



MPIfG Discussion Paper 16/14

**De-Constitutionalization and Majority Rule**  
A Democratic Vision for Europe

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Max-Planck-Institut für Gesellschaftsforschung, Köln

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## Abstract

European integration has come to constrain the capacity for democratic political action in EU member states through the judicial constitutionalization of “economic liberties,” whereas the capacity for effective political action at the European level is narrowly constrained by the multiple-veto character of the Union’s “ordinary legislative procedure.” Since both of these constraints have institutional causes, they might be loosened by institutional reforms that shift the competence for negative integration from the sphere of judicial legislation to European political legislation and would allow legislation by majority rule at the European level. In order to ensure democratic legitimacy, however, majoritarian legislation would have to allow national opt-outs.

**Keywords:** EU, democracy, legitimacy, consensus, majority, negative integration, liberalization, constitutionalization

## Zusammenfassung

Die europäische Integration hat den Handlungsspielraum demokratischer Politik in den Mitgliedstaaten durch die richterrechtliche Konstitutionalisierung der ökonomischen Grundfreiheiten beschränkt. Gleichzeitig wird aber effektives politisches Handeln auf der europäischen Ebene durch den hohen Konsensbedarf des „ordentlichen Gesetzgebungsverfahrens“ behindert und oft verhindert. Beide Beschränkungen könnten durch institutionelle Reformen gelockert werden, die einerseits die Kompetenz zur Definition der negativen Integration von der richterlichen auf die politische Gesetzgebung übertragen, und die andererseits europäische Gesetzgebung mit einfacher Mehrheit ermöglichen. Das majoritäre Verfahren wäre freilich nur in Verbindung mit der Möglichkeit nationaler Opt-outs demokratisch legitimiert.

**Schlagwörter:** EU, Demokratie, Legitimität, Konsens, Mehrheit, negative Integration, Liberalisierung, Konstitutionalismus

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## De-Constitutionalization and Majority Rule: A Democratic Vision for Europe

European integration has long relied on the democratic legitimacy of its member states without paying much attention to the increasing importance of its multilevel governing processes. Today, however, Europe is caught in the intersection of multiple crises, all of which – Brexit and the euro crisis, the refugee crisis, and the crises in Europe’s relations with its eastern and southern “near abroad” – are challenging the effectiveness and the democratic legitimacy of government at the European and national levels. These dual challenges are connected: democratic legitimacy presupposes effective governing and problem-solving capacity. Hence the failure of output legitimacy may undermine or even destroy the possibility of input legitimacy – a risk for which the fate of the Weimar Republic remains a most disturbing memento (Brecht 1955). At the same time, however, the lack of input legitimacy in the present European context will constrain and may ultimately destroy the effectiveness of measures based on non-accountable supranational authority. Since these propositions go beyond my previous conceptualization of output-oriented and input-oriented legitimating arguments (Scharpf 1999), I will elaborate on them briefly before addressing my main theme, the specific factors constraining the capacity of democratically legitimate political action to deal effectively with the multiple crises challenging the multilevel European polity.

### 1 Democratic aspirations

Democracy is a contested normative concept. Even though Lincoln’s triad of “government of the people, by the people, for the people” may find broad agreement, different traditions of normative democratic theory put the emphasis on different elements. Thus the dominant emphasis of “**output-oriented**” legitimating arguments is on government *for the people* – that is, on the fundamental justification<sup>1</sup> for the coercive powers of the governing authority on the basis of its function of protecting life, liberty, and property and promoting the common interest of the governed. “**Input-oriented**” normative arguments focusing on government *by the people* emphasize the institutions and processes facilitating collective self-government or, in representative democra-

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1 Bernard Williams (2005: 3) defines the “first” political question “as the securing of order, protection, safety, trust, and the conditions of cooperation. It is ‘first’ because solving it is the condition of solving, indeed posing, any others.” In that sense, the representation of *buon governo* in Ambrogio Lorenzetti’s fresco in the Sienese Palazzo Pubblico (1338–39) does indeed symbolize the basic precondition of any discourse on political legitimacy.

cies, ensuring the responsiveness of governors to the interests and preferences of the governed. “**Community-oriented**” arguments, finally, focusing on government *of the people*, emphasize the precondition of a political community or *demos* that qualifies as the collective “self” of democratic self-government.

Obviously, these distinctions merely suggest different dimensions of normative concerns regarding the critique and justification of governing power. In the critical and affirmative discourses of constitutional democracies, arguments in all three dimensions are obviously pertinent, and the lack of conceptual precision is more of an academic than a political concern. In discussions of an alleged “European democratic deficit,” however, such an underlying agreement cannot be presupposed. Critics have primarily focused on the *no-demos* issue and the lack of effective channels of input-oriented political communication and electoral accountability (Miller 1995; Hix 2008), and they have sometimes treated output-oriented concerns as normatively irrelevant (Greven 2000). Their opponents, in contrast, have tended to deny the relevance of applying input-oriented criteria to EU decision-making processes, pointing to the low political salience of typical EU policy choices. Instead, EU legitimacy is seen to depend on the rule of law, popular trust in EU institutions, generalized output satisfaction, and ultimately on the central role of politically accountable national governments representing their constituencies in EU affairs (Moravcsik 1998, 2002).

But whatever may have been said until recently for the empirical plausibility of these output-oriented arguments, their legitimating power has declined dramatically under the cumulative impact of the present crises. These crises illustrate and demonstrate the fact that neither at the European nor at the national level does government have the capacity to provide effective solutions for manifest common problems and common aspirations. In short, the present crises demonstrate the political salience of challenges to the output legitimacy of government in the multilevel European polity.

Now obviously, once we have moved beyond the fundamental state functions of the Hobbesian Leviathan, the criteria for output legitimacy, or its failure,<sup>2</sup> are all socially constructed. They did and do change with the evolution of state functions, and with the rise and fall of expectations and normative aspirations. In the abstract, however, the relevant dimensions are well defined by the oaths of office in constitutional democracies, which commit presidents, heads of government, and ministers to employ the powers of government to promote the common welfare, protect the people from harm, and do justice to all.<sup>3</sup> These oaths reflect output-oriented rules at the actor level, which may

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2 As Amartya Sen (2009: 103–104) pointed out in reference to the concept of “*justice*,” agreement is much more likely to be reached if discussion focuses not on a positive definition, but on its opposite, the identification of cases of manifest “*injustice*.”

3 For example, Article 56 of the German Basic Law stipulates: “I swear that I will dedicate my efforts to the well-being of the German people, promote their welfare, protect them from harm, uphold and defend the Basic Law and the laws of the Federation, perform my duties conscientiously, and do justice to all.”

matter in personalized political critiques, political scandals, and impeachment procedures. Manifest output failure at the system level, however, may have less to do with the misconduct of officeholders than with the inadequacy of governing capacities in relation to the magnitude of the challenges confronting the polity. In other words, Moravcsik's sanguine assessment of the Community's output legitimacy may have been quite plausible, given his focus on the progress of European integration in the decades before existing governing capacities at the European and national levels were overwhelmed by the cumulative impact of global and self-inflicted challenges and crises.

If that is so, however, input-oriented democratic legitimacy will be frustrated as well. For some, to be sure, political participation is a value in itself – and the present European Union provides few opportunities for its realization. But for most of us, politics is about policies shaping the legal, economic, and social conditions of our collective existence through purposeful political action. Yet, if the polity whose policies we hope to influence should lack the capacity to shape these conditions, input-oriented democratic participation will lose its meaning, and its legitimating power as well. And neither would “communitarian” legitimacy be able to arise under conditions where the prospective European political community so obviously lacks the capacity for effective self-government. In other words, under the present conditions of the multilevel European polity, the lack of output legitimacy would undermine input-oriented and community-oriented legitimacy as well.

In the present paper, I will not return to my earlier publications suggesting that the governance of the single currency is afflicted with a manifest failure of output legitimacy and that its present regime amounts to an exercise of technocratic-authoritarian governing powers that destroys input-oriented democratic legitimacy in the member states (Scharpf 2013). Instead, I will focus on how the European Union itself is constraining the capacity for democratic political action at the level of its member states through the excessive “constitutionalization” of the European Treaties, while the capacity for effective political action at the European level is narrowly constrained by the multiple-veto character of the Union's “ordinary legislative procedure.” Since both of these constraints have institutional causes, there is at least a possibility that they might also be relaxed through politically feasible institutional reforms.

## **2 The asymmetric impact of excessive constitutionalization**

In the European Union, the Treaties are legally binding for European and national authorities and their legislative, executive, administrative, and judicial actions. In this regard, they perform the functions ascribed to the “basic law” in constitutional democracies; they are even harder to change than most national constitutions; and just like national constitutional courts, the European Court of Justice (ECJ) has the final say in

their authoritative interpretation. But the Treaties differ from national constitutions in crucial respects: a “lean” federal constitution must have rules organizing the federal level of government; it must also allocate governing competences to the levels of government; and it will usually stipulate a number of fundamental rights protecting basic human and citizen rights and freedoms against the exercise of governing powers. The European Treaties, however, go far beyond these core functions by regulating in considerable detail a wide range of matters that democratic constitutions would leave to be determined by political legislation (Grimm 2015, 2016a, 2016b). In other words, there is more constitutional law in the EU than in constitutional federal states.

### The problem

By itself, the greater coverage of the Treaties affects the horizontal and the vertical balance of powers. In the horizontal dimension, it reduces the domain of political legislation and enlarges the space for authoritative judicial interpretation – which becomes the only mode through which changes in primary law can be brought about without a unanimous Treaty amendment. In the vertical dimension, it also constrains member states in areas where, in the absence of federal legislation, policy could have been shaped by national political action. What matters most for member states, however, is the fact that the Treaties have also come to incorporate an *economic constitution* that places the rules governing economic relations and economic policy beyond political determination.

This idea, which is alien to the constitutions of democratic states, whether federal or unitary, originated in Germany in the 1930s within the “ordoliberal” variant of normative economic theory. Opposed to both laissez-faire liberalism and state interventionism, it advocated a rules-based economic regime in which state intervention would be necessary but essentially limited to ensuring the stability of money and preventing the self-destruction of competitive markets through economic concentration and cartels. After the Second World War, ordoliberal principles had considerable influence on German economic and legal theory (Ehmke 1961: 7–55), and also on the monetary and competition policies shaping the German “social market economy.” But efforts to have the underlying principles constitutionalized failed in the assemblies drafting the Basic Law and in the Federal Constitutional Court, which, in an early decision (BVerfGE 4, 7, 20.07.1954), held that democratically accountable governments and parliaments, though bound by the basic human and citizen rights protected by the Constitution, were not constrained by the doctrines of any economic theory in their choice of economic policies and market interventions.

However, what had failed in Germany succeeded in the European Economic Community, whose competition rules were framed under German influence and whose early practice was shaped by a German head of the Competition Directorate committed to



ordoliberalism<sup>4</sup> (Gerber 1988; Wegmann 2008). What mattered even more in long run, however, was the ECJ's interpretation of Treaty provisions postulating tariff abolition and the free movement of goods, services, capital, and workers. They might have been treated as the political commitment to a goal that was to be realized through European legislation. Instead, the Court elevated them to the status of "economic liberties" – that is, subjective rights of individuals and corporations that, invested with the properties of "direct effect" and "supremacy,"<sup>5</sup> came to have the legal force of fundamental rights that must be respected by all levels of government.

The Treaty of Rome had, of course, not included any of the typical constitutional rights of life, liberty, property, free speech, free press, or free association that are generally protected by national constitutions. Instead, the Court's interpretation of economic liberties transformed issues that in national constitutions would be settled by political legislation into constitutional rights that are constraining political choices at the European and national levels. In hindsight, this interpretation may be construed as a revolutionary act of judicial self-empowerment (Alter 2001; Grimm 2015, 2016a) that placed the Court's interpretation of economic liberties not only above member states' laws and constitutions, but also beyond the political choice of European legislation. Its doctrinal bases had been developed and disseminated by a transnational network of "Euro-Law" associations (Vauchez 2008; Alter 2009a); politically, the Court's authority was not effectively challenged by the "Masters of the Treaty" (Alter 2009b); and it is now generally accepted by national courts as well (Stone Sweet 2004; Kelemen 2011).

As a practical consequence of the constitutionalization of economic liberties, private litigants are empowered to challenge national law in ordinary courts – which are then obliged to submit claims not yet supported by the settled case law to the ECJ for a preliminary opinion. It is this combination of self-interested litigation pushing against the boundaries of the current case law with the Court's methodological commitment to "teleological interpretation" (Itzcovich 2011), the *effet utile* principle, and its own role as a "motor of integration" (Horsley 2013) that has dynamically extended the protection of economic liberties – moving from intervention against protectionist discrimination to the removal of non-discriminatory potential "impediments" to economic choice (Barnard 2009), from the free movement of goods to all other economic liberties, and from the free movement of workers to mobility rights derived from European citizenship (S. Schmidt 2012).

In light of the obvious difficulty of harmonization through consensual legislation, judicial legislation promoting "integration through law" (Cappelletti et al. 1985) was widely considered a welcome "bypass" to avoid potential political blockades (Genschel 2011;

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4 From 1958 to 1967, Hans von der Groeben, a high civil servant in Ludwig Erhard's Ministry of Economic Affairs, was the first Director General for Competition in the European Commission.

5 *Van Gend & Loos v. Netherlands* (1963); *Costa v. Enel* (1964).

Falkner 2011). And indeed, the famous *Cassis* decision<sup>6</sup> of 1978 was then used by the Commission to promote political agreement on the Single European Act and the move from unanimity to qualified majority voting, as even governments as yet unconverted to the neoliberal creed (Jabko 2006) came to prefer the legislative harmonization of basic standards to the uncertainties of judicially imposed “mutual recognition” (S. Schmidt 2007).

Yet, even after the Single European Act had generated an avalanche of European legislation on product standards promoting work safety and environmental and consumer protection, the leadership of judicial “negative integration” and liberalization was maintained through the progressive widening and deepening of the reach of economic liberties and European competition law. Thus the domain of free service provision was extended to include public-sector banks (Seikel 2013) and a wide range of functions that had been performed by public infrastructure and public or publicly subsidized social services in most member states (Sauter 2014).<sup>7</sup> The right of free establishment was extended by the *Centros*<sup>8</sup> decision to prevent the application of national company law to firms established as letter-box companies abroad for the sole purpose of operating domestically (Lowry 2004); and free capital movement was seen to be violated by national attempts to constrain tax evasion (Genschel 2011) and strengthen stakeholder representation in shareholder assemblies (Werner 2013). And finally, in a series of (in) famous decisions in 2007 and 2008,<sup>9</sup> the freedom of service provision was also held to override national wage regulations and collective-bargaining and collective-action rights (Rödl 2011).

In this context, it is worth noting that the Court’s enforcement of economic liberties and European competition law is not constrained by the allocation of governing competences between the Union and its member states, or even by Treaty clauses such as Articles 153, 5 or 168, 7 of the Treaty on the Functioning of the European Union (TFEU), which explicitly preclude the exercise of European competences.<sup>10</sup> This effect appears constitutionally appropriate where basic human rights are at stake. But in light of the fact that in modern capitalism, economic interactions have come to pervade all aspects of society, the Court may now intervene in the full range of national governing powers – whenever there are litigants, individuals, or corporations who find it in their interest to push for the greater extension of economic liberties or unfettered competition.

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6 Case C-120/79 (1979).

7 This is not meant to deny the influence of OECD-wide beliefs supporting the neoliberal transformation of the post-war “mixed economies” since the 1980s (for a comparative account, see Wollman et al. 2016). But the ECJ’s case law facilitated the implementation in member states that were resisting.

8 Case C-212/97 (1999).

9 *Viking*, C-438/05; *Laval*, C-341/05; *Rueffert*, C-346/06; *Luxembourg*, C-319/06.

10 The standard argument is that even in the exercise of their undisputed governing competences, member states must of course respect the subjective rights of individuals and corporations that are protected by the Treaties (e.g., *Kohll* C-158/96, 19–20).

This is not meant to say that such efforts will invariably succeed. The Court may use its version of the *proportionality* test to tolerate some national constraints on economic liberty. Nevertheless, the balance between economic interests and public purposes is no longer defined by democratically accountable national governments and parliaments, but ultimately by a Court that is committed not only to the priority of European over national competences but also to the promotion of a liberal economic constitution (Höpner 2011).

In effect, the extension of judicial surveillance over the exercise of national competences has created a highly asymmetric regime for the heterogeneous political economies of EU member states. Given the historical, institutional, and political differences between “liberal” and “coordinated market economies” (Hall/Soskice 2001) and between “liberal,” “Bismarckian,” and “social democratic” welfare states (Esping-Andersen 1990), European states had defined different boundaries between state, market, and civil society. They had adopted different mixes of tax-financed, work-based and commercial social security, and of public, not-for-profit, and private social services; and their industrial relations and wage-setting institutions were corporatist, statist, or decentralized, to mention just some of the differences. In general, therefore, in the non-liberal Scandinavian and Continental “social market economies,” capitalism was more “organized” and the provision of goods, services, and infrastructure was to a larger part “mixed” between the state or societal organizations and the market than was generally the case (but not without significant exceptions, like the British National Health Service, NHS) in the more “liberal” Anglo-Irish political economies. These differences had three crucial implications.

First, since the non-liberal institutional configurations and policy legacies had been historically shaped by national policy choices reflecting the contingent outcomes of class battles and political compromises, they differed significantly from one country to another. By the same token, further policy changes were likely to have high political salience as well.

Second, to the extent that these non-liberal national solutions (including the NHS) had the effect of limiting the domain of market competition, they were obviously the primary target of the ECJ’s protection of economic liberties against “impediments” to their exercise. Equally important, however, were the differences among non-liberal national solutions. Even if these could pass the Court’s “proportionality” tests individually, transnational differences would still constitute “non-tariff barriers” to economic mobility – with the consequence that the ECJ’s requirement of “mutual recognition” would undermine the economic and political viability of more demanding national solutions (S. Schmidt 2007, 2009). In practical effect, therefore, the impact of the judicially defined and enforced expansion of the domain of Treaty-based economic liberties was necessarily, and almost exclusively, targeted at the institutions and policy legacies of the non-liberal member states of the Community and the Union.

Third, the “legitimate diversity” (Scharpf 2003) among non-liberal political economies also frustrated the promise of a “social dimension” of European integration that Jacques Delors had associated with the completion of the “Single Market” program in 1992 (Delors 1988). Even after the mid-1990s and before Eastern enlargement, when center-left governments for a while had a majority at the European level, there was no progress in creating non-liberal regimes at the European level, and no agreement on legislative harmonization that could stop the erosion of non-liberal national systems of social protection, industrial relations, and corporate governance (Barnard 2014), whereas a series of Treaty amendments that tried to protect national autonomy in such fields as education, healthcare, and industrial relations by explicitly limiting European competences could not, for the reasons mentioned above, stop the progress of judicial liberalization.

In effect, therefore, the advancement of European economic integration through the judicial extension and enforcement of Treaty-based economic liberties has had an asymmetric negative impact on the institutions and policy legacies of non-liberal political economies – whereas member states with liberal economic institutions and practices have hardly been affected.<sup>11</sup> This asymmetry cannot be corrected at the European level because the historically shaped configurations of non-liberal member states are “parochial” (Streeck 1997) in the sense that none of them could find acceptance as a template of uniform European solutions. Under these conditions, the legal erosion of national non-liberal systems will have a default outcome that approaches the liberal model, while legislation at the European level will be under constitutional and political constraints favoring the codification of the ECJ’s case law and market-making consensual rules (S. Schmidt 2016). In other words, the EU cannot become a social-market economy (Scharpf 2010).

In member state politics, however, the progressive expansion of legal constraints on non-liberal institutions and practices has generally had low political salience. One reason is that judicial legislation works through decisions in individual cases whose specific details will often appear unspectacular or even trivial and will catch the attention of political parties, trade unions, and the media only under exceptional circumstances – as was partly true in the *Laval-Viking* series of interventions in collective action or in the *Volkswagen* case<sup>12</sup> (Höpner 2009; Werner 2013). And even if governments are aware of the negative policy implications of the decisions, there is no legal remedy against Treaty-based ECJ judgments; political responses that would have to mobilize support for a unanimous Treaty amendment appear quite unpractical; and open defiance through explicit noncompliance<sup>13</sup> would bring governments in conflict with their own national

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11 In this regard, the asymmetric impact of the European regime of economic liberties on “liberal” and “non-liberal” political economies resembles the asymmetric impact of the regime upholding the European Monetary Union on “Northern” and “Southern” political economies (Scharpf 2016, forthcoming). In both cases, the asymmetry arises if a uniform European regime is imposed on structurally heterogeneous national polities, economies, and societies.

12 C-112/05 (2007).

13 There is, of course, a lot of tacit noncompliance in the EU (Conant 2002) – which, however, will

legal order and their commitment to the rule of law. It is not surprising, therefore, that even governments strongly opposed to a ruling have generally not only accepted the decision of the specific case, but also accommodated their administrative responses and subsequent policy choices (Blauberger 2012). A similar avoidance of open conflict has characterized responses by the Council and the European Parliament (EP) to Treaty-based ECJ decisions that nullified or modified European legislation (Martinsen 2015; Davies 2016; S. Schmidt 2016).

By and large, therefore, “integration through law” has not only progressed through non-political processes relying on the institutional independence and supranational authority of the ECJ (Kelemen 2012; Joerges 2016); it has also generated remarkably little open opposition at the national and European levels; and it has hardly been touched by the increasing politicization of European issues (Hutter/Grande/Kriesi 2016). In that sense, its impact on the exercise of democratic governing powers in the multilevel European polity has remained politically latent. Whereas the piecemeal erosion of the institutions of non-liberal economies, industrial relations, and welfare states is widely lamented in comparative political economy and welfare-state research, it is usually ascribed to the competitive pressures of economic globalization and the dominance of a neoliberal *Zeitgeist*. By comparison, studies combining legal and politico-economic analyses with a focus on the liberalizing effects of the judicial constitutionalization, expansion, and enforcement of “economic liberties” have remained quite rare (Höpner/Schäfer 2008; Scharpf 2010; Rödl 2011; Werner 2013; Seikel 2013; Barnard 2014).

What is more widely recognized by now is the constraining effect on political democracy arising from excessive constitutionalization in general (Bellamy 2007) and from European constitutionalism in particular (Menéndez 2013; Grimm 2015, 2016b; Garben 2015). This effect operates not only through actual interventions against specific national laws and institutions, but even more so through “non-decisions” (Bachrach/Baratz 1962), that is, through the deterrent effect on political initiatives which, arguably, might violate supreme European law. The effect is greatly extended by the large penumbra of legal uncertainty associated with judicial legislation evolving through decisions in individual cases rather than through the general rules of European legislation (S. Schmidt 2008, 2016).

Given the constitutional supremacy and practical irreversibility of Treaty-based case law combined with the expansive dynamism of interest-driven litigation, there is a ratcheting effect of ever tighter legal constraints on non-liberal political action at the national and European levels. And quite apart from the liberalizing transformation of non-liberal political economies, the consequence is a progressive narrowing of the action space and hence of the problem-solving capacity of democratic politics in the face of increasing external and internal challenges and crises. In other words, the judicial constitutionalization, extension, and enforcement of economic liberties has the effect

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not be able to challenge the legal validity of the Court’s rule for law-abiding member states.

of incapacitating democratic political action at a time when the multilevel European polity is challenged by the interaction of multiple crises that have the potential of undermining not only the democratic legitimacy, but also the political viability of government at the European and national levels.

But what can be done about this?

### A precedent: The New-Deal revolution in US constitutional law

The present European constellation is institutionally unique. But there is a remarkably close parallel in the constitutional history of the United States in the first third of the twentieth century (Maduro 1998; Barnard 2009), when the Supreme Court used three bases of constitutional law to create ever tighter constraints on political action by the states as well as the federal government. With regard to state action, constitutional constraints were derived from Article I, Section 8, Clause 3 of the original Constitution, which states that “*the United States Congress shall have power to regulate Commerce with foreign Nations and among the several States,*” and from the Fourteenth Amendment, which provides that “*no State ... shall deprive any person of life, liberty or property without due process of law.*” In the Court’s interpretation, however, the empowerment of federal legislation also implied a “*negative (or dormant) commerce clause*” that constrained state action impeding interstate commerce even in the absence of legislation (Eule 1982). Moreover, the Fourteenth Amendment, which had been adopted after the Civil War to protect former slaves against discriminatory state action, was read as a guarantee of “*substantive or economic due process*” that protected economic actors’ freedom of contract against state regulation (Ehmke 1961: 334–380; HLR Note 1990; Phillips 2001). In combination, the Supreme Court’s interpretation of these two clauses imposed roughly the same liberalizing constraints on state action as those that are presently imposed on EU member states by the ECJ’s interpretation of “*economic liberties*” (Maduro 1998).<sup>14</sup>

At the same time, however, federal legislation under the *commerce clause* was also constrained by the Court’s “bi-polar” interpretation of the constitutional allocation of competences (Scharpf 2010). Treating the “*police power*” as the core of the residual competences of the states, the Court intervened against federal laws purporting to regulate interstate commerce if they also appeared to serve the typical public-health, safety, and general-welfare purposes of police-power measures. In a landmark case, therefore, a federal statute excluding the products of child labor from interstate commerce was held to conflict with the *police power* reserved to the states,<sup>15</sup> while the child-labor regu-

14 Technically, the constraints imposed by American case law were even tighter, as the application of economic due process did not even require a potential trans-border impediment to the exercise of economic liberty.

15 *Hammer v. Dagenhart*, 247 U.S. 251 (1918).



lations of individual states were frustrated by out-of-state competition that could not be excluded under the *dormant commerce clause*.

These issues came to a head in the Great Depression of the 1930s, when the Supreme Court struck down core elements of Roosevelt's New Deal program in a series of dramatic decisions. As the conflict had become a major issue in the 1936 elections, outright resistance and a "Court packing plan" seemed imminent when the Democrats won by a landslide. The confrontation was barely avoided when the Court reversed itself<sup>16</sup> in 1937 by removing the constitutional constraints on the economic policy choices of democratically accountable governments at both levels. After the "constitutional revolution of 1937," therefore, state governments were bound only by federal legislation, but no longer by the judicial doctrines of *economic due process* and the *dormant commerce clause* (HLR Note 1990; Barnard 2009). At the same time, federal legislation under the *commerce clause* was no longer prevented from pursuing the public-health, safety, and general-welfare purposes that are also matters for the concurrent *police power* of the states (Ehmke 1961: 381–402; Scharpf 1965: 325–346; Eule 1982; Redish/Nugent 1987). In other words, even though the United States continues to be an extremely liberal political economy, policy choices at both the federal and state levels have ceased to be constrained by a judicially defined "economic constitution."

## European solutions?

In the United States, the "constitutional revolution of 1937" was brought about through judicial self-correction under the threat of a frontal collision between judicial authority and highly politicized democratic majorities. As these conditions are unlikely to arise in the European Union, hopes for a judicial self-correction are also unlikely to be fulfilled. The question is whether a similar result could be achieved through an amendment of the European Treaties – perhaps in the context of a broader revision of the European institutional set-up in response to the present crises and the Brexit negotiations?

Dieter Grimm (2015, 2016a, 2016b) has suggested a radical de-constitutionalization of the European Treaties. In his view, a future Treaty of the European Union (TEU) should contain only rules of genuine constitutional status. These would have to constitute governing authorities at the European level, regulate their roles in the decision-making procedures of the Union, specify EU governing competences in relation to the member states, and define the fundamental principles, human rights, and citizen rights that are binding on European and national authorities. Most other rules in the present TFEU should then be downgraded to the status of ordinary or secondary European law.

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16 The "switch in time that saved nine" was actually achieved by one Justice (Roberts) changing sides in a divided Court – but then consolidated by Roosevelt's subsequent judicial appointments (Leuchtenburg 1995).

This fundamental revision of the Treaties would of course require the settlement of a vast number of difficult and controversial issues. If it could be achieved, it would indeed liberate political and legislative choices at the European level from the ever tighter and ever more rigid constitutional constraints of the overextended primary European law. As a consequence, it would rebalance the relationship between judicial and legislative authority in such a way that the judiciary would have to respect the primacy of potentially reversible policy choices made by politically accountable actors, but would nevertheless have the mandate and the authority to review political legislation on the basis of the institutional ground rules, basic human and citizen rights, and the fundamental principles of the European constitutional Treaty.

From the perspective of EU member states, however, the immediate effect of this fundamental reform would be quite limited. The present *acquis* of European law, even if much of it should lose constitutional status, would of course remain in force. And according to the general rule of federal constitutions, European law and its judicial interpretation would still override the law of the member states; it could still be invoked by individual and corporate litigants in national courts; and it would still be policed by the Commission in infringement proceedings (Article 258 TFEU). Specific rules could, of course, now be relaxed or abolished through European legislation. But given the diversity of non-liberal national solutions and political preferences, individual governments would have to fight steep uphill battles trying to mobilize broad political support at the European level for removing a particular element of the *acquis*.

From the perspective of American states, the constitutional revolution of 1937 had a narrower thrust: it merely had to reverse the judicial creation and enforcement of subjective constitutional rights based on the doctrines of the “*dormant commerce clause*” and “*economic due process*.” From the perspective of EU member states, it would be equally sufficient if the same effect could be achieved for the “economic constitution” that the Court has created by interpreting Treaty clauses promoting the integration of the internal market as “*economic liberties*,” which it treats as directly applicable and enforceable subjective rights. Since we cannot count on the Court to reverse its interpretation, the question is whether a similar effect could be achieved through Treaty amendments that would not require a total revision of the European legal order.

One such possibility might be the insertion of a general clause at the beginning of Part Three of the TFEU stating that, under Titles I–IV, VI, and VII, litigation and infringement proceedings may only be based on regulations and directives adopted under Articles 289, 290, and 291 TFEU.<sup>17</sup> A similar clause might also be inserted with regard to Article 16 of the Charter of Fundamental Rights. By not including the prohibition of discrimination on the grounds of nationality under Article 18 TFEU and Article 22 (2) of the Charter, however, the proposed amendments would still allow litigation and

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17 Thus, Commission directives adopted under Article 106 (3) TFEU would not qualify.



infringement proceedings challenging protectionist measures impeding the access of foreign suppliers or consumers to national markets.<sup>18</sup>

If this or a similar solution were to be adopted, there is no reason to fear that it could destroy the single market. The huge body of European legislation on economic integration, much of it codifying the *economic liberties* case law, would of course remain in place. From the perspective of member governments, therefore, the proposal would make most of a difference in policy areas like capital taxation, industrial relations, corporate governance, social and public services, and public infrastructure, where the diversity of national traditions, institutions, and preferences has so far impeded effective European legislation (Scharpf 1999: ch. 3). Where European legislation does exist, it could now be changed – but it would still be hard to mobilize European majorities for issues that may have political salience in only one or a few member states. In a previous article, however, which did not focus on constitutional issues, I proposed a procedure that would allow member states to ask for politically controlled individual opt-outs from the European *acquis* (Scharpf 2015a: 403). It could well be combined with the present proposal.<sup>19</sup>

From the perspective of European legislation, the present proposal would change the function of economic liberties: instead of displacing European legislation, these liberties would empower it to define (and re-define) the wider or narrower limits of competitive markets in the political economies of the European Union. And where the effective boundaries between markets, civil society, and the state have not been (or no longer will be) defined by political legislation at the European level, the competence would revert to political choices at the national level. In other words, the proposed amendments should and could impede and also reverse the expansion of a judicially defined European economic constitution at the expense of political action at the European and national levels.

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18 This would amount to a return to the Court's case law before the *Dassonville* and *Cassis* decisions moved from intervening against protectionist discrimination to intervention against all national rules or practices "that are capable of hindering, directly or indirectly, actually or potentially" the exercise of a Treaty-based liberty. A return to non-discrimination would also correspond to the very cautious use of the "*dormant commerce clause*" in recent case law of the US Supreme Court (Barnard 2009).

19 Under the procedure, a member state should notify the Commission of a national legislative initiative that would conflict with existing European legislation. After being reviewed in light of the issues at stake in the particular case, such initiatives could be denied by Parliament and Council. In effect, the possibility of re-examining the *acquis* on a case-by-case basis should result in a more fine-grained pattern of European law that is based on a political assessment of the actual need for Europe-wide uniformity, and it should eventually limit the body of binding European law to rules that serve a positive European purpose and that have the political support of current legislative majorities at the European level.

### 3 The Joint Decision Trap

But while these reforms would enlarge the action space for democratic policy choices at the national level, their effect on European legislation might be quite limited. As was pointed out some time ago, the manifest asymmetry of negative and positive integration is a consequence not only of the “negative” effectiveness of legal constraints on national action, but also of the political weakness of “positive integration” and re-regulation through legislative action at the European level (Scharpf 1999: ch. 3).

#### The problem

The problem, in a nutshell, has been and still is the “*Joint Decision Trap*,” i.e., the fact that European legislation must be adopted in a multiple-veto system (Scharpf 1988; Tsebelis 2002). Under the present rules of the “Community Method,” the process must start with the Commission making a proposal that a majority – but generally a consensus – of the College of Commissioners has agreed upon (Hartlapp et al. 2014); and it cannot succeed without the agreement of a qualified majority – but generally a consensus – of governments in the Council and an absolute majority in the European Parliament. But as successive rounds of enlargement have not only increased the number of member states from the *Original Six* to twelve in the mid-1980s and now to twenty-eight (or twenty-seven?), they have also dramatically increased differences among them in size, economic development, social and political cultures and institutions, geo-political location, and political preferences. At the same time, the specialized directorates in the Commission are highly accessible to the inputs of economically and organizationally powerful interest organizations (Eising 2008; Hartlapp et al. 2014), whereas the committees and party families in the European Parliament may be responsive to different combinations of lobbies and non-governmental organizations (Coen/Richardson 2009). In other words, European legislation presupposes broad consensus and is easily blocked by conflicting economic, institutional, and political interests and preferences among the multiple participants.

This explains why judicial legislation and “integration through law” (Cappelletti et al. 1985) was widely welcomed as a non-political “bypass” (Genschel 2011) after legislative harmonization had stagnated in the 1970s; and it also explains the quantitative importance of legislation that appears politically uncontroversial because it merely seems to codify the Treaty-based case law (Martinsen 2015). Beyond that, the dynamic expansion of European legislation in the fields of public health, work safety, and environmental and consumer protection (Art. 114 TFEU) is to a large extent explained by the common interest of governments and industries in the harmonization of product standards that ensure access to the wider European market, whereas regulations of production processes that do not affect the quality of products and hence their market access have encountered much greater difficulties (Scharpf 1999: 91–101).

Moreover, even in fields where political interests do not initially converge, research has identified a variety of strategies going beyond the “classical” methods of side payments and package deals to facilitate agreement in multi-actor negotiations (Scharpf 1997: ch. 6). These include the Commission’s employment of “ideational power” (Carstensen/V. Schmidt 2016) to facilitate ideological convergence (Jabko 2006), its use of legal instruments to divide and undermine national veto positions (S. Schmidt 2009), and its resort to Treaty-base games, arena shifting, and procedural “subterfuges” that allow political conflict to be reduced or avoided (Héritier 1997). In actual practice, therefore, the promoters of European legislation will often find ways and means to achieve solutions exceeding agreement on the lowest common denominator that otherwise would have been expected as the default outcome of the veto-player model (Héritier 1999; Falkner 2011; Scharpf 2011).

However, though there is more effective European legislation than a simple veto-player model would suggest, the rules of the Community Method still imply a need to accommodate a wide variety of national, institutional, economic, and partisan veto players. As a consequence, European legislation is unlikely to violate any of the politically salient interests represented by national governments or any of the economic and civil-society interests that have privileged access to Commission directorates or to committees and party groups in the EP.

By the same token, however, the incapacity to inflict harm also explains the lack of effective and democratically legitimate political action in the face of significantly diverging preferences. Even in calm and economically favorable periods, the search for uniform European rules that will not inflict Pareto-inferior outcomes on any veto player will be difficult and time consuming. Moreover, the process will be non-transparent as solutions are worked out behind closed doors in inter-institutional and intergovernmental deliberation and bargaining. From the perspective of citizens, therefore, EU legislation by the Community Method has no resemblance to the ideal model of representative democracy, where policy choices arise from publicly debated controversies that are publicly resolved between governments and office-seeking opposition parties that must appeal to citizens for support at the ballot box. Nevertheless, as long as no harm was inflicted, and as long as democratically accountable national governments loyally implemented European law, academic interest in the European democratic deficit was not matched by politically salient public concerns (Scharpf 2013).

But when times turned rough during the international financial and economic crises after 2008, the constitutionalized Maastricht rules prevented effective policy responses, while the procedures of unanimous Treaty revision foreclosed any attempt to change the substantive rules in order to allow discretionary political and effective legislative responses to the crisis. In its first serious challenge under the Maastricht and Lisbon Treaties, therefore, European legislation by the Community Method was incapacitated by an overly rigid constitutional straightjacket. Faced with the prospect of massive government failure, therefore, European and national leaders have tried, and are still trying,

to gain more room for maneuver by fudging the constitutional constraints – whose legal force they cannot challenge as long as they are unable to agree on formal changes. In order to gain more flexibility, they have widened the discretionary powers of non-accountable supranational actors and relied on conflict resolution through intergovernmental negotiations outside of the Treaty and under the influence of asymmetric bargaining powers.

### Supranational and intergovernmental flexibility

The first of these options is exemplified by the extension of the discretionary powers of the European Central Bank (ECB). Since its political independence is more securely institutionalized than that of any other central bank, it has been able to interpret the narrow mandate defined by the Maastricht Treaty very broadly. Hence, on the verge of another euro crisis in the summer of 2012, President Draghi's dramatic announcement of unconventional measures was effective in stopping speculative attacks on some Southern states. And in the face of serious *ultra vires* challenges, the ECJ's *Gauweiler* decision<sup>20</sup> affirmed that the Bank was not overstepping its narrow mandate of securing price stability through monetary (rather than economic) policy measures. Yet even when pushed to its limits, monetary policy alone has been unable to stimulate economic growth in the Eurozone. And the more the Bank's discretionary measures appear to be straining its Treaty-defined narrow mandate, the more they are also pushing against the boundaries of the limited legitimacy of politically non-accountable authority. In any case, the ECB's autonomous powers can only address a narrow range of problems, and even there the bank's effectiveness is constrained by the lack of complementary action in fiscal policy (De Grauwe 2013). Similarly, the Juncker Commission is straining against its narrowly defined legislative mandate under the Excessive Deficit Procedure by postponing the enforcement of deficit rules against member states in economic and political distress. But while this exercise of "discretion by stealth" may soften the negative impact of rigid rules, it also challenges the narrow boundaries of the Commission's legitimacy and its difficult relationship with the Council (V. Schmidt 2015a; Seikel 2016).

In short, the problem-solving capacity of politically non-accountable authorities remains limited by narrow constitutional and legislative mandates – which may at best be somewhat extended by discretionary extensions and creative judicial interpretation. Such constraints seem to be absent when the exit from the Community Method is achieved through intergovernmental agreement – a mode of policy making whose importance is said to have generally increased in the post-Maastricht period (Bickerton et al. 2015). But while intergovernmental action has certainly dominated recent political responses to crises in Ukraine, the euro crisis, and the refugee crisis, there is still a theoretical puzzle: if high consensus requirements explain the lack of effective political

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20 Case C-62/14 (16 June 2015).

action in the Joint Decision Trap, why should one assume that effectiveness is increased by switching from the Community Method to bargaining among the governments involved – where the decision rule is generally unanimity or, at best, consensus?

In approaching an answer, it seems useful to distinguish between intergovernmental policy making within and outside the institutional framework of the European Treaties. In the former case, bargaining takes place in a “compulsory negotiation system” (Scharpf 1997: 143–145) in which unilateral action is ruled out and objectives can only be achieved through (near) universal agreement. Outside of the EU rules, in contrast, negotiations are “voluntary” in the sense that participation is not institutionally ensured and that outcomes are binding only for those who agreed. In matters not regulated by the existing Treaties, therefore, “coalitions of the willing” may commit themselves to common action, while others may prefer to stay outside. The Schengen Agreement is a celebrated example of how European integration could be advanced outside of – and subsequently integrated into – the legal framework of the Treaties. The Fiscal Compact was adopted under international law to avoid a British veto against amending the Treaties. But the ECJ’s obvious difficulty in justifying the Treaty creating the European Stability Mechanism (ESM) in its *Pringle*<sup>21</sup> decision (De Witte/Beukers 2013) suggests that the option of intergovernmental action outside of the Treaties in areas that are arguably within the competence of the Union will not be generally available – except under the constraining rules of “enhanced Cooperation” (Articles 20 TEU, 326–334 TFEU).

If decisions have to be reached within the institutional framework of the EU, and if the Community Method appears blocked by disagreement in the Council, it is nevertheless true that intergovernmental agreement is often reached in summit meetings among the heads of state and government (Hartlapp 2011). One obvious reason is the greater opportunity at the higher hierarchical level for inter-sectoral package deals. Beyond that, leaders may have the political authority to accept concessions that lower-level negotiators would have to reject. Moreover, the group dynamics and the drama of summit meetings may also provide an emotional and political push that increases the perceived importance of reaching a common European solution relative to the national concessions required.

What may matter more from a theoretical perspective, however, is the lesser role of supranational actors and formal decision rules – and the increasing importance of power asymmetries among EU member states. Under the Community Method, the Commission’s role of agenda setter may constrain political action<sup>22</sup> and the European Parliament may oppose intergovernmental compromises. At the same time, formal decision

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21 Case C-370/12.

22 Moreover, mandates of the European Council will not only short-circuit the processes through which the Commission comes to launch legislative initiatives, but may also immunize these initiatives against close political scrutiny under the Community Method – as seems to have happened with the EU regulation banning incandescent household bulbs (Deters 2015).

rules in the Council define the relative voting power of national governments in ways that moderate the effect of population size and take no account of any other differences in national power resources.<sup>23</sup> This is why small EU member states have always looked to the Commission and formal European institutions to protect them from their bigger neighbors (Panke 2010); and it is also why Andrew Moravcsik's "liberal intergovernmentalism" has not been completely persuasive when used to explain all European policy outcomes by reference to the size and economic potential of individual member states (Moravcsik 1993, 1998; Garrett/Tsebelis 1996).

This is not meant to imply that differences in national power resources are fully neutralized by institutional voting rules. But it suggests that their importance increases as formal voting procedures are bypassed by informal intergovernmental bargaining. It needs to be understood, moreover, that what matters is not differences in power resources as such, but issue-specific differences in bargaining power. This is the common conclusion of power-dependence theory (Emerson 1962), resource-dependence theory (Pfeffer/Salancik 1978), and Nash bargaining theory (Nash 1950): power is a relational and issue-specific concept; and bargaining power is defined by the relative costs of non-agreement for individual participants.

In the context of the euro crisis of 2010, for instance, and after "exit" from the Monetary Union had been ruled out by general consent, the dependence of financially challenged states on intergovernmental credits, and the position of Germany as the largest creditor state, had indeed generated an extremely asymmetric distribution of bargaining power that allowed the imposition of strictly Northern "conditionalities" (Tsoukalis 2016; Scharpf 2016, forthcoming).<sup>24</sup> Moreover, the "coercive power" of financial dependence may also have favored the acceptance of the "ideational" German precepts of fiscal austerity and supply-side reforms (Carstensen/V. Schmidt 2016a, 2016b; Matthijs 2016). In September 2015, in contrast, when Germany asked for the redistribution of refugees, the power-dependence relationship was reversed, and instead of contributing to ideational power, the relative strength of the German economy now weakened the appeal to European solidarity and burden sharing.<sup>25</sup>

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23 That is why it matters that the "*one country, one vote*" rule of the ECB Governing Council differs significantly from the weighted votes reflecting shareholder contributions on the ESM Board of Governors.

24 And once these rules were in place, the attempt by the Greek government to have them changed in 2015 lacked the asymmetric bargaining power that would have been needed to bring about their unanimous revision (Tsebelis 2016).

25 Resorting then to formal decision rules, the Commission managed to have a regular Council Decision adopted that defined quotas for the relocation of 120,000 refugees from Greece and Italy. But though the rule adopted by qualified majority in the Council is legally binding for all member states, its legitimacy is challenged by governments in Central and Eastern Europe, and implementation remains minimal (Börzel 2016).



In short, moving from the formal constraints of the Community Method to informal intergovernmental bargaining may indeed facilitate European action by exploiting situation- and issue-specific asymmetries of bargaining power. But of course the existence of power asymmetries among EU member states that *happen to favor* effective European action (e.g., the “Franco-German tandem”) cannot (or can no longer) be taken for granted. Hence it also seems unlikely that the “new intergovernmentalism” (Bickerton et al. 2015) might point the way toward a general remedy for the European problem-solving and democratic deficits resulting from the legal strength of negative, and the political weakness of positive, integration.<sup>26</sup>

In effect, therefore, neither supranational nor intergovernmental options seem to provide generally viable and legitimate solutions in policy areas where democratic politics in member states is constrained by negative integration and effective European action is blocked by political disagreement. Under these conditions, the appropriate response in normative political and constitutional theory would be to restore the problem-solving capacity of EU member states – which might require European legislation that disables the binding force of the *acquis* in specific matters. But obviously, such enabling legislation may also be blocked by parties benefiting from the status quo. Moreover, the solution would not fit constellations where the ineffectiveness of purely national responses to transnational crises seems obvious, while potentially effective solutions at the European level lack political feasibility.

### Activating the politics of European legislation

Under these conditions, effective problem solving at the European level does seem to require reforms that help activate political demand for European solutions and politicize the policy choices in European legislation. A first step might be to reduce the negative control of the European agenda that is implicit in the Commission’s monopoly of legislative initiatives. In exceptional cases, to be sure, the European Council may, by intergovernmental consensus, mandate the development of a particular policy initiative. Beyond that, however, problems, policy purposes, and potential solutions that are not taken up by the Commission will remain excluded from the European policy making process. And though the Commission President may have a few political priorities, the gatekeeping function would primarily be exercised by the specialized Directorates General and shaped by the distinct technical orientations and the political sensitivities of their professional staffs (Hartlapp 2014).

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26 Moreover, where intergovernmental power asymmetries do in fact facilitate European action, democratic legitimacy is undermined by the dominance of executives over parliaments in intergovernmental negotiations, and even more so by the asymmetry of governing powers itself. From the perspective of the peoples affected, concessions accepted by the governments of power-dependent states will amount to being ruled by foreign governments – and thus to violations of the fundamental “non-domination” principle of republican self-government (Pettit 1997).

In the interest, therefore, of activating the politics of European policy making, the Commission's veto function could and should be disabled. Allowing legislative initiatives to be introduced by governments in the Council and by factions of the European Parliament would widen the range of European policy options for which political support, and against which political opposition, could be mobilized at the national and European levels.

A second and much more radical step would allow the adoption of European legislation by plurality vote in the Council and the Parliament. This would greatly increase the capacity for *political* action at the European level, and it would also raise the stakes in European politics – and hence the political salience of European policy choices. At the same time, however, European legislation by majority rule would provoke fundamental concerns of democratic legitimacy as well as quasi-metaphysical controversies over the existence of a European *demos* that could only be met if the move to majority rule were combined with the right to national opt-outs. But that requires more thorough discussion.

#### 4 From legitimating consensus to legitimate majority rule?

Originally, European legislation had required the unanimous agreement of national governments in the Council. At that time, its political legitimacy was thought to rest on the Roman-law consensus principle of *volenti non fit iniuria* combined with the assumption that politically accountable national governments were authorized and legitimated to represent the interests and preferences of their peoples in external interactions. That link was weakened when the Single European Act of 1987 introduced qualified majority voting (QMV) in the Council on issues of economic integration – which then provoked academic and some public concern over a European democratic deficit. In response, the rights of the European Parliament were progressively extended and, in combination with the extension of QMV in the Council, generalized in the rules of the “Community Method,” alias the “ordinary legislative procedure” (Article 289 TFEU). At the same time, the Lisbon Treaty postulated a dual legitimacy base for the EU as a “representative democracy” – combining the direct representation of citizens in the European Parliament and their indirect representation through democratically accountable governments in the Council and in the European Council (Article 10 TEU).

In practice, nevertheless, the Council tries to avoid decisions by QMV, continuing to search for consensus solutions. And even if unanimity is not achieved, the formal quorum is so high, and blocking minorities are so small, that the Community Method in practice can still claim legitimacy by invoking the consensus principle. If that should be abandoned in the search for greater capacities for European political action, discussion would, for the first time, have to address the normative legitimacy and political acceptability of majority rule at the European level.



## Factual presuppositions of legitimate majority rule

Constitutional democracies at the national level take majority rule for granted, but they limit its domain through the rule of law and the constitutional protection of (individual) human and citizen rights and the (collective) rights of specific minority groups. Beyond that, they differ in the extent to which the straightforward exercise of majority rule is further impeded by institutional “checks and balances,” super-majoritarian voting rules and multiple veto positions that are supposed to provide protection against the “tyranny of the majority” or “populist democracy” (Riker 1982). In this regard, the EU’s Community Method is surely located at the extreme end of Arend Lijphart’s (1999: 42–47) comparative classification of majoritarian and consensus democracies. Hence, if a reduction of its consensus requirements is considered, one needs to examine the legitimating arguments and assumptions justifying the exercise of majority rule in majoritarian democracies at the national level.

The theoretical starting point is, again, the interest-based consensus principle, or its reverse implication: if no harm is done, consensus may be presumed. Hence the need for justification is low for policies that are roughly compatible with the interests and preferences of those affected, and it is highest for policies that impose unequal and uncompensated sacrifices or violate the highly salient values or preferences of a minority. In a next step, this distinction is linked to assumed differences in the interests, values, and preferences of the polity’s membership: in homogeneous and egalitarian political communities, it seems plausible to believe that majoritarian policy choices, even though they are not preferred by the opposition, will not generally violate the highly salient concerns of the minority.<sup>27</sup> In socially divided and unequal societies, in contrast, majority rule is likely to be more distrusted and the minority’s tolerance for policy choices violating its interests or preferences is likely to be lower – which is why checks and balances and supra-majoritarian voting rules are often considered necessary to ensure the cohesion of the polity.

Even in relatively homogeneous societies, however, the interest-based consensus principle would not justify the imposition of uncompensated sacrifices on parts of the membership. It is in reference to such “hard” policy choices that arguments legitimat-

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27 This point is conceded even by normative political theorists starting from liberal premises that have no place for the “communitarian” concept of a socially or culturally constituted *demos* (Christiano 1996; McGann 2006). In their view, democracy implies majority rule (and proportional elections), because only majority rule is compatible with the fundamental principle of political equality. Nevertheless, the legitimacy of democratic rule presupposes a “common world” in which “the fulfillment of all or nearly all of the fundamental interests of each person are connected with the fulfillment of all or nearly all of the fundamental interests of every other person” (Christiano 2008: 80). It is the rough equality in the way constituents are affected that justifies equal participation and majoritarian decisions. These real-world preconditions of political equality and democratic majority rule are presently not seen to exist beyond the boundaries of the modern state (Christiano 2008: 83, 2010).

ing majority rule then tend to invoke *demos*-related concepts. Postulating a “thick” collective identity, variously based on claims of ethnic, linguistic, or sociocultural homogeneity, common history, common normative commitments and values, or common aspirations and perils (Weiler 1992; Miller 1995; Habermas 2001; Scherz 2013), such arguments presuppose shared attitudes like solidarity or patriotism that imply a willingness (or a socially stabilized obligation) to accept personal sacrifices in the interest of (other members of) the political community. In politically integrated communities where such attitudes may be taken for granted, they will greatly expand the action space of democratically legitimate majority rule. But even in internally divided societies, the normative salience of existing cleavages may be suppressed, and the appeal to a common identity may gain the force of normative compulsion if the polity itself is (seen to be) confronted with an external threat that challenges its viability.<sup>28</sup>

When these empirical preconditions are taken into consideration, they certainly do not support *demos*-based justifications of majority rule in the European Union. The ethnic, linguistic, cultural, institutional, economic, and political diversity of the “peoples of Europe” far exceeds that of majoritarian constitutional democracies. Collective identity among its heterogeneous constituents is at best quite thin.<sup>29</sup> And far from stimulating pan-European patriotism, the serious external challenges the Union is now facing in Ukraine and in the refugee crisis seem to be deepening existing cleavages instead (Börzel 2016). In other words, input-oriented political legitimacy in the Union continues to depend on the consensus principle.

The normative and institutional implications of this conclusion are spelled out by “republican” political theorists in the increasingly influential literature promoting the normative concept of a European *demos*-cracy (e.g., Nicolaidis 2003, 2012; Chevenal/Schimmelfennig 2013; Bellamy 2013; Lindseth 2014). These authors are acutely aware of the erosion of democratic self-government in EU member states and their increasing domination by European constraints and interventions that, at present, cannot be democratically legitimated at the European level. From their perspective, democratic legitimacy can only be derived from the “peoples of Europe,” and the Union itself must be interpreted as the cooperative association of a plurality of European “states’ peoples” organized as democratic member states. These will have to accept the principle of “mu-

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28 At the onset of the First World War, Emperor William the Second of Germany famously declared: “*Ich kenne keine Parteien mehr; ich kenne nur noch Deutsche*” (“I don’t know parties any more, I only know Germans”). And in France, “*la union sacrée*” expressed the same imposition of an internal political truce in the face of war.

29 Such differences are not written in stone, of course. The literature on state building, political integration, and political pluralism has emphasized not only the importance of “cross-cutting cleavages,” but also the historical processes that have mitigated the salience of existing divisions and the importance of “overlapping interests” that could legitimate majority decisions in pluralist political communities (Lipset 1960; Rokkan 1967; Truman 1951). For the European level, however, even optimistic assessments before the present crises would at best have anticipated an evolution toward “consensual” or “consociational democracy,” but certainly not toward legitimate majority rule (Lijphart 1999; Andeweg 2000; M. Schmidt 2002).

tual recognition.” In addition, they must avoid negative externalities of national action and pursue common objectives through either voluntary intergovernmental coordination or “two-level contracts” among national governments and between these and their national constituencies (Weale 2014; Bellamy/Weale 2015).

If put into practice, an institutional framework reflecting the principles of *demoi-cracy* might indeed reduce present legal constraints on democratic self-government at the national level (but see Sievers/S. Schmidt 2015). However, its capacity for dealing with conflicting national interests and preferences in the face of crises and challenges requiring effective political action at the European level appears to be even lower than it is at present. From what has been said, therefore, it would follow that the consensual ground rules of the Community Method may indeed represent the maximum legitimate political integration and legitimate capacity for political action that can be achieved by the European Union under present conditions.

If that were the last word, however, the European Union would be left with a stark choice: when faced with challenges calling for effective European action under conditions of severe political disagreement, consensual decision making would fail the test of output legitimacy, whereas majority rule would lack democratic legitimacy under *no-demos* conditions. In this predicament, the Union has tended to rely on non-political supranational authority or on the exercise of asymmetric intergovernmental power – both of which lack democratic legitimacy and are limited in their problem-solving capacity. But is this conclusion inevitable?

### Deliberative democracy and majority vote

The analysis presented here is essentially structural in character. It assumes that the legitimacy of majority rule is determined by the impacts of (a) a given type of public policy on (b) a given structure of interests and preferences among the membership of the polity. If these impacts are relatively uniform, majority rule would be acceptable. If they discriminate in highly salient respects among different parts of the membership, decisions by majority would be considered illegitimate – unless (c) the shared assumption of a common *demos* or highly salient common-interest orientations should increase the acceptability of asymmetrical sacrifices. For the reasons discussed, therefore, this model would not provide much support for legitimate majority rule in the European Union.

In recent contributions to a possible theory of democracy beyond the nation-state, however, structural and static arguments have been replaced by dynamic approaches suggesting that democratic legitimacy may be generated through political processes as such (e.g., Archibugi/Held 1995; Nanz/Steffek 2005; Archibugi et al. 2011). In line with a general “constructivist turn” in social and political science, the basic assumption is that “socially constructed” interest and value positions need not be taken as given, but

may change under the influence of empirical and normative arguments (Müller 2004) – which resonates with the liberal ideal of “government by discussion” (Habermas 1962). In the present normative discussion, the basic approach is represented by theories of discursive or deliberative democracy (Dryzek 1990; Bohman 1996) that combine Jürgen Habermas’s (1984) theory of communicative action with an epistemic version of democratic theory. The theory of communicative action postulates that, in principle and under ideal circumstances, truth-oriented exchanges of arguments are capable of attaining unforced agreement, not only on issues of fact, but also in normative controversies. In the political sphere, therefore, ideal deliberative processes should also be able to resolve conflicts of political interests and preferences through general agreement on the empirically and normatively optimal solution. In that sense, the ideal of deliberative democracy is meant to provide a radically consensus-oriented version of political legitimacy that – because universal consensus defines the common good – would also avoid any tension between output-oriented and input-oriented democratic legitimacy.

As deliberation can be practiced in any setting – local, national, global, scientific, bureaucratic, or political – academic interest mainly focuses on the ideal preconditions for truth-oriented and non-strategic discussion and unforced agreement, and on their approximation in experimental and empirical settings (Grönlund et al. 2014; Baccaro et al. 2016). To qualify as a plausible theory of political *democracy*, however, deliberative democracy depends on further assumptions. Thus Habermas (1992: ch. VII, 2008) postulates the existence of a “public sphere” with universal access in which all social and political propositions, concerns, and demands may be freely articulated and publicly debated in open-ended discourses. The need for binding decisions is to be accommodated at a second, institutional level, where deliberations are focused on the resolution of specific legal or political issues. To satisfy democratic requirements, however, institutionalized deliberation must continue to be immersed in, informed by, transparent to, and publicly justified in relation to the ongoing stream of discussion in the public sphere.

Decision-oriented deliberations, however, cannot be open-ended; they must be terminated at some point even if full consensus has not been reached. And in that case, Habermas, following Joshua Cohen, suggests that decisions are to be reached by majority vote. The rule is justified if the vote itself is part of the ongoing deliberative praxis. It is then not a free-standing, voluntarist decision, but a reflection of the current state of truth-oriented exchanges of information and arguments – which implies that “the fallible opinion of the majority will for the time being provide the rational basis of common praxis.” (Habermas 1992: 371, my translation). Thus, if the process as a whole is truth-oriented, the majority vote appears as a legitimate shortcut that approximates, for the time being, a consensual solution.<sup>30</sup> In contrast to *demos*-oriented legitimat-

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30 The argument is reminiscent of the Condorcet Jury Theorem, which was anticipated by Rousseau (Grofman/Feld 1988): if truth is assumed to exist, and if all participants are independently searching for it, then the greater number of votes justifies a presumption of getting it right. But these conditions are rarely met in real-world decisions (Ladha 1992).

ing arguments, therefore, the theory of deliberative democracy offers a legitimation of majority rule that is generated by the process of political communication and policy-oriented deliberation itself.

But even if all that is conceded on the theoretical level, there are still two fundamental objections against considering deliberative democracy as a pragmatically plausible and normatively convincing justification of majority rule at the European level. The first is empirical. The communication processes on which the theory relies for its legitimating arguments do not (yet) exist. There is presently no pan-European public space; and the national compartments of public debates are at best linked through highly selective reports in the quality press, which, even if they are increasing (Risse 2015), cannot substitute for the legitimating function of Europe-wide discourses. Worse yet, political debates in national public spaces are increasingly framed in fundamental opposition to the European Union (Börzel 2016) and, at any rate, hardly connected to deliberations at the European level: national political parties are not competing over European policy choices, and the European Parliament is deliberating in splendid isolation from national political debates.<sup>31</sup> In short, European decision-making processes still lack the political infrastructure and communicative linkages that would allow policy-oriented deliberation (assuming that it occurs at the European level) to be considered deliberative *democracy*.

The second problem of deliberative democracy in the European context is the claim that “in principle” it should be able to resolve all types of conflict through consensus-oriented arguing rather than through strategic bargaining. When what is at stake is the legitimacy of majority rule at the European level, this assumption is obviously critical – and it is also obviously unrealistic. This is not meant to deny that deliberating participants may change their prior preferences, or that randomly selected citizens in “mini publics” may achieve agreement on controversial political issues. There is also empirical research showing that actual stakeholders in local conflicts may sometimes (but by no means always) resolve these conflicts through well-designed mediation procedures (Holzinger 2001; Deitelhoff/Müller 2005). And there is no reason to deny that not only

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31 In my view, the most important obstacle to any attempts to “democratize” European legislation is the lack of a political linkage between the Members of the European Parliament (MEPs) and their voters. In Germany, for instance, all 93 MEPs are elected from country-wide closed lists put up by their respective national parties. Their lack of grassroots connections appears glaring when compared with the intense relationship of members of the US House of Representatives with voters, party activists, and the media in their single-member districts. And even in Germany, where the outcome of national elections is determined by proportional vote, half of the seats are filled by plurality votes in single-member districts. And as all candidates on party lists must also stand in one of these local districts, local winners will generally face local MPs elected on the list of another party as competitors for the attention of local voters. None of these local links exist for MEPs, who generally remain unknown to voters in any locality, and who are thus free to engage in European-level deliberations and power games without ever having to worry about maintaining their electoral bases. Habermas’s (2015: 548) proposal of European elections with pan-European lists of candidates would of course maximize the isolation of European elites.

bargaining, but also arguing plays a role at the European level – in the Committee of Permanent Representatives and the Council Secretariat (Lewis 2010), in some Comitology committees (Joerges/Neyer 1997), and even in committees of the European Parliament. But none of this evidence suggests that fundamental conflicts of interest, identity, or normative value orientations could also be resolved through real-world deliberative processes in national politics, let alone at the European or transnational level (McGann 2006; Deitelhoff 2012). So the conclusion must be: in constellations where consensual resolution through deliberation is not within reach, majority rule cannot be legitimated by invoking the epistemological claims of deliberative democracy.

At the same time, however, the obvious unrealism of in-principle theories should not stop the search for pragmatic approximations. A parallel example on the rational-choice side is the Coase Theorem (Coase 1960), which postulates that in the absence of transaction costs, self-interested and rational bargainers will always be able to reach agreement on the welfare optimum. But even though the assumed condition is totally unrealistic, the theorem motivates rational-choice theorists to search for favorable constellations and useful strategies that may facilitate agreement by reducing transaction costs (Scharpf 1997: ch. 6). Similarly, deliberation is likely to be more effective among groups that share an important political purpose, whereas – as Yanis Varoufakis (2015) had to find out – the resort to deliberative reasoning in a constellation framed as a zero-sum conflict may well contribute to further polarization. In other words, the pragmatic usefulness of deliberation and hence the legitimating power of arguments derived from the theory of deliberative democracy will vary with the intensity of the conflicts that need to be resolved.

### A pragmatic approach to deliberative majority rule

The conclusion to take from the discussion of deliberative democracy is that resort to decision by majority may not only be pragmatically useful, but also legitimate if consensus can be assumed to be within reach. The next question then is: whose consensus should be thought to matter for democratic legitimacy in institutional deliberations on European policy choices? In view of the present political conditions in the European polity, the following discussion assumes that (input-oriented) democratic legitimacy can be generated neither by the supranational authorities of the ECB, the ECJ, and the Commission, nor by trans-European political parties, nor by the politically disconnected European Parliament.

Instead, I continue to assume that politically salient interests and preferences are still aggregated in national political processes and represented by politically accountable national governments in European policy processes.<sup>32</sup> Hence what matters for the chances

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32 This assumption is not shared by pro-European democrats like Jürgen Habermas, who place



of reaching deliberative consensus are primarily the ex-ante constellations of interests and preferences among member state governments. Regardless of the nature and origin of these preferences, such constellations can be usefully classified by the game-theoretic distinction between games of “pure conflict,” games of “pure coordination,” and various types of well-understood “mixed-motive games” (Scharpf 1997: ch. 4). In the first type of constellations, deliberation is likely to fail, and the Community Method would be blocked, whereas in intergovernmental negotiations an illegitimate settlement might be imposed through asymmetric bargaining power. In the second case of harmonious or converging preferences, in contrast, deliberation would be easy; the Community Method would work as well, and majority rule would also be unproblematic.

In actual practice, however, both of these extreme constellations are rare in European politics. Constellations resembling mixed-motive games, where all parties have an interest in cooperative solutions but will disagree about the specific terms of the settlement or the distribution of its costs and benefits, are much more common. If the decision rule is (near) unanimity, however, veto players may be caught in the “negotiators’ dilemma,” where distributive bargaining over secondary advantages may prevent them from reaching agreement on the primary objective (Lax/Sebenius 1986). These are the conditions under which the dominance of the consensus principle under the Community Method may either prevent political action at the European level or, after endless bargaining rounds, produce suboptimal compromises.

If deliberations or negotiations had to be carried out “in the shadow” of a majority vote, in contrast, the incentive and opportunity to “hold out” in the pursuit of minor advantages would be greatly reduced. Hence in constellations resembling the classical *Battle of the Sexes* or *Assurance* games, where for all parties possible losses on secondary (distributive) issues are outweighed by the benefits gained through achieving a common solution, the possibility of ending deliberations or negotiations through a majority vote should and probably would be preferred to non-agreement by all parties. Under these conditions, therefore, decision by majority rule would indeed be considered acceptable under the criteria of both deliberative and bargaining theory.

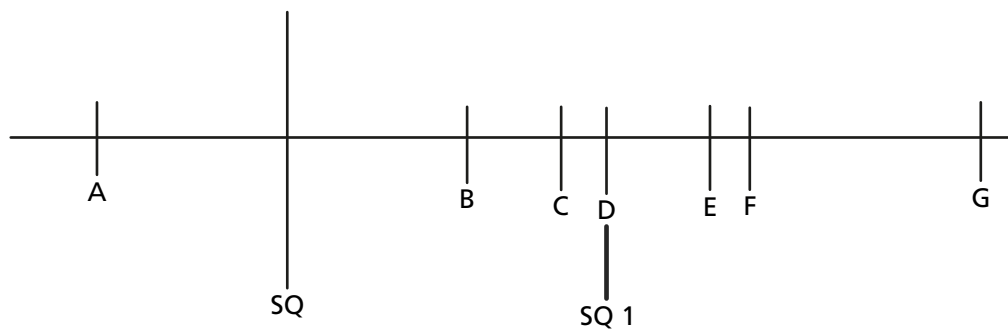
In both cases, however, the argument depends crucially on the assumed characteristics of the constellation. If original preferences should diverge more widely, majority rule may turn into the “tyranny of the majority” under assumptions of rationally self-interested parties, and truth-oriented deliberation would not converge on solutions for which consensus could be assumed to be within reach. To illustrate this point, the figure below assumes that the multi-dimensional interests or preferences of seven actors, A, B, C, D, E, F, and G, may be represented in one dimension by the distance of their respective ideal points from the current Status Quo (SQ). Even though all want to move away

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their hope on the Europe-wide mobilization of generalizable interests. And of course member state governments represent not only their national constituents, but also their own institutional self-interest (Scharpf 1988).

from SQ, they disagree not only about how far, but also about the direction. Under the unanimity rule, this conflict would block any agreement. If the issue should be decided by majority instead, the outcome favoring the “median voter” D would be located at SQ1. It would be better than SQ for all members of a coalition including B, C, D, E, F, and G. For government A, however, SQ1 appears so much worse than SQ that it would surely oppose it. If the country were nevertheless bound by the vote, it would have reason to consider the decision an illegitimate exercise of tyrannical majority power.

Figure 1 Unanimity, majority rule, and opt-out



Under the assumed conditions, illegitimacy could only be avoided in two ways. A’s interests could be protected by a return to the unanimity rule – which would, however, block the policy changes desired by all other parties. On the other hand, A could be exempted from the decision – which would protect its preference for SQ over SQ1, but would not prevent the other parties from adopting a policy that they jointly prefer over SQ.

When applied to the problems of European politics, the model has two implications: it demonstrates that the legitimacy of moving from the consensual rules of the Community Method to decisions by majority rule (under the *no-demos* conditions of the European Union) depends crucially on the existence of interest constellations in which it is indeed plausible to think that consensus is within reach, and that for all parties concerned the benefits of a roughly acceptable common outcome exceed the costs of an individually suboptimal solution. At a time, however, when the extremely diverse and unequal “peoples of Europe” are driven apart under the impact of multiple crises (Armingeon et al. 2016), such conditions cannot be generally assumed. But where they do not exist, decisions by majority vote that violate highly salient interests or values of the minority would lack legitimacy and might provoke disruptive conflict in a Union that still depends on the consensus principle.

Unfortunately, there is no substantive ex-ante test that could generally and reliably identify constellations where the application of the majority rule would be normatively appropriate or clearly unacceptable. But there may be a procedural equivalent: the use of the majority rule could be combined with the possibility of an opt-out that would restrict the legal effect of the decision to member states whose governments participate



in the vote – and who presumably expect to gain from a European solution even if they should be outvoted on some of its details. In effect, this procedure would simultaneously protect highly salient minority interests, reduce the probability of political blockades, and allow “coalitions of the willing” to use the powers of European legislation to deal with common problems and advance common purposes that are beyond the reach of individual member states acting on their own.

In practical terms, this would imply having two different “ordinary legislative procedures.” The first one would basically consist of the “Community Method” defined in the present Article 294 TFEU, but modified to accommodate the possibility of legislative initiatives introduced by governments in the Council and factions in the European Parliament. The second procedure would allow legislation to be adopted by plurality votes in Council and Parliament, and it would have to regulate the conditions, procedures, and effects of national opt-outs. In principle, these rules should allow for political choices dealing with two problems.

First, there may be legislation for which Europe-wide and uniform application is considered essential – perhaps for normative or symbolic reasons or because the problem to be regulated is thought to have “leaky-bucket” characteristics – where the effect of the common rule would be undermined by opt-outs. Hence the promoters of an initiative should be free to choose initially between one or the other of two “ordinary procedures,” and they may also be allowed to withdraw an initiative in the majoritarian procedure after opt-outs have been declared. In any case, however, member states that have initially chosen the opt-out should be allowed to accede subsequently to the regime created by majority vote.

Second, majoritarian legislation might damage the interests of opt-out states – in which case present Treaty rules against discrimination on account of nationality would have to be invoked. Beyond that, one might also consider rules imposing an upper limit on allowable opt-outs (defined by population or the number of member states) in order to avoid extreme forms of legal differentiation in the European Union. Smaller groups of states pursuing common purposes would then be left to try the much more circumscribed and essentially non-political procedures allowing for “enhanced cooperation” (Articles 326–334 TFEU). Whether such a rule is required and where such a limit should be drawn are matters of judgment that, like the majority-cum-opt-out proposal itself, resonate with fundamental and controversial views on the purposes of European integration and the value of legal uniformity, which I will now turn to in the concluding section.

## 5 Differentiated integration and the empowerment of democratic politics

European integration has been promoted to serve two different purposes that were not clearly distinguished because they were thought to reinforce each other; and it was also associated with one great hope. The first purpose, driven by strong anti-nationalist motives after the Second World War,<sup>33</sup> was the establishment of a United States of Europe as a supranational, externally powerful, and politically integrated federal state. The other, more pragmatic purpose is best expressed by the title of Alan Milward's (1992) bestseller, *The European Rescue of the Nation State*: member states agreed to a partial transfer of sovereignty, and to its joint exercise, in order to obtain European solutions to problems that could no longer be successfully resolved at the national level. And the great hope was that both purposes could be realized with democratic legitimacy. In the meantime, however, the purposes are perceived to be in partial conflict, and the hopes for democratic self-government in Europe have been disappointed.

To date, the greatest achievements of the “federalist” impetus have been the common market, the common currency, and a European legal order whose constitutional authority is as comprehensive and effective as that of any constitutional state, federal or unitary. From the perspective of EU member states, however, the Monetary Union has not only failed to resolve any of their existing problems, but is also the main cause of massive problems for many of them, while European law, by constitutionalizing “negative integration,” is imposing ever tighter constraints on the action space of EU member states.

At the same time, however, the second purpose is reflected in an institutional structure in which member states remain in control of not only the transfer of governing powers, but also their exercise at the European level. Given their increasing number and diversity, this institutional framework has come to defeat its original purpose. It implies that the political capacity of the European polity, whose legal system is that of a federal state, is nearly as limited as that of a cooperative federation.

As a consequence of these conflicts and disappointments, the present debate about European integration has become increasingly polarized. Proponents of the “federalist” goal, among them institutional actors at the European level but also many pro-European democrats in civil society, are implicitly hostile to the European nation-state. They attribute most of what is thought to be wrong in the European Union to the recalcitrance, egotism, and myopia of member state governments defending national (and institutional) self-interest at the expense of the European common good. The proper

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33 By viewing the Second World War as a catastrophe of excess nationalism, this interpretation fails to realize that Nazi Germany's vision for post-war Europe was not the reinforcement of a German nation-state, but the establishment of a transnational European empire under German direction (Hank 2013).

remedy, as they see it, would be a wholesale transfer of constitutional sovereignty, competences, and governing resources to a democratic European state. In the meantime, in any case, the *aquis* must be defended, and existing controls over national governments and policies must be reinforced and extended.

At the other extreme, right- and left-wing “populist” movements, political parties, and governments are blaming the rise of social inequality, economic failure, and the frustrations of collective identities by global capitalism and migration on neoliberal and power-hungry European technocrats. But there are also politically responsible and responsive governments (Mair 2009) and democratic political parties that are frustrated by the lack of problem-solving effectiveness and the absence of democratic accountability in European governance. They may not be ready to imitate the “Brexit” campaign, but appear to be increasingly willing to explore the options of “devolution,” re-nationalization, or a resort to intergovernmental action.

The present paper is not committed to either a federalist or a national perspective: it is meant to explore options that may strengthen European and national capacities for effective and democratically legitimate political action in the face of critical external and internal challenges. The proposals presented here are meant to loosen the institutional constraints on democratic political action at both levels. Nevertheless, their immediate effects will be unwelcome from the federalist perspective: by limiting the constitutional effect of economic liberties, they will reduce the domain of legal controls over national choices, and by allowing opt-outs from European legislation they are likely to increase the territorial fragmentation of European law. These proposals are thus unlikely to persuade readers committed to either the completion of a uniform and supreme European legal order or the perfection of an integrated European market that is protected against interference from democratic politics.

Hence the following arguments are mainly addressed to readers who are worried by the declining problem-solving capacity of government, the shrinking influence of democratic politics on policy choices, and the ineffectiveness of political accountability at all levels of the European polity. From their perspective, the loss of legal uniformity (which would of course place burdens on the Commission and on teachers, students, and practitioners of European law) should be a lesser problem.<sup>34</sup> What may weigh more negatively, however, on the scales of pro-European democrats is the implicit strengthening of the roles of national governments in European political processes. Their aspirations for a democratic European Union would include full parliamentary powers for the EP, direct elections of the Commission President or a Commission that is fully accountable to the EP, uniform rules for EP elections, the nomination of EP candidates

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34 In comparison to the presently existing degree of “differentiated integration” (Leuffen et al. 2013; Duttler et al. 2016), the increase might not be dramatic. If the problems addressed by majoritarian legislation are indeed of the *Battle of the Sexes* variety described above, it is likely that opt-outs would be few – and in many cases of a temporary nature.

on Europe-wide lists, and so on (Follesdal/Hix 2006; Hix 2008; Habermas 2012, 2015). Their democratic ideal, in other words, is a presidential or parliamentary European constitution whose politics are shaped by Europe-wide political parties competing on politically distinct platforms over European policy choices, whereas the governments of EU member states should have a minor role in a second legislative chamber.

But whatever one might think of the desirability of this presidential or parliamentary model and its centralized politics for the heterogeneous membership of the EU, it seems clear that the institutional changes suggested would be unable to generate democratic politics under the present conditions of citizen disinterest or frustration, horizontally fragmented political communications, and nonexistent vertical linkages or locally rooted European political parties. The proposals presented here would instead expect European democracy to arise within the existing political spaces of EU member states. By loosening the stranglehold of constitutionalized neoliberalism, they would provide the space for political debates about the shape of European political economies. And by allowing for the possibility of majoritarian European legislation, they would widen the range of potentially feasible European policy choices, which might lessen the deadening sense of futility that presently inhibits the search for European options. It would be more plausible for national governments, political parties, labor unions, and NGOs to try to mobilize political support and media attention for and against European policy initiatives that would be nipped in the bud under present rules. At the same time, opting out would also be a politically salient decision that governments would have to justify to their European peers as well as to their national publics. In the end, therefore, the politicization of controversies over feasible policy choices, and the importance of having to build transnational coalitions for their realization, might not only revitalize democratic politics, but also contribute to the evolution of a European public space.

It goes without saying, however, that institutional reforms would not ensure success. We cannot know if the combined governing capabilities of the Union and its member states are sufficient to cope with the multiple crises threatening Europe at this time. Nor can we know whether the politics of European peoples will allow national and European leaders to focus on common European problems, or whether these leaders will be wise enough to design effective responses to present crises. All that these proposals would be able to do is remove the institutional constraints that presently impede effective and democratically legitimate political action at the national and European levels.

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