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Reihe Politikwissenschaft

Political Science Series

Problem Solving Effectiveness and Democratic Accountability in the EU

Fritz W. Scharpf

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Founded in 1963 by two prominent Austrians living in exile – the sociologist Paul F. Lazarsfeld and the economist Oskar Morgenstern – with the financial support from the Ford Foundation, the Austrian Federal Ministry of Education, and the City of Vienna, the Institute for Advanced Studies (IHS) is the first institution for postgraduate education and research in economics and the social sciences in Austria. The **Political Science Series** presents research done at the Department of Political Science and aims to share "work in progress" before formal publication. It includes papers by the Department's teaching and research staff, visiting professors, graduate students, visiting fellows, and invited participants in seminars, workshops, and conferences. As usual, authors bear full responsibility for the content of their contributions.

Das Institut für Höhere Studien (IHS) wurde im Jahr 1963 von zwei prominenten Exilösterreichern – dem Soziologen Paul F. Lazarsfeld und dem Ökonomen Oskar Morgenstern – mit Hilfe der Ford-Stiftung, des Österreichischen Bundesministeriums für Unterricht und der Stadt Wien gegründet und ist somit die erste nachuniversitäre Lehr- und Forschungsstätte für die Sozial- und Wirtschaftswissenschaften in Österreich. Die **Reihe Politikwissenschaft** bietet Einblick in die Forschungsarbeit der Abteilung für Politikwissenschaft und verfolgt das Ziel, abteilungsinterne Diskussionsbeiträge einer breiteren fachinternen Öffentlichkeit zugänglich zu machen. Die inhaltliche Verantwortung für die veröffentlichten Beiträge liegt bei den Autoren und Autorinnen. Gastbeiträge werden als solche gekennzeichnet.

Abstract

The paper begins by examining the functions of input-oriented and output-oriented legitimating arguments in liberal democracies. At the European level, input-oriented arguments remain weak, but legitimacy problems are generally avoided since the policies which can in fact be adopted under prevailing institutional conditions are still based on broad intergovernmental consensus. For a variety of new policy challenges, however, consensus on the choice of European solutions is unlikely to be reached, even though member states are unable to cope with such challenges on their own. The resulting problem-solving gaps, which may undermine political legitimacy nationally and in the EU, could not be legitimately overcome by moving from consensual to majoritarian governing modes at the European level. What could help are modes of differentiated integration which allow groups of member states to adopt consensual European solutions applying only to members of the group.

Zusammenfassung

Der Aufsatz beginnt mit einer Diskussion der Funktion input-orientierter und output-orientierter Legitimationsargumente in liberalen Demokratien. Obwohl die europäische Union sich kaum auf input-orientierte Argumente stützen kann, lassen sich Legitimationsdefizite weitgehend vermeiden, weil die Politik, die im gegebenen institutionellen Rahmen tatsächlich beschlossen werden kann, sich immer noch auf breiten intergouvernementalen Konsens stützen muss. Bei einer Reihe neuer Herausforderungen ist jedoch Konsens über die Inhalte einer gemeinsamen Lösung unwahrscheinlich, obwohl die Mitgliedstaaten je für sich diese nicht bewältigen können. Die Folge ist ein Problemlösungsdefizit, das die Legitimität der Politik auf nationaler und europäischer Ebene untergraben kann. Es könnte nicht durch den Übergang von konsensualen zu majoritären Entscheidungen überwunden werden, ohne gerade dadurch die Legitimationsgrundlage der Union zu gefährden. Möglich und nützlich wäre dagegen ein Ausbau der Optionen einer differenzierten Integration, die es Gruppen von Mitgliedstaaten erlauben würde, im Konsens europäische Lösungen zu beschließen, deren Geltungsbereich sich auf die Mitglieder der Gruppe beschränkt.

Keywords

EU, Democracy, Legitimacy, differentiated Integration

Schlagwörter

EU, Demokratie, Legitimität, differenzierte Integration

General note on content

The opinions expressed in this paper are those of the author and not necessarily those of the IHS Department of Political Science

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Introduction

Given the widespread concern about the "European democratic deficit", it seems remarkable that through most of the history of European integration that was not an issue at all. For decades, political actors and publics were content to assume the legitimacy of European institutions and policy processes even though these did not resemble the patterns of democratic governments at the national level. By contrast, the present debate often assumes that a lack of institutional isomorphism with the constitutions of democratic nation states must imply a lack of European legitimacy. Ignoring the possibilities, and the importance, of functional equivalence, such debates tend to generate either undue pessimism or unrealistic hopes and counterproductive recommendations for institutional reform. In order to avoid both of these pitfalls, I will begin with an abstract discussion of the prerequisites of legitimate governance and then consider the legitimacy and limited problem-solving effectiveness of present EU governing modes. Next, I will then try to show that currently discussed institutional reforms that would increase problem-solving effectiveness will encounter severe legitimacy problems, and I will conclude by suggesting options that might evade this dilemma.

1 Legitimacy

My starting point is the function of legitimacy beliefs in ensuring effective government in liberal polities. In this view, arguments invoking shared legitimacy beliefs imply *a socially sanctioned obligation to comply with government policies even if these violate the actor's own interests or normative preferences, and even if official sanctions could be avoided at low cost.* In the absence of such beliefs, government would either be ineffective or would have to transform the liberal polity into a police state. If this functional definition is accepted, it also follows that the need for legitimation varies with the salience of the preferences that are potentially violated. Policies that interfere significantly with life, liberty or property interests, or that violate deeply held normative preferences of the governed, will need to be justified by stronger legitimating arguments than pareto-superior policies that are thought to increase social welfare without violating salient interests. This point will be of some importance in the later discussion of the legitimacy of EU policies.

Historically, as Max Weber has shown, generally accepted legitimating arguments have been derived from a variety of premises — religious, traditional, formal-legal, ideological or charismatic. Under modern (Western) conditions, however, legitimacy has come to rest almost exclusively on *trust in institutional arrangements* that are thought to ensure that governing processes are generally responsive to the manifest preferences of the governed (*input legitimacy*, "government *by* the people") and/or that the policies adopted will generally represent effective solutions to common problems of the governed (*output legitimacy*,

"government *for* the people").[1] Taken together, these two types of arguments constitute the core notions of democratic legitimacy (Scharpf 1970; 1997; 1999, chapter 1).

They both start from the normative premise that legitimate government must serve the "common good" of the respective constituency, and that this function must be protected against both the self-interest of governors and the rent-seeking strategies of special interests. In the *input-oriented* tradition, shaped by the ideals of participatory democracy in the Greek *polis* and of the French Revolution, the starting point is the Rousseauian equation of the common good with the "general will" of the people. If that were all that matters, legitimacy would be ensured by institutions maximizing either the direct participation of the governed in policy choices or the responsiveness of governors to the (collective) preferences of the governed. In small constituencies, that would justify direct democracy. Where representative government is a practical necessity, Westminster-type institutions maximizing the visibility and electoral accountability of majoritarian governments would have the strongest claim to legitimacy. However, as Rousseau himself had emphasized, the underlying equation of the expressed preferences of a majority[2] with *la volonté générale* depends on highly demanding preconditions.

To begin with, not every aggregate of persons constitutes a *demos* — i.e., a political collectivity among whose members *majority rule* could be legitimated (a point to which I will return below). Even where that assumption should be unproblematic, however, one could not be sure that members of the *demos* or their representatives will in fact be oriented toward the common good. Hence modern proponents of input-oriented legitimating arguments, being aware of the totalitarian potential of the Rousseauian tradition (Talmon 1955), have returned to nineteenth-century liberalism and its emphasis on "government by discussion" (Habermas 1962). Here, the communicative logic of the ideal discourse and the discipline of *public* deliberation are expected to censor arguments defending "non-generalizable" interests (Habermas 1973) and to promote convergence on public-interest-oriented policy choices (Elster 1998; Habermas 1996; Dryzek 1990; Schmalz-Bruhns 1995). Unfortunately, however, these expectations are hardly incentive-compatible with the very institutions of competitive democracy that are generally favored by the input-oriented tradition: Election campaigns are not the most favorable setting for "truth-oriented" discourses, and competition

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[1] In a more extended discussion, one could locate (input- and output-oriented) legitimacy arguments at three levels — specific policy processes, characteristics of the government and characteristics of the regime. If a specific policy is challenged, an input-oriented justification might show that it had popular support (e.g., in a referendum) or that the government that adopted it had electoral support, or that the political system did provide ample opportunities for challenging and replacing governments of the day. In the absence of widespread noncompliance, therefore, electoral defeats of the government need not indicate serious legitimacy deficits — whereas the rise of parties committed to "system opposition" would. For a similar hierarchical conceptualization, see Neil Walker's (2001) distinction between performance legitimacy, regime legitimacy, and polity legitimacy.

[2] For Rousseau, of course, even the *volonté de tous* would not create legitimacy, whereas most contemporary theorists would consider unanimous agreement of the governed as sufficient. The legitimacy problem is thus reduced to the justification of majority rule.

generates "office seeking" preferences that may interfere with the "policy-oriented" preferences which the parties would otherwise pursue (Scharpf 1997, chapters 7 and 8; Abromeit 2002). In other words, purely input-oriented legitimating arguments in support of majoritarian institutions depend on very demanding preconditions and often quite unrealistic assumptions.

In the *output-oriented* tradition, going back to Aristotle's and Montesquieu's arguments favoring "mixed constitutions" and canonized by the Federalist Papers, the common interest[3] was seen to be as much threatened by the potential "tyranny of the majority" as it was in danger of being corrupted by self-interested governors. Legitimacy, therefore, depends on governing institutions[4] that protect public policy against both dangers — through the assignment of governmental powers to multiple political actors that are separately subject to electoral accountability; through the establishment of independent judiciaries, central banks and regulatory agencies that are protected against the interference of political majorities; through the establishment of veto positions and complex interdependencies between political actors; and through a Bill of Rights that inhibits government from interfering with certain basic individual and group interests.

However, at the same time as output-oriented legitimacy arguments emphasize the dangers following from the abuse of governing powers, they also presuppose a need for effective government with a capacity for achieving common purposes and dealing with common problems that are beyond the reach of individuals and families acting on their own, through market exchanges, or through uncoerced cooperation in civil society. Within the output-oriented perspective, there is thus an obvious and problematic tension between institutional arrangements designed to *prevent wrongdoing* by governors and exploitation by special interests on the one hand, and institutional arrangements facilitating the vigorous pursuit of the common interest and *effective problem-solving* on the other hand. As the functions of governments have vastly increased in comparison to those that were presupposed by eighteenth-century normative theories, this tension has also gained in practical importance.

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[3] The change in terminology implies a shift in the criterion of assessment. Rousseau had taken pains to distinguish the *public*-interest oriented *volonté génerale* from the sum-total of private interests pursued by the *volonté de tous*, and in the same vein, Habermas (1973; 1996) would allow only "generalizable interests" in public policy discourses. The authors of the Federalist Papers, by contrast, and certainly the theorists of American pluralism following in their footsteps (Truman 1951; Dahl 1967) take the legitimacy of private interests in life, liberty and property as their point of departure. By implication, the "common interest" must then be defined as the social maximum that could be attained through ideal Coasean bargains among self-interested parties (Scharpf 1997, chapter 6).

[4] In light of some criticisms, it needs to be emphasized that output legitimacy should not be equated with "output satisfaction". Both input- and output-oriented legitimating arguments only come into play if a policy violates politically salient constituency interests. Hence such arguments must refer to characteristics of policy making structures and procedures that will generally ensure that policies are common-interest oriented, rather than to the characteristics of the substantive policy in question.

While specific institutional forms vary widely among constitutional democracies, it is generally true that more safeguards against the abuse of governmental power imply an increase in the number of veto positions, and that more veto players imply a lower capacity for effective action (Tsebelis 2002). Depending on differences in their historical experience and societal and political cohesion, the constitutions of democratic polities will be closer to one or the other pole. Thus, Westminster-type regimes in the UK and, until recently, in New Zealand minimize the institutional obstacles against government action which, *if employed wisely*, may facilitate effective policy responses to new challenges, whereas an extreme form of multiple-veto constitution has rendered policy reform very difficult in Germany (Scharpf and Schmidt 2000).

In short, democratic constitutions vary not only in the relative emphasis they place on structures and procedures supporting *input-oriented* and *output-oriented* legitimating arguments, but within the context of output-oriented considerations, they also vary in the relative emphasis placed on *power-constraining* versus *action-enabling* features. In any case, however, all of these normative dimensions are considered relevant for democratic legitimacy at the national level; and even if trade-offs are acknowledged, one could not argue that performance in one dimension would fully substitute for deficits in another. What all variants of democratic polities share, moreover, is a reliance on *electoral accountability*[5] as a crucial input-oriented[6] mechanism for keeping governors oriented toward the common interest of their constituencies — which also implies a basic asymmetry between actors that are electorally accountable and "independent" governing agencies (Dunn 1999).

In general, the power to adopt positive policy choices is reserved to the occupants of elective offices — presidents, prime ministers, cabinets, and parliamentary majorities. Judicial review is generally understood as a restraint on current majorities, rather than as a license to legislate (Bickel 1962), and where judicial legislation occurs nevertheless, it can generally be overturned by political majorities or super-majorities. By contrast, independent central banks

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[5] Accountability is a general concept implying the existence of monitoring and sanctioning mechanisms in principal-agent relationships. Constitutional democracies make use of a wide variety of such mechanisms (including hierarchical supervision, courts of accounts, judicial review, parliamentary investigations) — all of which serve important purposes, but do not add up to "*democratic* accountability" which is constituted by the electoral dependence of governors on the governed.

[6] Since elections are likely to reflect backward-looking responses to past government performance, one might doubt their classification as an input-oriented mechanism. Moreover, since voters can only express blanket judgments on a diverse variety of policy dimensions, elections are an extremely crude mechanism for expressing voter preferences, and governments have many ways of influencing public opinion (Maravall 1999). However, governments are not alone in playing such games and, more important, they cannot know, at the time of decision, to which outcomes voters will selectively respond at the time of election. Moreover, as Lionel Jospin discovered to his disadvantage, voters are not obliged to be fair: If the economy goes well, it may cease to be a salient issue and the government may then be defeated on internal security issues, and vice versa. As a consequence, uncertainty creates strong incentives for governments to *anticipate* and respond to a wider range of voter interests than will actually achieve political salience at election time (Scharpf 1997, chapter 8). Hence, if anticipation is taken into account, it does make sense to consider electoral accountability an input-oriented mechanism.

and regulatory agencies are explicitly empowered to make policy choices. However, their independence generally rests on legislation which also specifies the policy purposes they are supposed to achieve and the means they can employ, and their choices could be reversed, or their institutional independence revoked, by ordinary legislation if the policies adopted should be in sustained conflict with the salient preferences of political majorities. In other words, constitutional democracies make use of various combinations of institutional arrangements supporting output-oriented and input-oriented legitimating arguments. Nevertheless, "political" institutions and actors that must be responsive to input-oriented mechanisms of electoral accountability tend to be dominant in all constitutional variants.

2 Legitimacy in the European Union

As I said in the introduction, the legitimacy of European government is often judged by the direct comparison of its institutions with those of national constitutional democracies. But given the functional definition of legitimacy introduced above, this criterion may be quite inappropriate: If its function is to justify voluntary compliance with policies that violate my interests, the need for legitimation will vary with the salience of the interest that are potentially at stake. Hence if the legitimacy of European institutions was not considered problematic through most of their history, the reason may well have been that European policies were not thought to violate politically salient interests.

2.1. The need for legitimation

This basic idea has been central in two strands of the literature claiming that the core governing functions of the European Community have no need for democratic legitimation.[7] Authors writing in the neoliberal tradition of (predominantly German) "economic constitutionalism" have insisted that European integration has been, and should be, essentially confined to removing national barriers to the free movement of goods, services, capital and persons. Interpreting these economic freedoms as a manifestation of basic human rights, they conclude that European policies of "negative integration" protecting and enforcing these liberties against government interventions are in no need of further democratic legitimation (Mestmäcker 1994; Streit and Mussler 1995; Cassese 2002). By a different line of argument, Giandomenico Majone (1996) comes to similar conclusions. For him, the EU is primarily a "regulatory state", committed to the definition and enforcement of rules promoting (economic) efficiency, whereas it lacks significant taxing and spending powers that would allow it to pursue politically salient policies of redistribution. Since, by

[7] A somewhat similar, but less dogmatic, argument was recently presented by Moravcsik (2002).

definition, regulations approximating (Pareto) efficiency will improve general welfare without violating significant interests, EU policies are, again, not in need of (input-oriented) democratic legitimation. Instead, their (output-oriented) legitimacy needs to be protected against political intervention.

Theoretically and empirically, it is of course fairly easy to punch holes in these affirmative arguments. Negative integration will increase the liberties of exporters and importers but will interfere with the property rights of hitherto protected producers; the liberalization of monopoly services may have benefited consumers (in telecommunications more so than in the case of railroads), but it also destroyed hundreds of thousands of jobs (Héritier and Schmidt 2000); and any regulation of competitive practices will generate winners and losers among the competitors involved. Nevertheless it is true that the market-creating policies of negative integration and liberalization as well as European regulations of competition and of product standards have had broad support among member governments (Garrett 1992, 1995; Moravcsik 1998)[8] and were generally met by at least the permissive consensus of their publics. In other words, much of what European policy has actually been doing was indeed fairly uncontroversial politically, and hence less in need of explicit political legitimation (Moravcsik 2002).

But that state of affairs has been changing for some time. When the Single European Act expanded the range of European competencies to include policy areas like environmental protection, safety at work and consumer protection, conflicts of interests and preferences among member states gained in political salience. In the meantime, the disintegration of the Soviet Empire and the "spillover" effects of economic and monetary integration and of increasing mobility have pushed problems of internal and external security as well as issues of employment and social policy on the European agenda — all of which have extremely high political salience in all member states. At the same time, these are issues where national interests and political preferences tend to diverge, and where broad consensus seems difficult or impossible to reach (Scharpf 2002) — a condition that is bound to be further exacerbated by Eastern enlargement.

As a consequence, the legitimacy of EU policies and of the EU polity has itself become an issue of increasing political salience over the last decade and a half. If evidence were needed, it is amply provided by both the Commission's (2001a) White Paper on European Governance and its sequel (Commission 2001b), and even more so by the "constitutional" debates preceding and following the Treaty of Nice and by the mandate formulated by the

[8] Support for the general rule (of free trade, for instance) is of course not falsified by pointing to empirical examples of governments fighting specific applications of the rule (Burley and Mattli 1993). If the underlying constellation of interests resembles a Prisoner's Dilemma, that is exactly what one should expect — and also the reason why governments would agree to delegate enforcement powers to a supranational authority (Garrett 1992; 1995).

Laeken Summit (2001) and the deliberations of the Convention ─ and most of all, by the failure of the Constitutional Treaty in France and in the Netherlands. However, before discussing the legitimacy problems associated with new policy challenges, and proposed institutional reforms that might resolve them, I find it useful to assess the problem-solving effectiveness and legitimacy of the governing modes through which the European Union has so far been dealing with the policy problems on its agenda.

2.2. Modes of Governing

Governing modes are defined by institutional arrangements specifying the constellations of actors participating in policy choices and the decision rules through which outcomes are to be determined in case of disagreement among these actors (Scharpf 1997). In the present de-facto constitution of the European Union, it seems useful to distinguish between at least three such modes, "intergovernmental agreement", "joint-decision making", and "supranational centralization" (Scharpf 2001a).

As of now, the foundational governing mode of the European Union is *intergovernmental agreement*. Initially, all governments of member states must decide — through Treaties and Treaty amendments that need to be ratified by all national parliaments (and in some countries, by referenda) — that certain competencies, otherwise exercised autonomously by member states, should be transferred to the European level. In the same process, governments must also decide in which institutional mode these European competencies should be exercised. They may reserve powers to themselves by insisting on policy making through unanimous intergovernmental agreement; they may move matters into the joint-decision mode involving the Commission, the Council and the European Parliament; or they may directly empower the Commission, the European Court of Justice or the European Central Bank to make binding policy choices in the mode of supranational centralization without the further participation of member governments. These modes differ in their capacity to achieve effective policy choices in the face of disagreement among member states, and by empowering different actors with differing preferences, they will affect the substantive policy outcomes that are likely to be achieved. They also differ with regard to the range of choices that could be legitimately taken.

2.2.1. The Supranational-Centralized Mode

The most far-reaching form of delegation to supranational authorities occurs in a two-step process. At bottom, there must be an intergovernmental agreement on the Europeanization of the policy area. This agreement may also formulate a basic policy choice and then delegate its further specification and enforcement to a supranational institution. The clearest example is the authority of the European Central Bank over European monetary policy. Its mandate to "maintain price stability" (Art. 105 TEC) was defined through Treaty negotiations, but in carrying out this mandate the Bank is more insulated against the influence of EMU

member governments or other politically accountable actors than is or was true of any national central bank, including the German Bundesbank.

The same two-step process applies in all policy areas where the Treaties impose directly applicable prohibitions and obligations on member states, or establish rights of individuals and firms against their governments. In these cases, the Commission is explicitly empowered to initiate treaty infringement proceedings against individual member states and the European Court of Justice is empowered to issue formally binding and enforceable interpretations of these Treaty obligations. Again, these interpretations could only be reversed politically through amendments of the text of the Treaties, adopted unanimously and ratified by all member-state parliaments. As a consequence, there is an opportunity for a politically uncontrolled evolution of judicial interpretation which could, and did in fact, go far beyond the original intent of treaty-making governments (Scharpf 1999; Alter 2001).[9]

The legitimacy of EU policies adopted in the supranational mode is originally rooted in the intergovernmental agreement on the relevant Treaty provisions. Its ultimate location, therefore, is at the national level, where it draws on the legitimacy of democratically accountable national governments and national parliaments. However, given the fact that the outcome of multi-party negotiations cannot be expected to correspond to the individual "optimal point" of any negotiating party, it follows that the relevant test cannot be congruence with ex-ante constituency *preferences* (which, if strictly adhered to by negotiators, would block agreement);[10] all that reasonable voters could ask for is that the *outcome* should be superior, in terms of constituency interests, to the hypothetical state of affairs that would prevail in the absence of an international agreement (Scharpf 2000). As a consequence, the legitimacy of international agreements would either depend on outcomes that avoid violations of politically salient interests, or it must be covered by the blanket electoral accountability of the governments and parliamentary majorities that have agreed to them.

Strictly speaking, however, this indirect form of legitimation holds only for the original agreement, but not for subsequent interpretations of Treaty provisions by the Commission and the Court — just as current judicial interpretations of the United States Constitution could no longer be legitimated simply by reference to the historical agreement of the "Founding

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[9] To a lesser extent, supranational powers are also created by European directives and regulations adopted in the joint-decision mode. In the enforcement of these more specific rules of "secondary" European law, discretionary interpretation by the Commission and the Court is more narrowly circumscribed, but since such interpretations could only be politically corrected upon a legislative initiative from the Commission and with the agreement of at least a qualified majority of Council votes, some capacity for supranational policy making exists here as well. If the Commission had its way, the "revitalized Community Method" described in its White Paper on Governance (2001) would greatly expand the scope for supranational legislation (Scharpf 2001b).

[10] Hence governing by intergovernmental agreement must create serious difficulties for all attempts to define democratic accountability by reference to expressed constituency preferences, party signals and electoral mandates (Manin et al. 1999).

Fathers" (Bickel 1962). And while it makes theoretical sense to disregard the objections of a government when a consented rule is applied against it (cf. footnote 8, above), that would not imply that judicial interpretations extending Treaty provisions beyond the historical intent of the negotiating governments could be legitimated by the same logic. Moreover, as Karen Alter (2001) has emphasized, the requirement of unanimous agreement and ratification for Treaty amendments protects judicial legislation against political revision even by very large majorities — which also undercuts arguments deriving legitimacy from the assumption that all instances of acquiescence by member governments must reflect a tacit consensus (Garrett 1992).

But what type of argument could then justify the policy-making functions of the European Court of Justice and the Commission? As is true of judicial interpretation nationally, legitimacy beliefs draw on a culturally ingrained respect for "the Law" that antedates modern democracy, and on counterfactual beliefs that judges do not legislate but are merely acting as *la bouche de la loi.* What matters more in political terms, however, is the fact that the actual manifestation of judicial legislation will primarily take place within the judicial systems of member states, where European law is invoked by private parties in controversies with their government or with other private parties, and where courts will defer to the preliminary rulings of the ECJ (Art. 234, ex 177 TEC). Since national high courts have accepted the doctrines of direct effect and supremacy as well as the ultimate authority of the ECJ to interpret European law, national governments and other parties opposing a particular ECJ ruling are typically trapped in the procedures of their national judicial systems whose final judgments they could not challenge without challenging the rule of law itself. In other words, when European law is applied in national courts, European judicial legislation is immunized against political challenges by its parasitic relationship with the legitimacy of the national legal order (Burley and Mattli 1993; Dehousse 1998; Alter 2001).

It needs to be emphasized, however, that the substantive range of policies that can be adopted in the supranational-centralized mode is in fact quite limited. The criteria of monetary policy to be applied by the European Central Bank are tightly circumscribed by Treaty provisions (Arts. 105-111 TEC), and the opportunities of the Court to engage in Treaty-based judicial legislation are with few exceptions (one of which is the injunction against gender discrimination in employment relations — Art. 141 ex 119 TEC) restricted to the fields of negative integration, mobility and market liberalization (Scharpf 1999, chapter 2). This is not meant to suggest that these powers are unimportant. European rules on mergers and acquisitions are the strictest in the world, and in contrast to the anti-trust law of the United States and of other federal nation states, European competition law also applies to activities in the public sector of member states and to state aids that could distort market competition. These powers interfere with the industrial policies of member states and with their *service-public* functions— which in some countries, such as France, have very high political salience (Lyon-Caen and Champeil-Desplats 2001) — and they also are threatening national welfare state regimes (Scharpf 2002). Nevertheless, as of now it is still possible to

argue that the judicial interpretation of EU Treaty law has primarily served to remove barriers to trade and distortions of economic competition — i.e., purposes that had and still have the general support of all member-state governments.

2.2.2. The Joint-Decision Mode

Beyond negative integration and competition law there is, in any case, little that the Commission and the Court could do on their own. Instead, the dominant mode in which "First-Pillar" competencies are exercised is what I have described as the joint-decision mode, and what the Commission (2001b) calls "the Community Method" (Wallace and Wallace 2000). Here, the Commission has a monopoly of agenda-setting power, and it has the freedom to select the individuals, groups and organizations which it will hear and hence the inputs to which it will pay attention. However, any legislative initiatives of the Commission must be adopted by the Council of Ministers, voting either by qualified majority or by unanimity. In preparing its common position, the Council relies on COREPER and the Council Secretariat to integrate the positions of national ministries and the work of large numbers of preparatory committees staffed by national civil servants and experts. In an increasing number of policy areas, moreover, the European Parliament has become a co-equal partner of the Council whose amendments are also developed in specialized committees which allow access to a range of interests that may not find the same attention in the Commission and the Council (Pollack 1997). But that is not yet the end of it. If the directives so adopted need further specifications before they can be implemented, the task is delegated to the Commission which, however, is generally required to consult, or even obtain the agreement of, "Comitology" committees in which, again, national civil servants and experts must work out broadly acceptable solutions (Joerges and Vos 1999). Finally, European directives must be transposed into national law by national governments and parliaments, and they must be implemented by national and subnational administrative agencies, all of which may have their own preferences and constituency interests in mind when exercising discretion.

In assessing the effectiveness and legitimacy of policies adopted in the joint-decision mode, several observations are in point: First, European policy processes in the joint-decision mode are highly specialized — choices in agriculture policy are determined by the Directorate General for Agriculture, by the Council of Ministers of Agriculture, and by a specialized committee of the European Parliament — and the same is true of trade policy, environmental policy and all other policy areas in the First Pillar. At all levels, there seems to be less substantive involvement of actors representing the concerns of other policy areas or government-wide perspectives than is true in national governments and parliaments with stronger mechanisms for cross-sectional policy coordination and political integration. As a consequence, European policies may sometimes pursue more ambitious sectoral goals — for instance in the fields of work safety and environmental policy (Eichener 2000) — than

one might expect on the basis of a more comprehensive analysis of the national interests affected.

Second, within these sectoral confines, the multi-stage policy process combines the very different access opportunities provided by the Commission, by national government ministries and by committees of the European Parliament to allow inputs from a wide range of interests organized at European and national levels and from experts with diverse national and disciplinary backgrounds. Taken together with the potential roles of the Committee of the Regions and the Economic and Social Committee, it seems fair to say, therefore, that European policy processes in the joint-decision mode provide opportunities to be heard for a range of interests that is at least as wide, and probably wider, than is true in any national political system (Mazey and Richardson 1993).

Third, in structural terms, the joint-decision process must be described as negotiations in an extreme form of multiple-veto constellation (Tsebelis 2002). Hence if the style of interaction were that of distributive ("bloody-minded") bargaining, one should expect a low capacity for effective action and frequent blockages (Scharpf 1997, chapter 6). From empirical research, however, one gains the impression that interactions are generally characterized by a considerable commitment of negotiators to search for solutions that are acceptable to all parties involved (Joerges and Neyer 1997; Hayes-Renshaw and Wallace 1997; Lewis 2000; Wallace and Wallace 2000). Nevertheless, the alleged socialization into a cooperative interaction orientation and "deliberative supranationalism" can only affect "agents" who actually participate in the Brussels rounds, but not their respective "principals" back home. Hence it seems plausible that the success of negotiations depends to a large extent on the willingness of participants to recognize the political constraints under which all of them must work, and to accept that everybody needs to achieve some "victories" that would help to ensure acceptance at home — which is facilitated by the fact that political salience tends to be highly selective, and that many items on the European agenda will remain below the threshold of attention in national politics.

As a consequence, it seems that negotiators have converged on conflict minimizing practices[11] which might be expressed as an informal rule according to which national representatives are expected to concede points that are of minor political importance at home, but are allowed to hold out on provisions whose inclusion or omission would plausibly provoke highly salient opposition in domestic politics (Lewis 1998). Such a rule would explain not only the fact that European regulations are often agreed upon even though they require considerable (but politically non-salient) changes of legislation and administrative routines of member states (Falkner 2000; Falkner et al. 2002; Héritier et al. 2001), but it would also

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[11] Such conflict-minimizing rules were originally discovered in studies of federal-Länder negotiations in Germany (Scharpf 1988).

account for the overly complex and detailed character of European regulations — which the Commission (2001a) explains as the cumulative result of specific demands from member states.

Taken together, these characteristics ensure that the policies which the EU is in fact able to adopt in the joint-decision mode will generally not violate interests that have high political salience in the member states. For that reason, the need for legitimation is relatively low. By the same token, however, the EU is unable to act when salient interests are in direct conflict, and its problem-solving capacity is further constrained by the design weaknesses of consensus policies avoiding critical issues and reflecting cumulative and perhaps unrelated national demands.

2.2.3. The Intergovernmental Mode

From the perspective of national governments, however, the joint-decision mode nevertheless has its risks. The informal consensus rule in the Council is practiced in the shadow of a qualified-majority vote, and the strong roles of the Commission and of the European Parliament may force governments to accept compromises that are quite far from their ideal points and not much more attractive than the status quo. Moreover, since voters are not obliged to be fair, governments of member states cannot avoid political accountability for EU policies they have to implement, regardless of whether they voted for or against them in the Council. Hence they must see any transfer of competencies to the First Pillar, and any move from unanimity to qualified-majority voting within the First Pillar, as a calculated risk. They must weigh the benefits of Europeanization (or the risks of having to cope nationally with problems requiring Europe-wide solutions) against the risks of having to implement European policies that may violate interests and preferences that have very high political salience nationally.

In the fields of economic integration, the latter risks were generally seen to be outweighed by the benefits of the Internal Market, and for most member states that also applied to the Monetary Union. By contrast, the salience of immigration, internal security,[12] social policy, industrial relations, education, or taxation was generally considered to be so high in national politics that a general (idealistic) interest in European integration as such was not enough to overcome the defense of national autonomy by risk-averse member governments. When that is so, governments will only agree on Europeanization on the condition that they must remain in control — which, at minimum implies that there will be no qualified-majority votes in the Council. If apprehensions are even stronger, governments will also want to avoid being put on the spot by the Commission's monopoly of legislative initiatives or having to negotiate

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[12] In defense and external security, what is at stake, for member states that are also members of NATO, is not so much national autonomy but their relations with the hegemonic United States (Howorth 2001).

over compromises with the European Parliament, and they will seek to disable the supranational interpretative and enforcement powers of the Commission and the Court.

The obvious weakness of the intergovernmental mode is not only that European solutions can be held up by a single government demanding special favors — side payments and package deals could take care of that — but that European policy is paralyzed by politically salient conflicts of interest or preference among its member states. Unfortunately, this is most likely to be the case in those policy areas where the capacity of member states to deal autonomously with politically salient problems and challenges is most severely constrained by the consequences of economic integration and increases in transnational mobility. Among these are issues of external and internal security that are presently contained in the second and third "pillars" of the Treaty of European Union, but similar conflicts prevent effective European action in the fields of employment and social policy, fiscal policy, and taxation as well.

When common European solutions are considered less urgent, the preferred alternative to the intergovernmental mode has become the "Open Method of Coordination" which was formally introduced by the Lisbon Summit in the field of social policy, but which had already been applied *avant la lettre* by the Maastricht and Amsterdam Treaties to the coordination of national fiscal (Arts. 98-105 TEC) and employment policies (Arts. 125 – 130 TEC). In all these cases, there is no attempt to adopt common solutions at the European level. Effective policy choices and their implementation remain a national responsibility — which also implies that their legitimacy rests entirely on national foundations. What the Open Method could achieve under these circumstances is to focus the attention of national policy makers and publics on problems and goals defined as a "common concern", to define common indicators of success and failure at the level of policy outcomes (Atkinson 2002), and to provide opportunities for "policy learning" from the "best-practice" examples of other member states (Visser and Hemerijck 2001). Procedures may be more or less elaborated, but generally involve common guidelines, national action plans and reports, peer review based on analyses by the Commission, and Council recommendations.

If national governments are responsive, the process can help them to identify and adopt better national solutions (de la Porte and Pochet 2002), and peer pressure may also discourage the use of beggar-my-neighbor strategies which, if everybody resorted to them, would leave all member states worse off. Yet since member governments remain free to disregard recommendations and may also remain insensitive to blaming and shaming discourses, problem solving effectiveness of the Open Method of Coordination cannot be ensured in the face of divergent national interests (Schäfer 2005). Moreover, and more important here, since all solutions remain national, they will also be constrained by the constitutional asymmetry which is created by the "supremacy" of all European law (including its judicial interpretations) over all national law (Alter 2001). There is no way, therefore, in which the Open Method of coordination could relax the *legal* constraints imposed on market-

constraining and market-correcting national *service public* functions and social policies by the *acquis* of European competition law and its future extensions (Scharpf 2002).

2.3. Problem Solving Deficits and Legitimacy Crises

My review of European governing modes lead to the conclusion that the range of policies which the EU does in fact adopt does not give rise to major legitimacy problems. The policies of negative integration that can be imposed in the supranational-centralized mode are either supported by broad consensus or covered by the blanket legitimacy of (national) judicial systems and a general belief in the rule of law. For policies of positive integration, the dominant mode of joint-decision making reduces the need for legitimation by avoiding legislation that would significantly violate politically salient interests in member states. In the intergovernmental mode, finally, European policies can only be adopted if all national governments assume political responsibility for them, whereas the Open Method of Coordination avoids legitimacy problems at the European level altogether by leaving all effective policy choices to the governments of individual member states.

However, it also follows from this analysis that the problem-solving capacity of the European Union is severely constrained by the institutionalized need to avoid policy choices that would give rise to politically salient conflicts. By itself, that state of affairs would not raise significant legitimacy issues since, as of now, the EU is not expected to be an effective problem solver. By contrast, national governments with comprehensive competencies are held politically accountable for outcomes or even states of affairs that the voters strongly dislike, regardless of whether these were brought about by political action or by inaction. The EU, however, is known to be in charge of limited competencies and, what is more important here, it lacks a "government" in the sense of a politically visible center of power that could be held politically accountable for unsatisfactory states of affairs. Hence legitimacy issues at the European level can only refer to specific policies, rather than to general problems like unemployment or the rise of crime rates — and if care is taken to avoid deeply controversial policy choices, all should be well.

Unfortunately, however, that is only half the story. As I have suggested above and argued at greater length elsewhere (Scharpf 1999; 2002), the member states of the Union are increasingly confronting challenges with which they can no longer cope at the national level. In part these are due to international developments beyond their control. This is largely true of the new foreign policy, defense and security challenges arising from the end of the Cold-War stalemate, international terrorism, and the changing priorities of the United States. In other fields, however, EU member states are confronting the second-order consequences of the very success of European economic integration — which greatly reduced their autonomous problem-solving capabilities by exposing them to new economic challenges while imposing increasingly tight legal constraints on their choice of potential responses.

In a nutshell, the success of the Internal-Market program and of Monetary Union has dramatically increased not only the intensity of transnational competition in product markets, but also the potential mobility of finance and investment capital, of firms' headquarter functions and of production locations. As a consequence, member states are engaged in tax competition for mobile bases of revenue and in regulatory competition for mobile investments — both of which create pressures to reduce tax rates and to avoid regulations that could have a negative effect on production costs and the post-tax rate of return on capital. In short, the economic and fiscal opportunity costs of market-correcting redistributive and regulatory policies at the national level have increased considerably.

At the same time, the Common Market has eliminated protective tariffs and quantitative restrictions on imports, the Internal Market has eliminated non-tariff barriers, imposed tight controls on state subsidies and liberalized trade in services, and the Monetary Union not only eliminated devaluation as a policy instrument that could correct for a loss of international competitiveness, but it also imposes uniform interest rates that do not fit national economies with above-average or below-average rates of growth and inflation, and it constrains the fiscal-policy responses of member governments by the deficit rules of the Stability Pact.

What matters more is the constitutional asymmetry created by these legal constraints. At the national level, market-making and market-correcting policies had the same constitutional status, so that potential conflicts had to be politically resolved by majority or by compromises. Under the legal doctrines of direct effect and supremacy, however, any rule of European law takes precedence over any rule of national law. Since European policy has for decades concentrated on economic integration while market-correcting policies have mainly remained national, this has created a legal order in which European liberalization and competition rules have unconditional priority over national social-protection rules. This asymmetry became a major problem after the Internal Market program had authorized the Commission and the Court to seriously pursue the goal of service liberalization.

Unconstrained by the countervailing logic of market-constraining European rules, the Commission has vigorously extended the reach of liberalization and competition law into fields which, in the mixed economies of member states, had been exempted from market competition in the form of public services, subsidized non-profit organizations, or highly regulated private monopolies or cartels. In some areas (e.g., telecommunications), the outcomes of liberalization, deregulation and privatization have been very favorable for consumers, while in others (e.g., banking or railroads) they are mixed or negative. These are serious problems in some countries (Lyon-Caen and Champeil-Desplats 2001) . But they will pale in comparison to the political crises that will arise if the Commission and the Court should be allowed to continue in applying European competition law to the core areas of the welfare state, social insurance and social services, which traditionally had been farthest removed from the market.

As it is, the application of European law is constrained only by countervailing European law, and existing European law could be corrected only under the same rules that governed its adoption. In an ideal-type majoritarian democracy, decision rules do not discriminate between actors seeking to change an existing policy and others defending its maintenance.[13] However, as constitutional checks and balances and the number of veto players increase, symmetry is lost to the advantage of the defenders of status-quo policies (Tsebelis 2002). In the European Union, this asymmetry is in fact more extreme than in any national constitutional democracy. Policies adopted in the supranational-centralized mode can be changed only by unanimous Treaty amendments and parliamentary ratification in all member states, but obstacles to change are nearly as high for policies adopted in the intergovernmental or in the joint-decision modes. As a consequence, policies will be maintained and need to be enforced even though there would be no chance of having them adopted now under the original decision rules, or even by a simple plurality vote.[14]

In other words, nation states have become very much dependent on European solutions in order to cope with the "spillover" problems that are caused by successful European integration. But under the consensual decision rules which are needed to ensure the legitimacy and political acceptance of European policy choices in the intergovernmental and joint-policy modes of governing, not only new policy initiatives but also the reform of status-quo policies is easily blocked by conflicts of interest or preferences among EU member states. The expected result is a growing problem solving gap in policy areas where the EU generates problems and constrains solutions at national levels while effective solutions at the European level are blocked by political conflicts among member governments.

In the field of external security, such conflicts are likely to arise from fundamentally differing collective memories which EU member states associate with the outcomes of both, the Second World War and of the Cold War, and from differences in the emotional ties to (or the dependence on) the United States. By contrast, conflicts over the European harmonization of welfare-state policies, that would protect "Social Europe" against the impacts of economic integration and liberalization, arise from basic differences in national economic conditions, institutions, policy legacies and normative preferences. They amount to mutually incompatible, and politically highly salient differences in the levels of welfare spending, in the structures of welfare benefits, and in the types of welfare finance among "Scandinavian", Anglo-Saxon and "Continental" families of welfare states (Esping-Andersen 1990; Scharpf and Schmidt 2000; Scharpf 2002).

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[13] I leave aside the mechanisms discussed in the literature on "path dependence" (Pierson 2000; Thelen 1999) which may reduce the problem-solving effectiveness of policy choices, but which will not raise significant legitimacy issues since they affect the *preferences* of actors for maintaining status-quo policies.

[14] For that reason, it still makes sense to speak of a European "joint decision trap" (Scharpf 1988): Once it has been entered, exit is practically impossible.

3 Remedies?

If nothing could be done, the resulting problem-solving gap could indeed undermine the output legitimacy of national political systems as well as the continuing acceptance of European integration. Hence one ought to think about institutional reforms which will either increase the legitimate European capacity for effective action in the face of conflicting national interests or preferences, or which will restore or protect national problem-solving capabilities in fields where they are presently constrained by European integration. In other words, integration would either have to take a large step forward, or a step back — and as I will try to show, there are reasons to think that it ought to take steps in both directions at the same time.

3.1. Effectiveness Through Democratic Accountability?

In its White Paper on European Governance (2001a; 2001b), the Commission suggested that the capacity for legitimate and effective European action could be improved without any changes in the Treaties simply through a “revitalization of the Community Method” — by which it essentially meant a strengthening of its own role in the legislative process (Scharpf 2001b). In order to increase the Union’s capacity to act, the Council and the European Parliament should reduce their own involvement in legislation to the formulation of “essential principles”, and they should leave the specification of “details” to the Commission which, moreover, should not be required to go through cumbersome Comitology procedures in doing so. Normatively, so it is suggested, these procedures would be justified by the fact that the European Union has moved from a “diplomatic” to a “democratic” stage, and by the implicit assumption that the Commission itself is somehow also a beneficiary of democratic legitimacy.

There has been a good deal of discussion of the White Paper (Joerges et al. 2001) in which, it is fair to say, the Commission’s claim that the changes proposed would increase the Union’s capacity for effective action has not been seriously challenged. It seems indeed plausible that legislative processes would be less cumbersome if Council and Parliament would no longer be concerned with “detail”, and one might also expect a greater capacity for responding to changed circumstances if detailed regulations could be formulated and changed unilaterally by the Commission. For most critics, however, speculation about these advantages seemed “academic” since there was no reason to expect that Council and Parliament would agree to such a broad delegation of legislative competencies. Moreover, the Commission’s bold claim to democratic legitimacy was seen to be both unsupported by the present reality of political processes in the European Union and unsustainable in normative theory.

In normative debates, it is generally assumed that the Commission’s present claim is incompatible with its simultaneous claim to the role of a politically neutral promoter of the

European common interest. In order to attain the democratic legitimacy that could justify an expansion of its policy-making functions, it would have to abandon its present status of political independence. In principle, so it is thought, the Commission would have to be transformed into a politically accountable European government of either the parliamentary or the presidential variant. In the first case, the President of the Commission would be elected and voted out of office by a majority of the European Parliament; in the second case, the President would be directly elected by a majority of voters in the member states. In either case, moreover, individual Commissioners would be nominated by, and subject to instructions of, the politically accountable President.

Of these options, only the first received some attention in the European Convention. In their most consistent versions (see, e.g., Gloser and Roth 2002), such proposals envisage the European Union as a parliamentary democracy where the government is created by the majority (coalition) of disciplined parliamentary parties that prevailed in Europe-wide elections on the strength of their candidates for the Presidency and their programmatic platforms. It goes almost without saying that in these proposals the EP would gain full legislative and budgetary powers, that the status of the Council of Ministers would be reduced to that of a second legislative chamber, and that legislative decisions would be taken by majority vote in both chambers.[15] If such proposals could be realized, the number of veto positions would indeed be reduced and the European capacity for effective action in the face of conflicting interests would increase. The problem, however, is legitimacy.

By constructing blueprints for a majoritarian European constitution, the enthusiasts of European democracy tend to ignore the preconditions of legitimate *majority rule* — some of which cannot simply be created through constitutional engineering (Grimm 1995; Howe 1995). As I said above, in order to be considered democratic in the input-oriented sense, the Union should, at minimum, have a chain of *ex post* political accountability through which voters could effectively sanction European policy choices as well as conditions facilitating *ex ante* discussions of highly salient European policy choices and the formation of a Europe-wide public opinion. As of now, neither of these conditions are fulfilled: As long as European elections are still perceived as “second-order national elections”, the European Parliament does not link European policies to the electorate in a chain of political accountability; and in the absence of Europe-wide media and Europe-wide party competition, policy discourses and public opinion remain nationally fragmented (Schmidt 2006).

While it may have been reasonable to hope that the institutional reforms envisaged by the draft Constitutional Treaty would, in time, help to reduce both of these deficiencies, that hope

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[15] In the draft constitution presented as a “Berliner Entwurf” by SPD members of parliament, the Council would normally decide by a simple majority of its members. In exceptional cases, a “double majority” in the Council would have to include governments representing a majority of the EU population (Gloser and Roth 2002, Article 21)

was much more questionable with regard to a third, and more basic, precondition of legitimate majority rule — the commitment to a strong collective identity[16] and the belief in a "common good" that may override even highly salient collective interests and preferences of national constituencies.[17] If that basic belief is not shared, there is no normative reason why minorities should accept the legitimacy of policies adopted by a potentially hostile majority — think of Northern Ireland, the Kosovo or Cyprus.[18]

It is true that collective identity is also not given once and for all, but may develop over time through communication and salient interactions (Deutsch 1953), and that its evolution may be furthered through the existence of a common institutional framework. Thus it was not wrong to hope that debates about a European constitution and its ultimate adoption might themselves contribute to the strengthening of a European collective identity. But the referenda in France and Spain have put that hope beyond reach for the foreseeable future. In any case, one should not forget that in the absence of dictatorial repression even seemingly well established multi-ethnic polities (e.g., the Soviet Union, Yugoslavia and Czechoslovakia) did disintegrate as a consequence of conflicts which could not be legitimately settled by majority rule (Heraklides 1990). By contrast, the "consociational" constitutions of successful multi-ethnic polities like Switzerland or Belgium have established so many veto positions that the salient interests of significant minorities are unlikely to be ever overruled (McRay 1974, Lijphart 1999).

Considering the ethnic, linguistic, cultural, institutional and economic diversity within a European Union stretching from Ireland to Bulgaria, from Finland to Portugal, and from Estonia to Greece (let alone within a Union that would include Turkey and the precarious states of the Western Balkans), it seems clear that any workable European constitution must protect the political salient interests and preferences of its national constituencies at least as well as these consociational democracies are protecting their ethnic, linguistic or religious minorities. In short, if the EU should ever come to resemble one of the national models of democratic constitutionalism, its institutions would have to provide for veto positions and

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[16] In the European context, the *no-demos* debate has become a mine field. In the hope of avoiding the most explosive charges, I hasten to qualify the above sentence by three disclaimers: (1) I do not assume that legitimating collective identities need to be based on ethnicity or other primordial characteristics; (2) I do not deny that collective identities have been historically constructed and may continue to be reconstructed through political action and institution building; and (3) I also accept that collective identities are not necessarily unitary, and may in fact coexist at several levels of collective identification. In the latter case, however, it may be necessary to recognize differences in the intensity of identification — which will become a critical issue if higher-level collective interests are invoked to justify the violation of lower-level shared interests.

[17] If it is true that collective identity may exist at several levels of aggregation (Linz 1997), then it must also follow that the relative strength of identification will constrain the severity of sacrifices that may be legitimately imposed by governments at each level.

[18] In the light of recent research seeking to demonstrate the existence of a sense of "Europeanness" through public-opinion surveys, it seems necessary to re-emphasize that my present argument is narrowly focused on the justification of majority rule on issues which have a high political salience.

procedural checks and balances that must amount to an extreme variant of "consociationalism" (M. Schmidt 2000).

Since interests and preferences are still primarily articulated and aggregated in national political systems, it also follows that the role of national governments in EU decision processes cannot be greatly reduced below their present status. That does not rule out moves from the intergovernmental mode to the joint-decision mode, and from unanimous to qualified-majority decisions in the Council — but it means that the quorum of QMV decisions cannot be much reduced, and that the basic ground rules of consensual decision making must be maintained. If that is accepted, however, it also follows that EU legislation would still not be able to override politically salient national interests and preferences. Hence, neither the capacity for effective action in the face of conflicting interests, nor the capacity for reforming standing policies that have become obsolete, could be greatly increased by constitutional changes that would presently be politically feasible and normatively acceptable.

That is not meant to deny that present procedures and the definition of European competencies could be usefully systematized and simplified, and thus made to appear more transparent. It also would not preclude moves toward versions of parliamentary or electoral accountability of the President of the Commission which would help to increase the political salience of European elections (Hix 2002). Yet one also should not expect too much from such reforms. In a multiple-veto system, transparency must always remain an elusive goal as policies will ultimately emerge from negotiations and compromises for which none of the participants could or should be held individually accountable. Moreover, if reforms should in fact succeed in politicizing the Presidency of the Commission and in increasing the political salience of EP elections, voters might be led to expect that the winners should then be able to promote and adopt policies ensuring effective solutions to urgent problems on the European agenda. If these initiatives then get bogged down in multiple-veto bargaining, and if more intense partisan conflict should in fact exacerbate the difficulties of achieving inter-institutional policy consensus (Dehousse 1995; Schmidt 2006), then the result might well be more political frustration and alienation, rather than greater democratic legitimacy.

3.2. Effectiveness and Accountability Through Differentiation?

So where does that leave us? If input and output legitimacy is to be maintained in constellations where problem-solving effectiveness requires European solutions while politically salient policy conflicts cannot be settled by majority vote, "something's gotta give". What ought to give, in my view, is the notion that European policy should necessarily generate uniform rules applied equally in all member states.

This notion has its origin in the early history of European integration when, after the failure of the European Defense Community, the vision of a "United States of Europe" could only be

pursued through the second-best strategy of economic and legal integration — with the implication that the dual commitment to uniform European law and to a maximally integrated European market became the hallmark of “good Europeans”. As a consequence, decades of discussion about forms of differentiated integration — variously promoted under such labels as “variable geometry”, “different speeds”, “concentric circles” and the like (Ehlermann 1984; Giering 1997; De Búrca and Scott 2000) — have not produced more than the extremely restrictive and so far unpracticed provisions on “Enhanced Cooperation” that were introduced in Amsterdam and slightly modified in the Nice Treaty (Title VII TEU).

Once it is realized, however, that the insistence on uniformity prevents effective European responses to challenges with which member states are no longer able to cope, and that this may undermine political legitimacy at both European and national levels, the unquestioned moral commitment to uniformity should give way to more pragmatically useful criteria based on analyses of the underlying problem constellations.[19] If consensus on European action could be achieved only among a subset of member states, one would thus need to ask essentially two questions:

- Would common action by a group of member states have negative external effects on other member states that are unable or unwilling to join the group?
- Conversely, would the existence of member states that will not join the group have negative external effects on the effectiveness of action by the group?

If neither of these questions could be answered in the affirmative, there is no compelling[20] pragmatic reason to rule out either European action in the form of “Enhanced Cooperation”, or the “opt-out” of member states whose interests or preferences would be violated by a policy favored by the majority. In a highly interdependent world, it is true, it will rarely be possible to demonstrate the total absence of external effects in one direction or the other. What should matter, therefore, is the relative weight of the interests and the salience of the political preferences that are at stake on either side. This is, at bottom, a political judgment which, on the basis of an examination by the Commission, ought to be made by the Council. To discourage hold-outs over side payments, moreover, qualified-majority votes ought to suffice when permission is requested for enhanced cooperation or opt-outs.

In actual practice, such solutions are of course not unknown in the European Union, even though they were not adopted under the restrictive procedural rules governing “Enhanced Cooperation”. The best example is the European Monetary Union which does not force

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[19] For similar efforts to develop pragmatically useful criteria, see Philippart and Sie Dhian Ho (2001); WRR (2001, chapter 5); Kölliker (2001).

[20] I would not consider the difficulties that the Commission would face in keeping track of differences in the coverage of European law as a compelling reason.

Britain, Sweden or Denmark to join, even though these countries would meet the criteria of membership, and even though some negative externalities could be expected if the outsiders would try to increase their export competitiveness by devaluating their currencies against the Euro. Similarly, even after the Schengen agreement on the abolition of internal border controls was incorporated into the European Union Treaty at Amsterdam, not all member states of the Union are included. Moreover, under political duress Britain, Denmark or Ireland were allowed individual opt-outs from EU policies which they found particularly unpalatable, and accession countries were and are often granted derogation from certain requirements of the *acquis* during a transition period. It should be noted, however, these are usually understood as ad-hoc expedients, considered as perhaps inevitable but basically illegitimate exceptions from the commitment to European uniform law applied equally throughout the Union. Unless they are speedily corrected, so it is feared, the Union will be on the slippery slope toward increasing "Balkanization".

By contrast, the arguments which I have presented here suggest that one should treat these "exceptions" as precedents that illustrate the rationale of generally useful options of "differentiated integration". If it is accepted that uniformity for its own sake cannot be the guiding maxim of European policy, these precedents ought to be examined in order to search for rules and procedures which would enable the Union (1) to effectively realize purposes shared by all of its member constituencies; (2) to assist individual, and groups of, member states in coping with problems which can no longer be resolved at national and subnational levels; and (3) to prevent individual, or groups of, member states from adopting policies that would impose undue burdens on other member states.

Of these maxims, the first and the third may appear unproblematic, since they correspond in principle to the present dualism of "positive" and "negative integration" in European policy (Scharpf 1999, chapter 2). Yet both of them will be affected by acceptance of the second maxim — which has enabling as well as constraining consequences. It would enable positive integration among groups of member states even in the absence of generally shared purposes. Conversely, it would also constrain the application of rules of negative integration in situations where policies of individual, or groups of, member states have high salience for national constituencies whereas potential negative impacts on other member states are weak.

If these maxims were accepted, the present rules governing "*Enhanced Cooperation*" would have to be liberalized. Then a "European Security and Defense Community" would no longer be explicitly excluded under the restrictive conditions maintained in the Treaty of Nice (Art. 27b TEU). Instead, the constitutional prohibition would be replaced by the political judgment of a qualified majority in the Council. It would have to weigh the merits of pooling the military resources and coordinating security strategies among a cohesive group of countries (say, France and its Continental partners) as against the disadvantages this might impose on others (say, the UK with its trans-Atlantic priorities). While a positive outcome

would by no means be ensured, the creation of European capabilities would at least no longer depend on universal participation.

By the same token, and perhaps less controversially, countries with similar welfare-state institutions and policy legacies (say, Denmark, Sweden and Finland) could harmonize their social-policy reforms even if the group would include less than the minimum of eight member states required for Enhanced Cooperation by Article 43 (g) of the Nice Treaty — and the same would be possible for the groups of Continental or Southern-European welfare states and, perhaps, for the accession countries of Central and Eastern Europe. Since these harmonization directives would have the status of European law, they would have the effect of correcting the constitutional asymmetry between market-creating European law and market-correcting national institutions and policies.[21] Thus the balance between economic liberties and social-protection goals would cease to be an issue decided by the Commission and the Court through application of the legal syllogisms of undistorted competition, and would again become a matter of political conflict and compromise — within the group of countries attempting Enhanced Cooperation as well as between such groups and the Council as a whole.

In the same spirit, the constitutional treaty ought to provide for a generalized possibility of "constructive abstention" which would allow individual member states to "opt out" of a common policy which otherwise could be blocked by their negative vote.[22] This was the solution that allowed the creation of the European Monetary Union or the adoption of the Social Protocol (Falkner 1998, chapter 3), and it might also facilitate, say, the European harmonization of taxes on capital interest, of the rules for hostile takeovers or European action in some areas of immigration and asylum policy. If given the choice, dissenting governments might often prefer to allow the majority to go ahead, rather than having to choose between obstruction and submission. In view of free-rider temptations (or the "leak in the bucket" problem), however, it would still be necessary that opt-outs be allowed by a

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[21] That presupposes that the substantive rules restricting Enhanced Cooperation — which presently rule out policies that might conflict with the *acquis*, affect the internal market or restrain or distort trade among member states (Arts. 42, c, e, f TEU) — are also relaxed. This could be ensured by including "protective clauses" in the Treaty which, in analogy to the clauses mandating gender equality (Art. 3 (2) TEC) and environmental protection (Art. 6 TEC) would oblige European policy makers, including the Commission and the Court, to give weight to social-protection purposes (Vandenbroucke 2002; Scharpf 2002).

[22] It should be noted that the present Treaty also includes a form of opt-out from existing EU law in Article 88, 2., Para. 3 TEC. Under thus rule, state aids that would otherwise be illegal under Articles 87 or 89 TEC are allowed to stand if the Council decides unanimously to grant a derogation. While this provision has lain dormant for a long time, it was recently used by governments challenging the Commission's interpretation of Treaty rules on industrial subsidies (SZ 2002).

majority in the Council[23] — which would then have to decide whether, in its view, uniformity was more important than the risk of having no European rule at all.

4 Conclusion

If both of these changes, liberalized rules for Enhanced Cooperation and the possibility of opt-outs, were included in the new constitutional treaty, the Union's capacity for effective action would increase, and so would its capacity for reforming existing legislation that no longer fits the interests or preferences of a majority of member governments. Equally important, the higher problem-solving capacity would not have to be bought at the expense of democratic legitimacy in situations where the politically salient preferences of national constituencies might be overridden by majoritarian policy choices at the European level. It is also clear, however, that the price to be paid would be a greater variance in geographical coverage and hence the increasing patchwork character of European law.

That price must seem high for those who still hold on to the original goal of a politically integrated "United States of Europe", and who defend the perfection of economic integration and the unity of European law as the most significant achievements of decades of struggles toward that *finalité*. But that political goal, which might have been achieved among the "Original Six", has been beyond reach since the first enlargement in 1973 while the remarkable achievements of economic and legal integration are generating political repercussions that may yet destroy European integration itself.

When European integration began among the Original Six in the 1950s, their leaders did indeed see economic integration not as an end in itself, but as a vehicle that would carry them toward the goal of political integration. Given the basic similarities of welfare-state institutions and (primarily Christian-Democratic) views of the role of the state in society, that view was not obviously unrealistic, even though the institutions which were created then, and whose basic characteristics are still shaping the present EU governing modes, made political action dependent on very high levels of intergovernmental agreement. It became much less unrealistic, however, already with the first enlargement which, with the accession of Denmark, the UK and Ireland, added three new member states with extremely heterogeneous economic conditions, welfare-state institutions and political orientations, and heterogeneity increased further with later enlargements.

Under these conditions, high consensus requirements and the insistence on uniformity had the effect of drastically limiting *political* policy choices to issues on which member

[23] However, the European Parliament and the Commission, both of which are likely to be committed to uniformity for its own sake, should not have a veto.

governments could agree. Since the benefits of joining the larger European market was a major motive for, and the *acquis* of existing market integration a rigid condition of, later accessions, agreement on that score was least problematic, and once it was given, the supranational powers of the Commission and the Court would ensure its effectiveness. Beyond that, however, heterogeneity matters and will prevent effective European action in the face of politically salient conflicts among member-state governments or their constituencies. As a result, we have an increasing asymmetry between the increasing legal perfection of economic integration, promoted by the supranational powers of the Commission and the Court, and the political impotence of the Union in other policy areas — but particularly so in the domain of market-correcting social policies. As a consequence, we also have an increasing asymmetry between the European extension of economic liberties and increasing economic and legal constraints on national social-protection policies.

I have tried to show that one should not expect this asymmetry to be corrected by the creation of majoritarian European governing modes. On theoretical grounds, I have argued, these would lack democratic legitimacy on theoretical grounds ─ and the French and Dutch referenda on the Constitutional Treaty seem to have put the issue to rest in pragmatic terms. As a consequence, European integration, after Eastern enlargement even more so than before, seems bound to follow a scenario in which high levels of economic integration will entail the progressive disintegration of national social-protection systems, and in which the Union will remain unable to assume the governing functions which its member states can no longer perform effectively. If this scenario is to be avoided, the Union must find ways to complement economic integration with modes of political integration that can accommodate a greater degree of national heterogeneity than is presently thought acceptable. I have also tried to show that, in principle, controlled forms of "Enhanced Cooperation" and "constructive abstention" could increase the capacity for political action in face of diverging national interests and preferences.

Compared to the hopes for democratizing the European polity that have become associated with the current debates over the future EU constitution, these proposals must appear conservative and defensive. They are indeed derived from the conviction that the "peoples" of the European Union are not now, and will not soon become, an integrated nation, and that therefore the Union cannot be constructed as an enlarged nation state committed to the unitary ethos of a *république une et indivisible* (Weiler 1995; 2000). At the same time, however, these are proposals that would again widen the domain of political choices — as distinguished from economic compulsion and bureaucratic-judicial legislation — at national and European levels. Since democratic accountability can take effect only where there is political choice, the democratic legitimacy of the multi-level European polity would indeed be strengthened by the acceptance of differentiated integration.

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