not, and could not, stand by that sentence today. Arguably May 2014 was the first occasion when European matters decisively shaped significant voters' dispositions in EP elections (e.g., member-state bail-outs, banking bail-outs, Euro-zone austerity requirements, and anti-immigration protests), but, on an even lower average turnout it produced the largest wave yet seen of both anti-Europeanism and of right and left Euro-skepticism among voters.

In their general overviews van der Eijk et al. Powell and Blais and Dobrzynska raised two matters of electoral administration that may affect turnout to EP elections and that are still pertinent, namely compulsory voting and what is better called weekend rather than Sunday voting.

Compulsory Voting. Accompanied by (mild) sanctions, compulsory voting works. It raises turn-out in comparison with voluntary voting in otherwise similar democratic countries. Just within past elections to the EP, one may simply compare turnouts in Belgium and Luxembourg with those in the Netherlands (a country that once had compulsory voting). There are also good normative arguments for compulsory voting, which is a lot less paternalistically (or maternalistically) intrusive than obligatory vaccinations for children, filing a tax return, or obliging parents to ensure their children are schooled.²⁸ Moreover, the degree of "enforced freedom" to vote can be minimized. "Conscripted" voters may be given opportunities to refuse to endorse any candidate(s), party, or list; and the sanctions imposed for non-compliance can be mild, either in the formal penalties, or in their application.

But, whatever the merits of compulsory voting,²⁹ the relevant problem for this Committee (and the European Parliament) is that it has neither the legitimacy nor likely the formal legal authority to legislate such an innovation to apply to itself. It does not have the required enforcement capacity, and could face humiliation if it sought the power solely under its own auspices. Compulsory voting is used by a minority of member-states. World-wide it is associated with places formerly ruled by Spain or Portugal, and is not found in places formerly ruled by the British Empire, which might damage its chances of adoption in some places within the Union.³⁰ The Committee may wish to deliberate over suggesting a resolution in the Parliament recommending compulsory voting as one among many best practices for member-states, to be

applied voluntarily by member-states to all their elected member-state institutions, with the European Parliament to follow in due course, e.g. after a majority of member-states have adopted it. It would, however, be imprudent for the Committee or Parliament unilaterally to develop such an initiative.

Weekend Voting. Weekend voting (as opposed to Sunday or Thursday voting) along with other time-focused measures to ease voting—by post, or by electronic means — are certainly worth strong consideration by the Committee and Parliament. Voting from Friday afternoon until Sunday evening would reduce the excuses available to those with busy lives not to vote, and indirectly respect the religious days of the three major historic religious communities of the Union’s member-states (Christianity, Judaism and Islam). It would, of course, be more expensive to have more than one polling day, and election workers would have to be paid overtime for working at weekends, but the subject is worth the Committee’s attention, including investigating the costs. One cannot, however, hope that such a change will have radical consequences for turnout.

Related matters: Experiments in on-line voting, and in ensuring its effectiveness, accessibility, integrity, and security, are also worth the allocation of research funds.

Appropriate Comparative Evaluations. The European Parliament recognizes that turnouts for its elections, on average, are consistently falling across the Union, to levels that are now well below those of 1979, and it is rightly concerned about this phenomenon. Its average turnout has never risen, and accession by historically less participative countries is not enough to explain the durability of the trend.

The simple explanations remain best suited to the case: regulatory functions do not excite the same interest among citizens as redistributive and security politics, and second order elections cannot expect to produce the same turnouts as first order elections.

Whereas comparing turnout in all EP elections since 1979 is an important initial analytical step, another appropriate source of comparison is with kindred institutions. But, should the European Parliament, given its second-order status, compare its turnout performance to those of member-state parliaments, or to those of local and regional governments? MEPs usually take member-state parliaments as the appropriate comparator, which immediately confirms the conviction that EP turnouts are poor, and declining. It is true that there is evidence, worldwide, but especially in Europe, of declining turnouts in many member-states’ parliamentary elections, but the EP can take little comfort from sharing in this general pathology. If regional and local governments were to be taken as the appropriate comparator, the EP should feel less embarrassed by its mandate from the voters, but likely at the price of conceding the merits of the confederalists’ case for restoring indirect elections to the EP.

Let us continue, however, on the assumption that the appropriate comparator for the EU Parliament is with member-state parliaments of the EU or the parliaments of other democratic nation-states. In countries with compulsory voting like Australia, Belgium, and Chile, voter turnout hovered near 90% in the 2000s. Other countries, like Austria, Malta, Sweden, and Italy, experienced turnout rates near 80%. Overall, OECD countries experience turnout rates of about

70%, while in the US, about 60% of the voting eligible population votes during presidential election years, and about 40% votes during midterm elections.³¹ Are there any relevant conclusions to be drawn from such comparisons?³²

Federalism. Once the field of reference is defined in this way the trained comparative political scientist observes that turnouts for elections to the European Parliament are generally similar to (though usually lower) than those at the federal legislative level in Switzerland and in the United States, both of which are federations in economically developed countries.³³ In the 2000s turnout for the US House of Representatives hovered in “non-presidential elections” at around the current EU Parliament rate, namely 42%.³⁴ In November 2014, however, it plunged to 36.2%, a postwar record low according to the recognized authority on the subject.³⁵

The partially shared experience—in the EU, Switzerland and the US—of lower turnouts than in other established democratic institutions to their popular (federal) legislature prompts the question of whether “federal” style elections in economically developed countries, especially to the federal legislature, are depressed by (i) federal complexity, (ii) the absence of direct elections for the chief executive, or by (iii) variations in electoral administration across states and cantons.³⁶ Switzerland has had consistent and constant coalitions of the same parties, in its collective presidency since the mid-1950s,³⁷ in proportions that have rarely changed with changing election outcomes, “so the consequences of the voting act in federal elections are hard to discern just as they are in European elections,” observed van der Eijk et al.³⁸ The Swiss, however, have the right of direct initiative in referendums, an alternative mode of participation, and one that restrains the conduct of the federal executive. In the US, van der Eijk et al. that the ability of candidates to the House to deliver on campaign pledges is dependent on so many factors other than their own electoral success as to cut the link between the vote and its potential consequences—a small step, they suggested, from elections to the European Parliament where there is almost no link to cut. Gerrymandering in the US, it should be added, now renders uncompetitive most seats in the House of Representatives, conducted under winner-takes-all in single member districts (except through primary challenges within the same party, where turnout is often very low). A genuine surge in turnout, associated with a strongly supported candidate in presidential election years, is required to bring many seats in Congress into play. Further reference to the US literature on turnout is made here, but, in short, the low turnouts in the US (especially in “off-year”) elections to the House of Representatives) and in elections to the Swiss federal assembly may be used to suggest that the absence of a uniform electoral law and electoral administration may adversely affect turn-out across the EU, but the aforementioned explanations (namely, the presence of otherwise of elections for the federal executive, and gerrymandering) are likely to pack much more explanatory punch. So, in short, though a *prima facie* normative case exists for the federalist contention that a uniform Union-wide electoral law is now appropriate, it is difficult to argue that it would itself do much to raise turnout.

Federalism, or incipient federalism in the case of the EU, cannot, of course, be the sole independent explanatory variable in accounting for relatively low turnout. Outside the EU federations such as Australia (with compulsory voting) and Canada (without compulsory voting), and federations within the EU such as Germany and Austria (without compulsory voting) have generally had comparatively high turnouts since 1948 (In recent decades, however, fall-offs

have occurred in three of these states that do not have compulsory voting). To the extent that EU-style federalism matters in explaining low turnouts it may be through the voters' perception of the lower efficacy of their vote in a complex power-sharing system. It may not be an accident that the parliamentary federations (in Canada, Australia, Germany and Austria) generally have higher turn-outs than either the US with its presidential system and biennial elections to the House, and the Swiss federation with its indirect collective presidency.

Size of polity? The all-Indian Union parliament has just had the highest turnout in its post-colonial history (66%) amid a population that is over twice that of the EU's, so there is no world-wide law-like relationship between the population size of the polity and turn-out (India of course has even greater linguistic and ethnic diversity than the EU). The EP's parliamentary turnout is, however, significantly lower than that in the four largest states of the Union, each of which have recently seen reasonably high turn-outs for member-state elections: Italy (75.2%, in 2013), federal Germany (71.5%, in 2013), the United Kingdom (65.1%, in 2010), and France (79.5% in the first round of the Presidential elections, but just 57.2% in the first round of the National Assembly elections in 2012.³⁹) The next two largest EU member-states Spain (68.9%, in 2011) and Poland (54.9% for the first round of the Presidential election of 2010, and 48.9% for the Sejm election in 2011) have had lower turnouts recently, but Spain's turnout for its House of Deputies remains significantly in excess of turnouts for the EP. The reasonable inference from this comparison is that voters recognize that their member-state parliaments matter more to their lives than elections to the EP.

Bad and best practices

What should the Committee on Constitutional Affairs not recommend? One may reasonably argue that the US provides a comprehensive object lesson in bad electoral law practices, combined with institutions described as "weird" by distinguished Canadian political scientist André Blais.⁴⁰ These include winner-takes-all in single member districts for the House of Representatives; a bizarre and intermittently disastrous electoral college for choosing the President;⁴¹ very frequent elections (every two years for the House) combined with primaries; extreme decentralization of electoral administration (to the county level within some states, i.e. not just to the state level) combined with no federation-wide electoral law at all (other than some implicit constraints by federal Courts' case law); widespread party-involvement in electoral administration without the use of independent electoral commissions; the drawing of all electoral boundaries within some states by party-or self-interested politicians in state legislatures who have been elected under low turnouts; the definition of financial contributions to candidates and parties as "free speech" by partisan-nominated and partisan-run Supreme Courts; and such blatantly discriminatory practices as the regular (ethnic and class-based) disenfranchising of felons and those convicted of minor misdemeanors beyond their sentences, combined with systematic efforts at (ethnically targeted) vote-suppression.

The United States is therefore not the place for Europe to go in search of a fair Union electoral law, but rather rich in illustrations of what is to be avoided. There is one important positive lesson here, though. Blais describes the US electoral institutions as "designed" to produce fiascos, but, as he suggests, precisely because US political institutions enjoy huge

reservoirs of patriotic legitimacy, the fiascos that do occur do not generate major public protests. The European Parliament does not have equivalent reservoirs of legitimacy, certainly not patriotic legitimacy, and therefore it must take greater care in assessing whether it should promote a uniform Union-wide electoral law, and if so on what subjects.

It has been suggested here that the Committee and the EP should avoid recommending one best proportional representation system, and that it should not seek unilateral authority over the electoral practices of member-states. The Committee does, however, have room to recommend and promote best practices, e.g., to argue for an EU-wide electoral commission that would co-operate with member-state commissions on EP elections, and that could have observer status in member-state elections.

If the EP is determined to seek uniformity across the Union it will need to consult very carefully on the design and management of a common electoral register, preferably one that was “automatic,” a task rendered difficult with no common EU identity number in use for any widespread purpose (there are not enough passport holders). Perhaps the EP would do better to offer itself as a constructive partner in improving ease of registration across all member-states, once it has conducted the relevant research.

If it wants those resident outside their member-states of origin to be able to vote in EP elections in those states of origin that raises the prospect of a jurisdictional clash with member-states, who vary on whether, and how, they let their diaspora vote. Similar considerations apply to proposals to give immigrants and permanent residents the right to vote for elections to the European Parliament. Since these matters are already deeply sensitive in many member states, the EP is not likely to succeed in non-consensual initiatives in this domain.

More controversially, let me briefly suggest that the EP should avoid giving the European Court of Human Rights jurisdictional review over the EP’s own electoral law, both to avoid unnecessary juridification, and to avoid the possibility of Court decisions that will neither be effective nor legitimate.⁴² Since most EU member-states have no major gerrymandering or other electoral abuses, and no ethnically driven vote-suppression in EP elections, and since all have their own courts and commissions to regulate these matters, it would be prudent to avoid unsought and possibly intrusive CtHR intrusions.

Apportionment Rule. In place of a conclusion let me comment on two matters raised by discussions put before this Committee and elsewhere. Whether one endorses a confederal or federal understanding of the future role of the EP, there is a case for a clear, transparent and durable rule of apportionment of MEPs, not least to ease future accessions.

The “Cambridge Compromise” as it is known,⁴³ is a thoroughly honest and honorable effort to derive a good apportionment rule, guided by current treaty constraints, and which takes into account future accession demands. I would prefer if it was publicly represented (and legislated) as a base (of a minimum number of MEPs per member state) plus a divisor rule (either d’Hondt or Sainte-Laguë) accompanied by a cap, because that will make it easier for most politicians and commentators, if not citizens, to see the apportionment rule as an extension of proportionality rules used widely throughout Europe.

One important matter that has not been seen raised is whether apportionment should be by population as opposed to registered voters. The merits of a population count are that it counts

immigrants (who may not have the franchise), children, and others not on the electoral register. The drawback is that it depends upon census-counts, which will often be out of date. The merits of electoral registers are that they count the enfranchised citizen, give incentives to member-states to encourage registration, and they are more likely to be up-to-date at the time of EP elections. One disadvantage is that they exclude immigrants.

Linking apportionment to the rules governing electoral registers could perhaps create a virtuous circle: warranting EP or an EU Electoral Commission oversight and co-participation, and convergence on electoral registration procedures across the Union. These very requirements may mean, however, that the EP and member-states who are concerned to preserve their prerogatives will prefer apportionment according to population.

Second Tier? Relatedly, however, what appear to be proposals to introduce what would seem to resemble a Union-wide second tier of MEPs, elected according to some formula that would either reward support across Europe as whole, or compensate for disproportionality across Europe at the member-state level, are federalist steps too far.

In the first place, they would serve to undermine the very purpose of an apportionment rule of the type just discussed—to guarantee member-states not just a certain minimum number of MEPs, but also a predictable number, based on their population-size, or upon their electoral-register, and not upon their turnouts, or the (alleged) caliber of their turnouts.

In a federation with a deep dual commitment among citizens to both the federal and member-state levels throughout most of the federation it may make sense to have a second tier of parliamentarians elected in a manner that rewards parties or blocs that had performed well across the federation as a whole, or to compensate through such a tier for disproportionality induced by different rates of turnout in different member-states. But the EU is certainly not yet that kind of federation.

Member-state	Average EP turnout from accession until 2009 (including only elections held in the five year cycle)	EP turnout 2014 (Numbers in bold indicate turnouts higher than previous average in the 2nd column)
Belgium	91.01	89.64
Luxembourg	89.00	85.55
Malta	80.59	74.80
Italy	75.61	57.22
Cyprus	65.95	43.97
Greece	60.02	59.97
Ireland	55.83	52.44
Germany	53.75	48.10
Spain	53.38	43.81
Denmark	51.00	56.32
France	49.87	42.43
Latvia	47.52	30.24
Austria	45.93	45.39
Netherlands	42.60	37.32
Sweden	40.74	51.07
Portugal	40.39	33.67
Bulgaria	38.99	35.84
Hungary	37.40	28.97
Finland	36.60	39.10
Estonia	35.36	36.52
Lithuania	34.68	47.35
United Kingdom	33.56	35.60
Slovenia	28.34	24.55
Romania	27.67	32.44
Poland	22.70	23.83
Slovakia	18.30	13.05

Table 1. Comparing historic average EP turnout in member states to 2014 turnout

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² For the argument that the EU is and should just be a confederation see Majone, G. (2005). *Dilemmas of European Integration*. Oxford, Oxford University Press. In his address to the first Assembly of the European Coal and Steel Community Jean Monnet, often seen as the founder of the federalist tradition, declared that, "Les États-Unis d'Europe ont commencés" 1952 Luxembourg: ECSC.

³ Phinnemore, D. (2013). *The Treaty of Lisbon: Origins and Negotiation*.

⁴ Ireland and Denmark have been notable exceptions in this regard.

⁵ This means, of course, that the current legal status of the Parliament is best construed as confederal given that confederations organize their constitutional relationships through treaties.

⁶ The Parliament references the EU 9, EU 10 and EU 12 when it should strictly be to the EEC/EC.

⁷ Majone, G. (2009). *Europe as a Would-be World Power: The EU At Fifty*. Cambridge, Cambridge University Press., 50.

⁸ The current combined strength of the EPP, S & D, and ALDE, the de facto governing coalition in the Parliament, rounds up to 64% of the current number of MEPs, but represents just over 27% of the eligible voters in May 2014.

⁹ The calculations exclude the first elections held by member-states on accession when they preceded the five-yearly cycle.

¹⁰ Since 2014 was Croatia's first participation in a five year cycle it has no average with which to compare its turnout.

¹¹ For discussions see Lehning, P. B. (1998). *European Citizenship: Towards a European Identity?* CSPT Conference, University of Wisconsin at Madison, Checkel, J. T. and P. J. Katzenstein, Eds. (2009). *European Identity*. Cambridge, Cambridge University Press.

¹² Reif, K. and H. Schmitt (1980). "Nine Second-Order National Elections. A Conceptual Framework for the Analysis of European Election Results." *European Journal of Political Research* 8(1): 3-44.

¹³ Fishkin, J. S. (1991). *Democracy and Deliberation: New Directions for Democratic reform*. New Haven, Yale University Press.

¹⁴ Quotation marks are required because it is at odds with the logic of proportionality to describe as a winning list one that obtains less than a democratic majority, Powell, G. B. (2000). *Elections as Instruments of Democracy: Majoritarian and Proportional Visions*. New Haven, CT, Yale University Press, Lijphart, A. (2008). *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice*. New York, Routledge.

¹⁵ From the first direct elections to the EP the procedure was not followed throughout the United Kingdom: Northern Ireland returned three MEPs through the use of the (proportional) single transferrable vote using Northern Ireland as a single district. The use of two separate systems continued even when Great Britain switched to using proportional representation to return its MEPs in 1999.

¹⁶ That is because plurality-rule in single member districts sometimes approximates a "cube rule" among the two principal parties: the cube of their ratio of votes approximates their ratio of seats. Shifts in vote-shares held by parties are thereby amplified in the shifts in their seat-shares. That is $S_a/S_b = (V_a/V_b)^3$ where S_a and S_b are the seats won by parties a and b respectively, and V_a and V_b are their respective vote shares. For discussion see Taagepera, R. and M. S. Shugart (1989). *Seats and Votes: The Effects and Determinants of Electoral Systems*. New Haven, CT, Yale University Press.

¹⁷ There are important empirical distinctions between measuring turnout as a percent of registered electors (REG), as percentage of voting-age population (VAP), and as a percentage of the voting-eligible population (VEP), as suggested by Michael McDonald, but the arguments in this memorandum are not significantly affected by these distinctions, except when discussing registration and apportionment.

¹⁸ Rose, R. (n.d.). *Evaluating Election Turnout. Voter Turnout from 1945 to 1997: A Global Report on Political Participation*. IDEA. Stockholm, Institute for Democratic and Electoral Assistance.

¹⁹ Powell, G. B. (1986). "American Voter Turnout in Comparative Perspective." *American Political Science Review* 80(1): 17-43.

²⁰ Mair, P. (2013). *Ruling the Void? The Hollowing of Western Democracy*. London & New York, Verso.

²¹ Blais, A. and A. Dobrzynska (1998). "Turnout in Electoral Democracies." *European Journal of Political Research* 33(2): 239-261. See also Blais' study with other colleagues of the impact of electoral laws and procedures Massicotte, L., A. Blais and A. Yoshinaka (2004). *Establishing the Rules of the Game: Election Laws in Democracies*. Toronto, University of Toronto Press.

²² van der Eijk, C., M. N. Franklin and E. Oppenhuis (1996). Chapter 19. The Institutional Context: Turnout. *Choosing Europe? The European Electorate and National Politics*. C. van der Eijk and M. N. Franklin. Ann Arbor, University of Michigan Press.

²³ By treating Belgium (Flanders and Wallonia) and the UK (Great Britain and Northern Ireland) as distinct political systems (these entities either have different party systems, or different electoral systems within the same member-state, or both) they were able to look at 14 political systems within the then emergent EU of 12.

²⁴ There now 30 cases, not 14, if we use van der Eik et al.'s methods of classification - see the above note. Indeed, there are reasons to argue that different party-configurations are emergent in Scotland, Catalonia and the Basque country (implying some 33 party-systems at work within the current Union).

²⁵ Farrell, D. M. and M. Gallagher (1999). "British Voters and Their Criteria for Evaluating Electoral Systems." *British Journal of Politics & International Relations* 1(3): 293-316.

²⁶ Taagepera, R. (2002). *Designing Electoral Rules and Waiting for an Electoral System to Evolve. The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy*. A. Reynolds. Oxford, Oxford University Press: 248-266.

²⁷ For rueful reflections on this subject see the work of the late Mair, P. (2013). *Ruling the Void? The Hollowing of Western Democracy*. London & New York, Verso.

²⁸ For arguments in favor of compulsory voting see among others Wertheimer, A. (1975). *In Defense of Compulsory Voting. Participation in Politics*. J. R. Pennock and J. W. Chapman. New York, Atherton.

²⁹ For good arguments see Lijphart, A. (1998). "Unequal Participation: Democracy's Unresolved Dilemma." *American Political Science Review* 91(1): 1-14, Hill, L. (2002). "On the Reasonableness of Compelling Citizens to Vote: The Australian Case." *Political Studies* 50: 80-101.

³⁰ Massicotte, L., A. Blais and A. Yoshinaka (2004). *Establishing the Rules of the Game: Election Laws in Democracies*. Toronto, University of Toronto Press.

³¹ From fairvote.org

³² World-wide data regularly updated may be found at <http://www.idea.int/vt/index.cfm>

³³ Between 1945 and 1997 the USA (51.1%) and Switzerland (50.1%) recorded the lowest average turnouts among long established liberal democracies Institute For Democracy and Electoral Assistance, I. (n.d.). *Voter Turnout from 1945 to 1997: A Global Report on Political Participation*. Stockholm, IDEA.

³⁴ <http://www.fairvote.org/research-and-analysis/voter-turnout/> accessed November 2014.

³⁵ <http://www.electproject.org/2014g>

³⁶ It is no part of this Committee's hearing to address the question of the possible direct election of the EU's executive. The author doubts the viability of a single person presidency and vice-presidency, as lucidly commended by Hix, S. (2008). *What's Wrong with the European Union and How to Fix It*. Cambridge, Polity. An indirectly elected collective presidency, built from geographic and small, medium and large state constituencies, seems much more likely to generate a viable executive design, but, consequently, is much less likely to have any impact on turnout.

³⁷ Steiner, J. (1982). Switzerland: 'Magic Formula' Coalitions. *Government Coalitions in Western Democracies*. E. C. Browne and J. Dreijmanis. New York, Longman: 315-335.

³⁸ van der Eijk, C., M. N. Franklin and E. Oppenhuis (1996). Chapter 19. The Institutional Context: Turnout. *Choosing Europe? The European Electorate and National Politics*. C. van der Eijk and M. N. Franklin. Ann Arbor, University of Michigan Press.

³⁹ Acknowledged to be the lowest ever first round turnout for a French National Assembly under conditions of universal adult suffrage.

⁴⁰ Blais, A. (2013). *Evaluating U.S. Electoral Institutions in Comparative Perspective*. Representation. Elections and Beyond. J. H. Nagel and R. M. Smith. Philadelphia, University of Pennsylvania Press: 15-25.

⁴¹ Edwards, G. C. I. (2004). *Why the Electoral College is Bad for America*. New Haven, CT, Yale University Press.

⁴² For the argument that the European Court of Human Rights was not the appropriate body to "strike down" the arrangements agreed at Dayton in 1995 see McCrudden, C. and B. O'Leary (2013). *Courts and Consociations: Human Rights versus Power-Sharing*. Oxford, Oxford University Press, McCrudden, C. and B. O'Leary (2013). "Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements." *European Journal of International Law* 24(2): 477-501. The authors argue that power-sharing bargains (including those in the EU) are most legitimately remade or amended under the rules that gave rise to them, not by courts.

⁴³ Grimmett, G. (2012). "Apportionment via the Cambridge Compromise." *Mathematical Social Sciences* 63(2 (March)): 68-73.