Fritz W. Scharpf

Community and Autonomy

Institutions, Policies and Legitimacy in Multilevel Europe

Max Planck Institute for the Study of Societies

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MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG
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Cologne, January 2010 *Fritz W. Scharpf*

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Introduction
Community and Autonomy in the European Union

The essays in this volume record a quarter-century of reflections on the multilevel European polity and its impact on the effectiveness and legitimacy of democratic government in Europe. Re-reading them in the order in which they were published, I find it interesting to see how themes that were mentioned as an aside early on evolved over time, and how the overall view of the institutional structure and its empirical and normative implications has become progressively wider and more complex, even though the individual articles focus on a relatively narrow range of specific issues. Thus my present map of the overall terrain would include

– a view of policy making at the European level that distinguishes between its "political" and "non-political" modes and that focuses on the specific problem-solving capabilities and legitimacy conditions of each of these modes. It would also include
– a view of the impact of European integration on the problem-solving capacity, democratic legitimacy and the socioeconomic orders of EU member states, and, finally, it would include
– a view of the mechanisms that may (or may not) adjust the balance between the equally legitimate concerns of European integration and of democratic self-determination in EU member states.

In this introduction, I will roughly follow the sequence in which I came to pay attention to these themes.

Problem-solving Effectiveness

My first contribution, and one of my most cited articles, focuses entirely on what I would now call the "political mode" of EU policy making, and it presents a very skeptical view of the Community's problem-solving capacity. Though published in 1988, it was written in 1983/84 (i.e., before the adoption of the Single-Market program), and it compares the effects of intergovernmental bargain-

ing on policy outcomes in German federalism and in the European Community. In Germany, we had explained the blockades and suboptimal policy outcomes (which our policy studies had identified in certain fields) by the dependence of national programs on the (nearly) unanimous agreement of *Länder* governments. Taking the state of the Common Agricultural Policy as an example, the article suggested that similar institutional conditions would also create a "joint-decision trap" (JDT) at the European level. With the benefit of hindsight (cf. Chapter 10), it was easy to show that the basic explanatory model (which anticipated George Tsebelis' [2002] theory of "Veto Players") remains valid wherever its assumed institutional conditions are in force. But the popularity of the article on the citation index owes probably even more to the fact that it was also easy to show that these conditions do not exist everywhere, and that even where they exist, they will not always generate policy blockades or compromises on the lowest common denominator.

Legislative and Judicial Policy Making

In my subsequent work (beginning in Chapters 2 and 3, and fully developed in Chapter 7), I have clarified the domain and the limits of the JDT model by distinguishing between the "political" and the "non-political" modes of policy making at the European level. Political modes are defined by the fact that member-state governments retain significant veto powers. This is not only true of purely "intergovernmental" negotiations over Treaty revisions and unanimous policy choices, but also of European legislation in the "Community Mode"—which requires an initiative of the Commission and a majority in the European Parliament. But since the agreement of at least a qualified majority of member-state governments in the Council of Ministers remains necessary in all cases, the constellation continues to fit the analytical category of a "joint-decision system" (Scharpf 1997: 143–145; Chapter 7 in this volume). In other words, European legislation in the "political mode" does depend on very broad agreement among a wide variety of veto actors—and hence the mechanisms suggested by the JDT model may apply.

This is not so where European policy choices can be adopted in the "non-political mode" by supranational agencies. Within specific policy domains, the European Central Bank (ECB), the European Commission and the European Court of Justice (ECJ) have the power to act without the involvement of national governments (or of the European Parliament, for that matter). For most purposes, moreover, these agencies can be modeled as a unitary actor (rather

than as a constellation of internal veto players). Within their fields of competence, in other words, the institutional preconditions of the JDT model do not apply—and hence there will be policy areas where the European capacity for effective action is not impeded by the mechanisms specified in the first article.

Thus the ECB has full competence over monetary policy for the Euro area, and it is more completely shielded from political directives or interference than any national central bank (Articles 105, 108 ECT). The same is true of the European Commission when it is defining and applying competition rules for private companies and public enterprises and when it is controlling state aids that might distort market competition (Articles 81–89 ECT). But while the policy areas and policy goals that are to be served by these mandates are reasonably well specified in Treaty provisions adopted by intergovernmental agreement, there are no similar substantive purposes circumscribing the Commission's power to initiate Treaty infringement proceedings against a member state (Article 226 ECT), let alone the Court's power to interpret and apply Community law (Articles 220–234 ECT). Both of the non-political powers have been used to massively undermine the position of member states.

Since the power to apply implies a power to interpret the law and thus to define the domain of its application, the normative dividing line between legitimate interpretation and illegitimate judicial legislation is difficult to define even in national polities. But there, the unquestioned normative priority of democratically legitimated rule-making over judicial rule interpretation is matched in practice by the ability of parliamentary majorities to correct judicial decisions that misconstrue the legislative intent. And even in countries where the judiciary may also review the constitutionality of legislation, its choices are politically constrained by intense public debate, and they may generally be corrected through qualified majorities. In other words, judicial law-making occurs in the shadow of democratically legitimated political authority. In the relationship between the European Union and its member states, by contrast, ECJ decisions based on an interpretation of the Treaty can only be corrected by the unanimous adoption of a Treaty amendment that has to be ratified in all twenty-seven member states, and attempts to correct the interpretation of directives and regulations are impeded by all the obstacles implied by the JDT. In other words, the potential range of politically uncontrolled judicial legislation is far wider in the EU than it is in any national constitutional democracy (Chapters 3, 4 and 7).

The foundations of this awesome power of the judiciary were already laid by two famous ECJ decisions in the early 1960s that postulated the direct effect of European law and its supremacy over all law of the member states. Their policy-making effectiveness, however, did not become manifest before the end of the 1970s. When harmonization directives were blocked in the Council,

judicial authority was able to simply disallow national regulations by defining them as non-tariff barriers that interfered with the economic liberties of importers and exporters. While the effectiveness and the normative ambiguities of this "integration through law" were soon recognized by politically sensitive students of European law (Weiler 1982; Cappelletti/Seccombe/Weiler 1985), many political scientists continued to focus exclusively on political action on the European level and ignored the power of judge-made law to constrain and selectively empower and shape political choices at the national and European levels (Chapters 12, 13).

Negative and Positive Integration

In my own work, the effectiveness of judicial policy making first came into view when I reflected on the upsurge of European liberalization directives under the 1992 internal-market program (which to my shame had not been anticipated in the JDT article). What struck me now was the considerable difference between areas where European policies seemed to be surprisingly effective and others where the low expectations derived from the original JDT model still seemed to be confirmed (Chapter 3). My first attempt to parse these observations relied on a distinction, introduced in economic theory in the early 1960s, between "negative integration," defined as the removal of national obstacles to trade, and "positive integration" creating a common European regulatory regime. Since the former appeared generally more effective than the latter, I found it important to note that it could also be achieved by judicial action, whereas positive integration would necessarily depend on European legislation.

By itself, however, that distinction did not account for all of the variance since there was also a considerable body of common European regulations. So in order to deal with differences in the domain of positive integration I resorted to a second distinction, between "product" and "process regulations," which I had borrowed from the literature on environmental law. The underlying argument assumes that international free-trade law would generally tolerate national regulations that excluded harmful products, but would not accept regulations of production processes as grounds for the exclusion of imports. And even though this legal distinction would, by itself, only affect the reach of negative integration, it would also have important secondary effects on the bargaining over positive integration. If imports could be required to comply with national product regulations, differing standards would still constitute barriers to trade. Presumably, therefore, all member states shared an interest in harmonization,

but member states with high standards could veto common rules that did not ensure a high level of protection. By contrast, regulations of production processes, labor relations or taxes affecting the costs of production, but not the qualities of the product itself, could not be applied to imports. Hence member states with lower standards would have a motive and the opportunity to oppose initiatives for harmonization that would eliminate their competitive advantage.

In other words, with the help of three legally and empirically-based distinctions it was possible to re-specify the domain of the original JDT model in theoretically productive ways: By definition, the negation-theoretic model did not apply to policy choices adopted by the Commission and the ECJ. To the extent that negative integration is being imposed unilaterally by the Court and the Commission, it is thus not impeded by the JDT. In the domain of positive integration, where European legislation is required, the JDT model does indeed apply. But its predicted constraints on European problem solving will be easier to overcome when product regulations, rather than regulations of production processes, are at stake. By and large, this extremely simple model, which can be represented by some elementary game-theoretic diagrams, has served well to identify policy areas where effective European problem solving could be expected, and others where it would have to overcome very high hurdles (Chapters 4, 10).

Of course, not all European policy initiatives can be classified as being either product or process regulations. Where the substantive distinction does not seem to fit, the negation-theoretic model itself would still apply, but it would require a more specific identification of member-state interest positions and bargaining powers. At the same time, however, it should be recognized that that even in the world of rational-choice models, the JDT represents an extremely simple version that could well be improved by the recognition of additional factors facilitating agreement on solutions that are both problem-solving effective and interest-compatible. Moreover, as I emphasized in the discussion of "cooperative" or "problem solving" orientations in the original JDT article, these factors may depend on cognitive and normative beliefs that would not usually be recognized in a rational-choice framework (Scharpf 1997: 60–66, 84–89). There is of course no reason to ignore them if and where they appear to have causal effect.

Legitimacy Issues

Discussions about the "democratic deficit," to which I have contributed myself (Scharpf 1999: Chapter 1), tend to focus on the EU as if it were a free-standing polity that should be judged by the criteria applied to liberal democracies at the

national level. In my present view, discussions in this frame must end in ambivalence: Whereas the EU meets all criteria of "liberal" legitimacy, it fails by the "republican" criteria of democratic legitimacy (Chapter 12). Moreover, the deficits of republican legitimacy could not be corrected through mere institutional reforms as long as the citizens of the member states did not share an EU-wide collective identity that could sustain majority rule and a government that was politically accountable to the EU citizenry at large. At the same time, however, the EU must be seen as part of a multilevel polity with member states that are legitimated by liberal as well as republican criteria—which ought to be reflected in discussions of a "European democratic deficit" (Chapters 11 and 12). As long as all EU policies must be implemented and enforced by the member states, citizens are never directly confronted with the governing authority of the Union. What matters is the willingness of member states to comply with EU mandates, and the willingness of citizens to comply with their national authorities, regardless of the national or European origin of the laws being enforced. The implication is, therefore, that the (republican) legitimacy of governing authority in the multilevel European polity rests on (and is limited by!) the legitimacy of EU member states.

In practice this means that citizens will hold national governments politically accountable not only for national policies, but also for the European policies and rules they will implement and enforce. It was no anomaly, therefore, that during the BSE scare, when EU rules required the destruction of hundreds of thousands of healthy cattle, public outrage in Germany forced two ministers of the federal government (rather than the EU Commissioner in charge) to resign their offices. And even though farmers may protest in Brussels, it is only their own governments who must fear electoral responses. But how would this vicarious accountability fit into accepted notions of democratic legitimacy?

Republican legitimacy relies on electoral accountability as the egalitarian mechanism that ensures government responsiveness not only to inputs from special interests, experts and elite opinion, but to the general public as well. It does assume, however, that voters will act in the context of public debates in which governments are obliged to explain and defend controversial and politically salient policy choices in "communicative discourses" (V. Schmidt 2006). But where they are trying to justify European policies that diverge from politically salient national preferences, the distinction between political and non-political modes of European policy making is again critical.

Given the high level of consensus required for political action, European legislation will rarely override the highly salient interests of a member state or the deeply held values of its citizens if these are vigorously defended by its government. But neither could national publics expect that outcomes of intergovern-

mental bargaining should realize pre-existing national preferences. They should, and generally will, understand that their government is not omnipotent, and that common European solutions can only be obtained if the interests and preferences of other member states are accommodated as well. Hence governments should be able to explain and defend European policies in whose adoption they participated, and they should only be sanctioned for having failed to do their best under the circumstances (Chapter 5). In other words, European legislation, and more generally political action at the European level, does not seem to raise fundamentally new problems of democratic legitimacy in member-state polities.

But if European political decisions will rarely create serious legitimacy problems at the national level, European "non-decisions" may in fact do so. As is to be expected, a lack of consensus among member governments will often prevent European solutions in areas where national policy options are constrained by international interdependence. If this European problem-solving deficit left member states free to cope on their own with unfavorable external circumstances, that would, again, not undermine national legitimacy. Democracy is, after all, about self-determination, rather than about wish fulfillment. But democratic legitimacy is indeed challenged where Europe is unable to act while the national capacity to cope with the problem is disabled by the legal constraints of negative integration that have been imposed by non-accountable judicial action (Chapter 12).

Community, Autonomy and the Constraints of Negative Integration

The balance of European and national competences was the subject of one of my first attempts to deal analytically with the problem-solving and legitimacy issues of the multilevel European polity (Chapter 2), it has been a major issue in my analyses of federalism reform in Germany (Scharpf 2009), and it has become an increasing preoccupation in my more recent work (Chapters 8, 9, 12 and 13). A major additional impulse came from the comparative study of national employment and social-policy responses to the challenges of economic internationalization (Scharpf/Schmidt 2000). I was impressed by the diversity of national institutional conditions, economic vulnerabilities and coping responses—and also by the intensity of normatively charged political conflicts associated with these responses. I also found it remarkable that European legislation (except for the conditions of membership in the Monetary Union) had no role in any of the narratives of national coping strategies. As a consequence, my ear-

lier conclusions about the obstacles to European solutions in the fields of social policy, industrial relations and capital taxation (Chapter 4) have been reinforced, and I am more deeply convinced than before that conflicting national preferences would frustrate political attempts to create a common "social model," let alone a "social economy," at the European level (Chapters 8, 9 and 13).

If that is so, the deep attachment of national publics to existing socioeconomic institutions and policy legacies of EU member states, and the high political salience of any changes, will create severe legitimacy problems for external interventions that would either destroy existing solutions or prevent the adoption of domestically desired reforms. Since judicially imposed negative integration can and will in fact do both of these, one should hope that the Court would be particularly sensitive to the need to strike a normatively justifiable balance between the European and national concerns at stake in the specific case. A closer look at the case law has convinced me, however, that the ECJ is neither willing nor able to define and manage this balance. Its doctrinal arsenal does not even have categories that could identify spheres where national political preferences and national processes of democratic self-determination might prevail over negative integration. Even where there is a semblance of balancing, as when national rules serving "imperative requirements in the general interest" may prevail over European liberties, the salience of the European concern is simply presupposed, whereas potential justifications are restrictively defined by reference to generally relevant safety problems, rather than to the normative or political salience of the issues in a specific national context. And if these limited justifications are invoked, they are subjected to a highly biased "proportionality test" in which the national government must prove the effectiveness and necessity of the measures it defends. In other words, the case law of the ECJ is fundamentally skewed and cannot define a normatively defensible balance between negative integration and national autonomy (Chapter 12).

But are there better solutions? In the concluding chapters, I have mentioned a range of possibilities, none of which seems to be fully satisfactory. One difficulty arises from the fact that defensible criteria cannot be uniform and general, but need to allow for normative, institutional and political differences among member states. Soft-law solutions like the Open Method of Coordination can allow such flexibility, but they do not have the power to limit the legal constraints of negative integration. The same is true of solutions making use of the limited potential of "enhanced cooperation." An effective constraint on negative integration might be achieved by the German Constitutional Court's claim, announced in its judgment on the Lisbon Treaty (2 BvE 2/08), that it may protect the core domains of a national "constitutional identity" against the supremacy of European law. Yet if this national *Kompetenz-Kompetenz* were exer-

cised by the high courts of all twenty-seven member states, the cumulation of unilateral (and potentially self-serving) opt-outs could leave not only European law but European solidarity in shambles. What is needed instead is a procedural solution permitting a member state to challenge a European rule that interferes with highly salient national concerns in a political forum that is equally sensitive to the requirements of European solidarity and the values of national self-determination. In my view, this forum could be the European Council (Chapter 12).

In any case, however, the legitimacy of the multilevel European polity as a whole will suffer if the judicial expansion of negative integration continues to reduce the domains in which member states are able to shape the socioeconomic institutions of their society through political processes of democratic self-determination—especially if this affects policy areas where political action at the European level cannot be expected. Since the Union depends entirely on the political legitimacy of its member states, the present imbalance of the equally fundamental legitimacy bases of "community" and "autonomy" ought to be not only a national concern but a major European one as well.

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1 The Joint-decision Trap: Lessons from German Federalism and European Integration (1988)

Introduction

In political philosophy government is justified, in comparison to anarchy, as an arrangement for improving the chances of purposive fate control through the *collective* achievement of goals (including protection against threats) which would be beyond the reach of *individual* action. The same logic of effectiveness would justify enlarging the scale of government whenever the achievement of goals, or the defense against threats, would be aided by the larger action space and resources of larger units. The countervailing logic of democratic legitimacy, however, would favor smaller units of government in which a greater homogeneity of preferences would allow collective choices to approximate aggregate individual choices. It is also claimed that a world of small government units would not, in the first place, produce most of the threats to security that large units of government are needed to provide protection against (Kohr 1978).

The search for the optimal scale of government, in the light of apparent trade-offs between the greater effectiveness of larger and the greater legitimacy of smaller units, is the subject of sophisticated speculation in the fields of public choice, fiscal federalism and political science (Breton/Scott 1978; Kirsch 1977; Mueller 1979; Oates 1972; Olson 1969; E. Ostrom 1986; Rothenberg 1970; Tullock 1969; Ylvisaker 1959). Historically, of course, it was the nation state which, during the nineteenth and early twentieth centuries, seemed to provide the most attractive balance: sufficiently large and resource-rich to cope with most external threats, it was also internally homogeneous enough to facilitate the acceptance of collective choices. Indeed, the history of national unification in the nineteenth century, as well as of the disintegration of multi-national empires in the twentieth century, suggest that national "identity" was a more powerful determinant of the prevailing scale of government authority than either the

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greater internal homogeneity of sub-national communities or the greater power resources of supra-national political units (Sharpe 1985).

In the post-1945 period, however, political authority on the scale of the nation state seemed to have lost much of its claim to optimality. Having been rescued from military disaster by the United States for the second time, most European nation states chose to renounce their claims to military self-sufficiency in favor of an American-led alliance. At the same time, European recovery, not only from war damages but also from the pre-war disintegration of the international economy, seemed to require the creation of a larger "common market" at least within Western Europe. For the committed "Europeanists," of course, this was only a beginning. They hoped, and worked, for a politically united Western Europe which would again be able to hold its own in a world dominated by military and economic "super powers." In these hopes they were encouraged by integration theories in the social sciences, expecting closer communications among member countries, and the "forward spill overs" of functionally specific European institutions, to generate the political momentum for an ever deeper and wider social and political integration (Deutsch et al. 1957; Haas 1958). Thus, NATO and the EEC were seen as only the first steps on the road to "a more complete union" modeled after the federal system of the United States of America.

Thirty years later, NATO is still no more than a defense alliance under the undisputed hegemony of the United States, but as such it has been remarkably successful by its own standards. The European Community, on the other hand, has increased its territorial scale from the original six to twelve member states, and it has also broadened its functional responsibilities beyond the specific mandates of the original treaty. Indeed, there is considerable pressure for further functional expansion in such areas as industrial policy, technology policy, communications policy and monetary policy, where the Community is urged to assume governing responsibilities for which the nation state has become too small.

Nevertheless it is fair to say that the Community, unlike NATO, is not characterized by the self-satisfaction of secure accomplishments but, rather, by a pervasive sense of disappointment, frustration and general malaise. The "Common Market," to be sure, is functioning more or less effectively as a customs union in the industrial sector, constraining the protectionist tendencies of member countries in exchange for the growing protectionism of the Community itself. In industrial policy, however, the relative success of common ventures in aerospace resulted mainly from collaboration outside of Community institutions, while Community efforts to cushion the decline of old industries are severely criticized as economically inefficient. Some beneficial programs, such as the Re-

gional Fund and the Social Fund, are ridiculously under-financed in relation to the problems they are supposed to attack, while in other areas the transfer of regulatory powers to the European level has mainly had the effect of frustrating more aggressive initiatives for pollution control or consumer protection at the national level. Most important, however, the centerpiece of European economic integration, Common Agricultural Policy (CAP), is now almost universally considered a grandiose failure. CAP has managed to generate huge agricultural surpluses, at the expense of European consumers and taxpayers who have to pay twice, for food prices far above the world-market level as well as for enormous subsidies for the purchase, storage and disposal of surplus production. And in spite of it all, CAP has neither been able to assure acceptable family incomes for small European peasants, nor has it maintained its major original achievement of common prices in a common European market for agricultural goods.

Thus, if there should be any "spill overs" at all from functional integration, they are more likely to be negative. Indeed, the controversies over British contributions, which almost wrecked the Community in 1984, were closely related to the perversities of CAP, and so are the budgetary conflicts with the European Parliament. Open conflict, it is true, might help to politicize European issues and thus, ultimately, further political integration (Schmitter 1969). But it is hard to believe that extremely low voter participation at European elections should be understood as the expression of vigorous political demands for more integration, rather than as a vote of non-confidence for the Community.

At the same time, however, the European Community is not only just "hanging on." Direct elections for the European Parliament, which were finally accepted in the 1970s, may not have achieved the political mobilization that had been hoped for, but they are still a symbol of institutional consolidation. In spite of acute conflicts of interest, Britain is still within the Community, and Spain and Portugal have finally been admitted. The European Monetary System did not only survive against many odds, but it is now promoted as the nucleus of a future European Monetary Union with a common currency and a unified monetary policy.

In short, the history of the European Community has not confirmed the hopes, of "Europeanist" politicians and "neo-functional" theorists alike, for dynamic processes of deepening and widening functional integration, culminating in the creation of a full-fledged federal state; but the European enterprise has proven much more resilient than the "realist" school of international relations and the political and scholarly promoters of an *Europe des patries* would have predicted. Paradoxically, the European Community seems to have become just that "stable middle ground between the cooperation of existing nations and the breaking in of a new one" which Stanley Hoffmann (1966: 910) thought impossible.

It is tempting to ascribe the paradox of European integration—frustration without disintegration and resilience without progress—to historical accidents or to the interventions of certain powerful individuals. Instead, I will try to argue in this paper that the European malaise may be systematically explained as the consequence of a characteristic pattern of policy choices under certain institutional conditions. This pattern, the "joint-decision trap," was first identified in the institutional setting of federal-*Länder* relations in West Germany. It can be shown that similar institutional conditions are producing similar decision patterns in the European Community.

Two Models of Federalism

When "Europeanist" politicians and social scientists were considering processes of integration that might lead to a United Europe," what they had in mind was a federal system fashioned after the American model. What was created, however, were institutional arrangements corresponding more closely to the tradition of German federalism. The fundamental difference between the two models is often misunderstood in Anglo-American treatises on federalism which tend to dismiss the German variant as little more than a camouflage for *de facto* centralization (Wheare 1960). Even William Riker (1964: 123), who recognized the unique characteristics of the German model, finds it hard to fit into his conceptual scheme which classifies federal systems according to the relative weights of the spheres of *independent* authority of central and constituent governments, respectively. What is missed is the possibility that authority might not be allocated, in zero-sum fashion, to either one or the other level of government, but that it might be *shared* by both (Johnson 1973). This is what distinguishes the German model from American federalism. Of course, a good deal of sharing, "marble-cake" or "picket-fence" like, is going on in the United States as well (Riker 1975), but differences at the constitutional level are nevertheless important.

In both models, the powers of the central government are limited, and constituent governments (the "states" or the *Länder*) continue to exercise original governing powers legitimated by democratic elections. In the American model, however, the central government's authority is derived entirely from direct elections of the President and of both houses of Congress, and the federal government is able to rely upon its own administrative infrastructure at regional and local levels whenever it so chooses. In other words, the exercise of federal government functions is formally independent of the governments of the American states, and those functions that have been taken over by the federal govern-

ment are effectively nationalized. Whatever sharing of functions is going on, is voluntarily granted, and may be withdrawn again by the federal government, as is illustrated by successive waves of the "New Federalism."

In the German model, by contrast, only one house of the federal legislature (the *Bundestag*) is based upon direct, popular elections, while the other one (the *Bundesrat*) provides for the representation of *Länder* governments. In practice, all important federal legislation does require concurrent majorities in the *Bundestag* and the *Bundesrat* and does depend, therefore, upon the agreement of *Länder* governments. In addition, the federal government is severely limited in its executive powers, having to rely upon the administrative services of the *Länder* for the implementation of most federal legislation. On the other hand, the revenue of both, the federal government and the *Länder,* is generally determined by federal tax legislation which imposes severe constraints upon the financial freedom of action of *Länder* and local governments. In short: the exercise of most governing functions is shared between the federal government and the *Länder* governments in West Germany. More specifically, for my present purposes, *Länder* governments have a significant share in the exercise of many of the important functions of the federal government. It is in this regard that German federalism is most comparable to the European Community.

It is probably fair to say that, even in the heyday of political enthusiasm for European integration in the 1950s, a European union along the lines of the American model of federalism was never a realistic possibility. The Community was created by the action of national governments at a time when their own continuing viability was no longer considered precarious (as it had been immediately after the war). The potentially most powerful motive for federation, common defense, was satisfied by the separate organization of the NATO alliance under US hegemony. What remained was the opportunity pull of economic integration (Scitovsky 1958; Balassa 1962) whose attraction was certainly not sufficient to persuade national governments of the need to commit institutional suicide. While recognizing the advantages of a common European market, they also had every interest in retaining as much control as possible over the substance, direction and speed of future steps towards political integration.

The primacy of national control is reflected in the limited authority of the European Parliament, even though it is now elected directly, and in the fact that the European Commission, the executive body of the Community, does not derive its authority from either the Parliament or from direct elections. Instead, the center of power has remained in the Council of Ministers, representing national governments, and in the periodic summit meetings of the European Council. In both bodies, the principle of unanimous agreement has prevailed in important matters, providing each member government with an effective veto

over European policy decisions affecting its own vital interests. Furthermore, the European Community is without administrative agencies of its own at the regional and local level; it must rely entirely upon member governments to execute its policies. And, of course, the Community has not been invested with its own powers of taxation, depending primarily upon import levies and upon contributions from the revenues of the member states (von der Groeben/Mestmäcker 1974; Wallace/Wallace/Webb 1977).

This is not to suggest that there are no significant differences between European institutions and German federalism. In fact, the European Community is much weaker in relation to its member governments than the German federal government is in relation to the *Länder*. Nevertheless, institutional arrangements are sufficiently similar to suggest that the difficulties of European integration might be illuminated by reference to some of the problems of German federalism which have been studied more systematically. The parallelism between European and German institutions appears to be particularly close in those areas of joint policy making which were added rather late (in 1969) to the existing structure of the German federal constitution. In these areas, which have been the subject of empirical and theoretical studies under the label of *"Politikverflechtung"* (Scharpf/Reissert/Schnabel 1976, 1977, 1978; Hesse 1978; Schultze 1982; Benz 1985) federal policy making is operating under the same requirement of unanimous consent which prevails at the European level. It is here that the "joint-decision trap" was first identified.

Joint Policy Making in West Germany

Under the original scheme of the German federal constitution, most important legislative functions are exercised at the federal level (with the agreement of the *Bundesrat*), while administrative functions are, with few exceptions, reserved to the *Länder*. Similarly, in the area of public finance, taxation is almost entirely governed by federal legislation, but tax revenues are shared by *Länder* and local governments. Even more significantly, the federal share of total public investment expenditures has always remained below 20 percent.

In the early post-war period, political pressures focusing upon fiscal inequalities between rich and poor *Länder* gave rise to a formalized system of horizontal and vertical fiscal equalization payments and to a number of extra-constitutional federal grant programs in such areas as housing and subsidies to agriculture and industry in depressed areas. In the 1960s, these programs were increased in scope and volume even though their immediate post-war justifications had

become less compelling. Instead, it had become clear that some of the important responsibilities of the modern state depended more upon the planning and financing of public infrastructure and public services than upon legislation. To that extent, the relative importance of the governing functions reserved to the *Länder* was seen to increase, while the legislative powers of the federal government appeared to lose some of their political salience.

At the same time, however, it was widely felt that the action space, and the action perspectives, of *Länder* governments were too narrowly circumscribed to deal effectively with some of the problems that had become major political issues in the "reformist" political climate of the mid-1960s. Foremost among these was the perceived need to deal with the "education gap" (or, even more dramatically, the *Bildungskatastrophe*) when participation rates in secondary and university-level education were seen to be far lower in West Germany than in other modern countries. Similar needs were perceived in some areas of large-scale public infrastructure, such as urban and inter-urban mass transport, urban renewal or the modernization of the hospital system. Furthermore, German peasants were about to be exposed to the direct competition of their European neighbors which they could only survive, or so it was thought, if the modernization of their farms and of agricultural infrastructure was heavily subsidized. By the same token, it seemed necessary to accelerate and subsidize industrial development in those rural and peripheral areas where agricultural employment was about to decline. In addition, the late conversion of German economic policy makers to the Keynesian philosophy of anti-cyclical demand management emphasized the importance, for economic stabilization, of national controls over the volume and the timing of public-infrastructure expenditures.

What is important is that these were all policy areas under the dominant influence of the *Länder,* but that "enlightened public opinion" was highly skeptical of their willingness, or ability, to provide acceptable solutions. Such skepticism was sometimes, as in education, based upon a preference for nationally uniform solutions over the ideological and religious pluralism of *Länder* policies. In other areas, such as university or hospital construction, it was thought that the positive externalities of large, central institutions might be ignored by the policy choices of smaller *Länder,* or that their resource base would be inadequate for projects that could take advantage of important economies of scale. The resource constraints of small or relatively poor *Länder* were also regarded as obstacles for efficient policy solutions in urban mass transportation, urban renewal and in agriculture (where the problems of small peasant holdings are concentrated regionally). In regional industrial policy, finally, criticism focused mainly upon the undesirable consequences of "ruinous competition" between *Länder* which were forced to attract new industrial settlements through ever larger offers of

subsidies. What was needed, in short, were joint federal-*Länder* efforts to mobilize the common resource base, and to exploit the combined action space, of both levels of government for the achievement of common, national goals.

The federal government had, of course, tried to deal with some of these problems through its grant programs which attempted to provide a degree of coordination between *Länder* policies, to impose some uniform standards, and to equalize some disparities of *Länder* resources. It was constrained, however, by unresolved doubts about the constitutionality of conditional federal grants in areas within *Länder* jurisdiction. The whole range of issues was, therefore, entrusted to an expert commission whose final report recommended far-reaching changes in the constitutional arrangements of fiscal federalism (Kommission für die Finanzreform 1966). In the general spirit of "reform politics" and under the aspects of a "Grand Coalition," such changes had indeed become politically feasible.

But constitutional change under the West German "Basic Law" does require two-thirds majorities in the *Bundesrat* as well as in the *Bundestag*. As a consequence, the constitutional reforms of 1969 had all the characteristics of a negotiated settlement among independent, sovereign parties. To that extent, they represent an even closer approximation to the decision structures of the European Community than does the original constitution of the Federal Republic. Briefly, agreement was reached on three new areas of joint policy making, each involving the federal government and all the *Länder:*

– "Community tasks" requiring joint planning and joint financing in the areas of university construction, regional industrial policy, and agricultural structural policy (Article 91a, Basic Law);
– federal subsidies to *Länder* investment programs in such policy areas as housing, urban renewal, urban transportation or hospitals, and in short-term economic stabilization (Article 104a IV, Basic Law); and
– federal-*Länder* agreements to collaborate in the planning of primary and secondary education and in research financing (Article 91b, Basic Law).

Of these, primary and secondary education turned out to be the ideologically most controversial policy area. As there was very little federal money at stake (apart from federally financed "model experiments"), "progressive" and "conservative" *Länder* felt free to engage in all-out conflict over their educational philosophies. For once, the Social-Liberal federal government was also willing to take a clear cut partisan position, so that the first drafts of the "integrated education plan" turned out to be remarkably progressive documents. Unfortunately, however, they could not be adopted at the level of the heads of government, where the agreement of nine (out of eleven) *Länder* prime ministers was formally required. As a consequence, existing educational policies remained

unchanged while efforts continued to reach agreement over ever more watered-down versions of the educational plan. In the meantime, public enthusiasm and political support for educational reforms began to erode, and so did financial resources for education at the onset of the economic and fiscal crisis after 1974. Predictably, the difficulties of reaching agreement in the face of acute political conflicts led to outcomes which frustrated not only the qualitative goals of progressive educational reformers, but also the quantitative goals shared by both the progressive and the conservative members of the education establishment (see Heidenheimer/Heclo/Teich-Adams 1975, 1983). In the end, the whole enterprise was abandoned in 1982 (BMBW 1982).

The lesson was not lost on others, and the internecine ideological battles of the educationists were not repeated elsewhere. Realizing the importance of presenting a united front toward an outside world of political "generalists" in chancellories, finance ministries and parliamentary budget committees, agreement became the primary goal itself. Thus, the specialist ministries responsible for federal-*Länder* negotiations at both levels developed decision rules approaching unanimity even in areas where, by law, majority decisions would have been possible. Perhaps still more important was a perception of common interest which prevented even those *Länder* that would have benefited in the particular case, from voting with the federal government as long as there was no nearly unanimous agreement among all of them.

Länder solidarity thus prevented the federal government from playing off the interests of some *Länder* against others in forming the "minimum winning coalitions" which coalition theory would have predicted under such circumstances (Riker 1962). In fact, the "cartelization" of *Länder* interests has been observed even in the field of research policy, where independent action by the federal government and individual *Länder* would have been entirely feasible and probably more effective (Bentele 1979), or in the planning of federal highways, where the federal government is legally empowered to decide unilaterally, but is in fact dependent upon the expertise of highway administrations at the *Land* level (Garlichs 1980). If even such weak linkages could bring about the application of *de facto* unanimity rules, the underlying mechanisms must be powerful indeed, and they have been operative long before the federal constitutional court did write the unanimity requirement into law for some of the joint-program areas (BVerfGE 1975: 96). Perhaps this might give pause to those who tend to regard unanimity in the European Community as a merely technical problem which could be solved by a more authentic interpretation of the Treaty of Rome.

The substantive outcomes of joint decision making in West Germany may be roughly described as follows. During the early 1970s, joint programs were remarkably successful in increasing the financial resources available for their

respective policy areas, and in defending their expenditure levels even after 1975, when many other programs were severely curtailed in response to the fiscal crisis arising from the economic recession. As a matter of fact, the share of joint programs among total federal expenditures increased from 6.8 percent in 1970 to 9.5 percent in 1974 and 11.2 percent in 1977 (BMF 1985: Tables 1 and 6). In the following years, however, the hopes associating joint decisions with new opportunities for more effective public policy making gave way to a growing sense of disappointment and frustration, first among political and bureaucratic insiders (Scharpf/Reissert/Schnabel 1977), but then among the wider public as well. Instead of utilizing the joint action spaces of the federal government and the *Länder* for the purpose of more active and creative problem solving, joint programs were increasingly seen as being either inefficient, or inflexible, or unnecessary and, in any case, quite undemocratic.

On the basis of our detailed studies of decision processes and outcomes in the various joint-policy areas, we tend to agree with these criticisms and, indeed, we may have contributed something to their overall thrust and credibility. Obviously, a satisfactory restatement of our findings would be beyond the scope of this article, but the gist of our analyses might still be conveyed through a few illustrative examples.

As far as the alleged *inefficiency* is concerned, it is claimed that joint programs tend toward "overspending" even by their own narrow criteria of optimality, and that the inter-regional distribution of funds tends to violate even their own criteria of allocative efficiency. The first claim is, perhaps, best illustrated by the joint program to finance capital investments in the hospital sector. As German health insurance regulations allow hospitals to charge their full operating costs to the insurance system, hospitals had every incentive to increase their capital expenditures, once the joint program provided for the full reimbursement of investment costs. The *Länder,* on their part, did not wish to forfeit their allotted share (determined by a per capita formula) of the available federal funds—with the predictable outcome of rapidly increasing investments even in areas where hospital services were fully adequate. As a result, there are now considerable excess capacities in the hospital sector (and rapidly escalating deficits of the health insurance system). Apparently, the joint program had eliminated existing financial constraints without being able to introduce functionally equivalent mechanisms of rational planning and efficient allocation (Schnabel 1980).

The per capita formula for distributing federal funds among the *Länder,* which prevails not only in hospital finance but in most other joint-program areas as well, is obviously also a source of allocative inefficiency whenever there should be significant inter-regional differences in the need for, or the existing supply of, particular public services. A glaring example was agricultural invest-

ment subsidies. There the established distribution of federal funds, favoring the big-farm regions of Northern Germany, was found to be grossly unresponsive to criteria of actual need and program effectiveness by a program planning and evaluation group set up by the ministers of agriculture themselves. Nevertheless, redistribution in favor of the disadvantaged small-farm and hill regions in Southern Germany proved impossible under the conditions of joint decision making.

The example of agricultural subsidies might also be used to illustrate the alleged *inflexibility* of joint decision making. Even more to the point, however, would be the case of regional industrial policy. Evolving from a tradition of *ad hoc* federal subsidies to depressed areas in the early post-war period, this had become the joint-policy area with the greatest claim to substantive and procedural rationality by the early 1970s. Far from distributing federal funds evenly among the *Länder,* or according to some arbitrary or traditional formula, regional policy managed to achieve agreement on economic criteria for subsidization and on the use of sophisticated econometric analyses for the designation of assistance areas. In the main, these were located along the eastern boundaries of the Federal Republic and in certain under-industrialized areas throughout the country.

The reputation for allocative efficiency suffered a severe blow, however, when regional industrial policy was unable to respond to the economic recession after 1974. Its impact was most severe in some of the old industrial regions, which in the past had been too prosperous to be included among the assistance areas. Now that their unemployment rates became much worse than those of many rural areas which were traditionally subsidized, agreement on an inter-regional redistribution of funds could not be reached. The best that the federal government could achieve was acquiescence of the beneficiaries of the status quo when *additional* federal funds were temporarily made available to some regions dominated by the newly depressed automobile industry. In the following years, similar *ad hoc* programs were introduced for the Saar region, for regions dominated by the steel industry generally, and for the Bremen area suffering from the simultaneous decline of steel and ship building. Thus, regional policy is still aimed at under-industrialized peripheral areas while a growing number of special assistance programs are used to subsidize declining industrial regions without curbing subsidies to peripheral regions. Instead of the necessary reorientation of assistance criteria in response to fundamentally changing economic circumstances, the result has been a cumulation of conceptually contradictory assistance programs, reintroducing just that pattern of inter-regional competition for the subsidization of mobile firms which the original program had been designed to eliminate.

The claim that some joint programs may in fact be, or have become, *unnecessary,* is derived from a normative analysis of the type of problems that might justify joint federal-*Länder* action in the first place. Some of these justifications,

such as the existence of significant inter-jurisdictional externalities, of economies of scale, or of redistributive goals (Oates/Wallace 1972; Breton/Scott 1978) seem to be as applicable now as they were when federal grant programs originated in the early post-war period. In other areas, however, such as housing or urban renewal or, perhaps, local road construction, we have argued that the objective need for any federal involvement had disappeared over time. At least after the mid-1960s, aggregate disparities between the *Länder* had been sufficiently equalized to eliminate the need for federal intervention (and the fact that in these areas federal money is allocated to the *Länder* on a per capita basis tends to confirm our judgment). At the same time, some of the joint programs, in such areas as university construction, hospital investments and urban mass transport, seem to have achieved most of their original goals, so that the remaining externalities and economies of scale could be handled within *Länder* jurisdictions. In many areas, therefore, it has become difficult to identify any purposes of federal involvement which could not be equally well pursued at the *Länder* level. On the other hand, the degree of red tape generated by the cumulation of regulations in jointly financed programs seems to be so high that the costs of delays and inefficiencies of program implementation have themselves become a major source of irritation (Lehner 1979a, 1979b; Zeh 1979; Borell 1981).

In addition to being allegedly inefficient, inflexible and, sometimes, unnecessary, joint programs are also often criticized for their *undemocratic* character, confronting parliaments with the *faits accomplis* of bureaucratic negotiations between the two levels of government (Klatt 1979). To some extent, this criticism seems trivial, as some loss of parliamentary control is necessarily involved in all forms of intergovernmental bargaining. Parliaments may ratify or reject the outcome, but they will rarely be able to exercise direct control over the negotiation process itself—except by Carl Friedrich's "rule of anticipated reaction." To some extent, it may also express unhappiness with the political conditions of German federalism, combining party-political confrontation in the *Bundestag* with the need to reach all-party agreement in the *Bundesrat,* at least until 1982 (Lehmbruch 1976). But the criticism may also cut deeper. The fact that certain programs are jointly financed by two (or sometimes three) levels of government reduces their opportunity costs at each level. In comparison to competing programs which would have to be financed entirely from one source, joint programs thus seem to have an "unfair" advantage at each level. One of the consequences is the tendency to "overspend" on joint programs, which was discussed above as one of the sources of inefficiency. Another is the distortion of "real" political preferences at the local and *Land* levels whenever some programs, but not all, are heavily subsidized by the federal government. Under such conditions, joint programs may indeed become offers which a *Land* or a city "cannot afford to re-

ject," and, thus, a serious constraint upon local and regional democratic control (Späth et al. 1979). Finally, the role of *Länder* governments in federal legislation has tended to increase the salience of "federal" issues in *Länder* elections at the expense of regional issues (Heidenheimer 1958; Hesse 1962; Lehmbruch 1976; Fabritius 1978; Abromeit 1982).

Taken together, these four lines of critical attack have seriously weakened the political attractiveness of joint programs in West Germany since the mid-1970s (Schmidt 1980; BMF 1982). In addition, there have been specific reasons for disenchantment at each level. The federal government, for instance, found itself frustrated by the inflexibility of joint programs when it tried to respond to the economic recession through fiscal redistribution. Instead of adjusting existing programs as needed, it was forced to pay for additional programs in regional industrial policy as well as in the field of public infrastructure investments (Nölling 1977: 391). Furthermore, empirical research has demonstrated that increases in the volume of joint programs were relatively ineffective as an instrument of anti-cyclical fiscal policy (Knott 1981). The *Länder* and, even more so local governments, tended to shift expenditures from one sector to another rather than to increase the overall level of their own spending as the federal government increased the volume of its grants (Reissert 1984). Thus, the federal government has again reduced its financial commitment to joint programs from 11.2 percent of total expenditure in 1977 to 8.2 percent in 1980 and 7.4 percent in 1983 (BMF 1985). One area, hospital finance, was even taken out of joint-finance arrangements altogether in 1984 (BMF 1985: 43–44).

Resistance of the *Länder* against such cutbacks has been remarkably muted. It seems that some of the "rich" *Länder* have by now concluded that joint programs had been a bad idea to begin with, and that they would be better off regaining their freedom of independent action. Poor *Länder,* on the other hand, have been disappointed by the absence of significant redistributive effects (because of the per capita allocation of federal funds in most programs). Furthermore, the standard of equal treatment in all programs implied that rich and poor *Länder* had to comply with the same matching requirements, which meant that some of the poorest *Länder* were in fact unable to claim their allotted share of federal funds during the recession. They, surely, would have been better off if the earlier practice of bilaterally negotiated federal grants would have continued.

What has been described is, however, mainly the response of "policy generalists" in the federal and *Länder* chancellories, ministries of finance and parliamentary budget committees. They seem now committed to resist all suggestions for establishing new joint programs. But such suggestions are still forthcoming from the vertical alliances of "policy specialists" who are pushed toward federal-*Länder* arrangements by the original logic of a constitution under which the fragmenta-

tion of functions can only be overcome through the sharing of responsibilities. In a period of general disenchantment with activist philosophies of state intervention, such pressures may be resisted. But the underlying logic is still powerful enough to prevent the wholesale dismantling of existing joint programs.

Joint Policy Making in the European Community

In some areas, the similarities between European policy making and joint policy making in Germany are so obvious as to be trivial. When small European programs are simply "tacked on" to ongoing national programs, they will add to the bureaucratic and political costs of vertical co-ordination (Hrbek 1979) without being able to change national policy priorities very much. The only interesting question is whether European funds will add to, or substitute for, national expenditures, but the ability of national dogs to wag the European tail is not really in doubt. Thus, it is not at all surprising that decision patterns corresponding closely to the model of joint programs in Germany have been identified in studies of the European Regional Fund (Bruder 1983; Noé 1983; Martins/Mawson 1982) and of the Social Fund (Laffan 1983), and that they also seem to govern the regional allocation of European R&D funds (Steinle/Stroetmann 1983).

The more interesting question is whether such similarities can also be found in Common Agricultural Policy (CAP) which, by common consent, is the one area in which the European Community is approaching the full powers of a federal government. At least in the field of market and price regulations, CAP is not "add on" but has replaced national programs altogether, and its financial volume of 16.5 billion ECU in 1984 (amounting to 65 percent of Community expenditure) is anything but trivial. Here, if nowhere else, we surely have a genuine European dog.

At the same time, CAP is formulated in a decision structure that is strikingly similar to that of joint programs in West Germany. In both cases, important policy functions were moved up to the next-higher level of government, while their exercise remained dependent upon the unanimous agreement of member governments (Feld 1980). As in the German case, CAP was originally praised as a successful solution to the obvious co-ordination problems of national agricultural policies in an internationalized market for agricultural products, and it is now increasingly criticized for being outrageously wasteful as well as ineffective in terms of its own original goals. Most of the criticism is levelled at agricultural market policy (as distinguished from agricultural structure policy): it has burdened European consumers with food prices far above the world market; it

has burdened European tax payers with a rapidly rising volume of subsidies; it is responsible for growing surpluses of agricultural production in Europe which must either be destroyed or dumped on the world market at enormous losses; and despite all these exertions, CAP was not successful in achieving its primary goals, a truly common market for agricultural products in Europe and adequate standards of living for low-income farmers (Body 1982; Rodemer 1980).

The alleged failures of CAP are directly related to its basic policy choices. At bottom, they can all be derived from the decision to protect and raise the income of European farmers through a system of price supports, rather than through direct income transfers. Once this choice had been made (which was probably inevitable in the light of the traditional agricultural protectionism of the founding members of the community), the further characteristics of CAP could be derived from the underlying structure of national interests (German and French, in particular) within the logic of unanimous decision making.

Compared to Germany, France had a much larger and, on average, more productive agricultural sector and significantly lower food prices. As a food-exporting country, France was vitally interested in free access to the larger European market, especially as she was likely to suffer from the German strength in industrial exports. German peasants, on the other hand, had little to gain and much to fear from a common European market for agricultural products, unless it was possible to maintain the high price levels prevailing in Germany for the typical products of German agriculture (mainly dairy products, meat, grains and sugar). The compromises which were reached after protracted negotiations, and dramatic Franco-German confrontations, predictably managed to accommodate both positions: the European market was to be opened to French producers (which precluded the general introduction of a system of production quotas), but prices were to be maintained at levels close to those prevailing in West Germany through a system of import levies and minimum prices (at which the "European Agricultural Guidance and Guarantee Fund" has to purchase farm products that cannot be sold on the open market). As these "intervention prices" were fixed far above the world market, and also far above production costs in the more productive agricultural regions in Europe, increasing agricultural surpluses were inevitable. The results were escalating guarantee payments which rapidly exceeded the revenue obtained through import levies. Far from being self-financing, the guarantee fund did require enormous subsidies, rising to more than 6 billion ECU (or about 75 percent of the total community budget) by 1976, to almost 12 billion ECU in 1980 and to 16.5 billion ECU in 1984 (DIW 1984a).

But even at that price, an effectively unified agricultural market could not be realized because of divergent national interests in the face of continuing variations in the exchange values of national currencies. When the French franc

was devalued by 11 percent in 1968, France was not willing to let food prices rise accordingly. Instead, food imports were subsidized and French agricultural exports penalized at the border. And when Germany revalued the Deutschmark later in the same year, the precedent was invoked to avoid price reductions for German farmers. A similar pattern was followed on many later occasions. The border levies on imports from low-value currency countries, and the border subsidies paid to exports from high-value currency countries, produced a "green exchange rate" differing more and more from the official exchange rates among the currencies of member countries. As a consequence, the internal price level for agricultural products was relatively higher in the high-value currency countries such as Germany or the Netherlands, and so was the amount of EC subsidies flowing into these countries. Thus, the incentives for agricultural overproduction, which originally were the largest in France, have later tended to favor German and Dutch producers (Feld 1980).

At the same time, CAP was also unable to achieve the income goals for which it had been instituted. Price support for agricultural products meant that fewer people were leaving the farms than had been expected, so that per capita farm incomes still were not able to catch up with average earnings. Furthermore, while large and productive farms did extremely well at CAP prices, price support alone could not significantly reduce the economic plight of small peasants in agriculturally disadvantaged areas where industrial jobs are also scarce (Balz/Meimberg/Schöpe 1982). A special subsidy program for hill farmers does provide some income support, but its volume is minimal compared to the expenditures on price support.

As in the German example, the growing disappointment and frustration over CAP is beginning to have an effect. The United Kingdom and, to a lesser extent, the Federal Republic, as the two large net contributors to the Community budget, have been trying to apply financial brakes to the vicious cycle of agricultural subsidies and surpluses. The formal opportunity to do so was provided by the growing budget deficit of the Community requiring an increase of the VAT levy (which also required unanimous agreement). For several years, CAP barely managed to squeeze by without re-examination because rising prices in the world market for agricultural products had unexpectedly reduced the need for subsidies. But in the spring of 1984, some adjustment had become inevitable. It took the form of a relatively permissive quota system for milk production and a more decisive effort to eliminate border equalization subsidies and levies in order to bring the "green exchange rate" more into line with official exchange rates (Jürgensen/Schmitz 1984). Obviously, this last measure would hurt producers in high-value currency countries, such as West Germany, and it is perhaps not surprising that the immediate German response (accepted by

the Community) was to provide national subsidies to make up for these losses (DIW 1984b). Thus, the Community had eased its budgetary problems somewhat, but at the sacrifice of one of the most cherished principles of European integration—the elimination of national farm subsidies and their replacement by what should have been a *common* agricultural policy.

But even with the 1984 compromise, the future of CAP is far from assured. Incentives for overproduction have not been eliminated, quota systems have not worked well in other areas, and the spill-overs from exchange rate fluctuations are likely to disturb the regulated markets for agricultural products in the future again. Furthermore, the entry of Spain and Portugal, with large agricultural surpluses of their own, will upset the precarious equilibrium of the Community budget even though their major products are not as heavily subsidized as the "Northern" products that were the subject of the original Franco-German compromise.

Nevertheless, judging by the past record as well as by the current "revealed preferences" of national governments, it is more likely that CAP will hang on, even if its original logic and purpose should be distorted beyond recognition, rather than that it will be either scrapped or reorganized into a more defensible policy system. In the following sections, I will attempt to develop an analytical argument that might explain both the substantive deficiencies and the persistence of joint policy making in the Federal Republic and in the European Community.

Joint Decisions and the Pathology of Public Policy

The contribution of institutional arrangements to the substantive deficiencies of joint policy making in West Germany and in the European Community are related to two simple and powerful conditions:

– that central government decisions are directly dependent upon the agreement of constituent governments; and
– that the agreement of constituent governments must be unanimous or nearly unanimous.

The German experience further suggests that the first condition may imply the second one, and that unanimity will evolve even in the absence of formal requirements. This might not be so if the number of constituent governments were very large (raising the transaction costs of unanimous agreement) or if the central government were allowed to negotiate bilateral agreements with each of the member governments separately. But in multilateral negotiations among a

small group of governments over uniform regulations which will apply to all of them, unanimity seems a rational rule to follow for risk-averse participants even if they might benefit from majority decisions in the individual case (Everling 1980: 221). Nevertheless, it is useful to distinguish between the two aspects of "joint decisions," their intergovernmental character, and the unanimity rule.

The importance of the *inter-governmental* aspect becomes clear when one compares the representation or regional interests in the US Senate and in the German *Bundesrat*. In both cases, the territorial distribution of societal interests is emphasized at the expense of other dimensions of multi-dimensional interests (and at the expense of the Rousseauean ideal of the "general interest"). But while US Senators, ideally, represent only the interests of their constituents (mediated through their own interest in re-election), the *Bundesrat* also (or, rather, primarily) represents the institutional self-interests of *Länder* governments. Thus, Claus Offe's *"Interesse des Staates an sich selbst"* (1975: 13) will be introduced twice, as "withinput" and as "input" in Eastonian language (Easton 1965: 54), into the political processes of the central government. One might expect, therefore, that the policy output of joint decision systems, when compared with unitary governments or the American model of federalism, will be less responsive to constituency interests and more oriented toward the institutional self-interests of governments and their "bureaucratic convenience" (Tullock 1965; Niskanen 1971). More important, however, is the fact that these governmental interests are not, in the strict sense, "represented" at all. Instead, they are direct participants in central decision processes. In that regard, what we have is a system of direct, "participatory" democracy without any of the safeguards for detached reflection on the general interest, by non-instructed delegates, which has been emphasized by theorists of representative government ever since Edmund Burke (Scharpf 1970). Also, as far as member states are concerned, there is none of the "generalization of support" which Talcott Parsons (1967: 231–234) thought necessary for the maintenance of effective government in a democracy. In joint-decision systems, the central government is not free to respond creatively to external demands, or to anticipate future consensus; its actions are determined directly by the immediate self-interests of member governments.

Nevertheless, differences are important. While decisions of the European Community are completely determined by the outcome of negotiations among member governments, the German federal government has a political identity, resources and strategic and tactical capabilities of its own. It cannot adopt and implement effective public policy without *Länder* agreement, but it can design and pursue bargaining strategies against the *Bundesrat* which the European Commission cannot similarly pursue against the Council of Ministers or the European Council.

But the German federal government is also paying a price for its greater strategic autonomy: being able to bargain with the *Länder* over policies which it considers essential to the national interest (or to its own political survival), it still must obtain their agreement. Sometimes it may be possible to design "win-win solutions" which are intrinsically attractive to the *Länder* as well. More often, its original policy proposals were watered down in substantive compromises. And if the federal government insisted upon its objectives, it often had to buy support for national policies at the expense of permanent improvements of the institutional and financial position of the *Länder*. Thus, just as the emperors of the Holy Roman Empire were forced to expend their dynastic possessions and, finally, the imperial prerogatives, in order to maintain the loyalty of their vassal princes, so the German federal government has seen its share of total revenue reduced from 53 percent in 1970 to 48 percent in 1983 (BMF 1985: Table 2). As there was, of course no corresponding reduction of federal responsibilities, the total volume of the federal debt increased from 54 percent of expenditures in 1970 to 105 percent in 1980, while *Länder* debts increased only from 62 percent to 76 percent of expenditure during the same period (Simmert/Wagner 1981: 455). Being entirely the creature of member governments, the European Community could not, of course, be similarly exploited by them.

But what are the implications of inter-governmentalism for the substance of public policy? The most clear-cut connection seems to exist with the alleged tendency of joint programs to increase expenditures beyond the level that would be politically acceptable within a unitary government. This tendency seems to follow directly from "rational" calculations of financial costs and political benefits at each level of government. If we assume that elected officials are sensitive to interest group pressure at all levels of government, and that interest groups are capable of presenting demands and exerting pressure at each level as well, then the political benefits associated with positive responses to interest group demands will be fully realized at each level, even if the response is delivered by a joint program. On the other hand, if the joint program is also jointly financed, its costs will be reduced accordingly for each level of government. Compared to single-government decisions, therefore, joint decisions have politically more attractive cost-benefit ratios. To put it crudely, more votes can be bought for less money at each level.

The conditions assumed in this model are closely approximated in West Germany, where governments at the local, regional and federal levels are dependent upon direct elections, where interest groups are active at all levels, and where joint programs have matching requirements involving at least two, and usually three, levels of government in their financing. Under such conditions, the separate calculation of costs and benefits at each level will indeed suggest a relative

increase of expenditures on joint programs at the expense of programs which have to be financed entirely by a single level of government. Our interviews in Germany have shown that active participants in policy processes are fully aware of these mechanisms—which explains why the vertical coalitions of interest groups, politicians and bureaucrats specialized in a certain field, are completely unanimous, in spite of all other internal disagreements, in defending the privileged status of their policy field as one of the joint programs. But what about CAP, where at least two of the conditions assumed above seem to be missing? First, there are no matching requirements in the core areas of price subsidies, so that expenditures are all on the European level. Second, even though there are now direct elections to the European Parliament, it is obviously impossible to interpret CAP as the response of vote-maximizing politicians at the European level. By contrast to the German model, where all levels of government are profiting from joint programs, it seems that the European Community has to bear the full costs without capturing any of the political benefits associated with CAP.

But, of course, it is national, rather than European, politicians who are determining CAP choices. And their cost-benefit calculations are obviously quite different. If we differentiate, for the sake of clarification, between the calculations of policy specialists and of generalists (say, national ministers of agriculture and national ministers of finance), the former must see CAP as an entirely free good whose production they have every incentive to maximize. For the finance ministers, on the other hand, a self-interested response would seem to depend mainly on the net position of their country with regard to the EC budget. Net beneficiaries would surely have less reason to object to the cancerous growth of CAP than net contributors. Thus it must be the acquiescence, or resistance, of net-contributing countries, the Federal Republic and the United Kingdom in particular, which explains the growth of the CAP.

For most of the period since the commencement of CAP in the middle of the 1960s, it has been acquiescence. The Germans were, and are still (Höhnen 1984) aware of the fact that they had to buy CAP in exchange for the common market for industrial products which favored German exports. And they also know that the high price levels prevailing under CAP, which are the cause of overproduction and, hence, of rising subsidies, were adopted at their own insistence to protect the prevailing income levels of German farmers. Thus, the one country that should have had a financial interest in limiting CAP was among its original supporters for reasons unrelated to the specific incentives and constraints of its decision structure.

Of course it is true that the Germans, like everybody else, had vastly underestimated the dynamics of price support, overproduction and escalating sub-

sidies in European agriculture—but when they found out, they were already caught in the rigidities of an ongoing decision system based upon the principle of unanimous agreement. *Unanimity* is generally considered as the decision rule which is most in conformity with the methodological individualism of public choice theory. If collective decisions depend upon the voluntary agreement of all members of the community, they are also likely to meet the welfare-theoretical criterion of Pareto optimality (Buchanan/Tullock 1962). Difficulties are likely to arise from increasing transaction costs in large communities and from the disruptive consequences of "strategic voting," when members are tempted to conceal their true preferences for public goods in order to exact concessions in the allocation of costs (Buchanan 1975: 41). Given the small number of member governments, and the transparency of their (institutional and constituency) interests, neither problem should be of great importance in German federalism or in the European community.

What public-choice theorists have generally neglected, however, is the importance of the "default condition" or "reversion rule," which was recently pointed out by Elinor Ostrom (1986). The implications of unanimity (or of any other decision rule) are crucially dependent upon what will be the case if agreement is not achieved. The implicit assumption is usually that in the absence of an agreed decision there will be no collective rule at all, and that individuals will remain free to pursue their own goals with their own means. Unfortunately, these benign assumptions are applicable to joint decision systems only at the formative stage of the "constitutional contract," when the system is first established. Here, indeed, agreement is unlikely unless each of the parties involved expects joint solutions to be more advantageous than the status quo of separate decisions. Parties with no interest in joint decisons will either opt out or will have to be bribed with side payments. Thus, the original agreement is indeed likely to be in everybody's interest, which may explain the general sense of satisfaction, enthusiasm and optimism associated with the early years of both European integration and joint policy-making in West Germany.

The "default condition" changes, however, when we move from single-shot decisions to an ongoing joint-decision system in which the exit option is foreclosed. Now non-agreement is likely to assure the *continuation* of existing common policies, rather than reversion to the "zero base" of individual action. In a dynamic environment, the implications for the substantive quality of public policy are obvious: when circumstances change, existing policies are likely to become sub-optimal even by their own original criteria. Under the unanimity rule, however, they cannot be abolished or changed as long as they are still preferred by even a single member. Thus, the association of unanimity and Pareto optimality emphasized by public-choice theorists seems to be restricted to single-

shot decisions. In ongoing decision systems, by contrast, unanimity is likely to be associated with a systematic deterioration of the "goodness of fit" between public policy and the relevant policy environment—unless there should be very powerful mechanisms of consensus formation.

The problem is even more serious when the freedom of individual action is entirely eliminated even in areas where there is no prior agreed-on policy at all. Obviously, this is not a necessary characteristic of joint-decision systems: Federal constitutions usually allow for the "concurrent jurisdiction" of member governments as long as federal legislation has not "pre-empted the field." But if joint-decision systems are specifically set up to regulate externalities of member-government policies, or to establish a truly common market, then the field must be pre-empted (Weiler 1982). That also means, however, that member governments will be precluded from dealing individually with pressing problems even if the Community cannot agree on an effective solution.

In short, joint-decision systems are doubly vulnerable to the consequences of non-agreement: they may be incapable of reaching effective agreement, and they may lose the independent capabilities for action of their member governments. As a consequence, their overall problem-solving capacity may decline—certainly in comparison to a unitary state of similar size and resources, but possibly also in comparison to smaller states, with less resources but an unfettered ability to act individually. Everything depends, therefore, upon the capacity of ongoing joint-decision systems to generate, maintain and adjust agreement on joint policies in the face of inevitably differing interests, goals and perceptions, and in the face of inevitably changing circumstances.

"Problem Solving" and "Bargaining" in Joint Decisions

Obviously, effective agreement is problematical under all conditions (even Robinson Crusoe had difficulty in making up his mind). But in decision theory it is increasingly recognized that the nature of the problem, and its inherent difficulty, varies systematically with the modalities under which effective agreement must be achieved. One dimension of these modalities is defined by the applicable decision rules (unanimous, majority or unilateral/hierarchical decisions). The other dimension is defined by the prevailing orientation of participants, and by the strategies which they are expected to employ in order to influence the outcome. There is, as yet, no agreement on terminology: March and Simon (1958) discuss different "processes of conflict resolution," Richardson (1982) refers to different "styles of decision-making," while Boboma (1976) proposes to dis-

tinguish among different "power systems." But substantive agreement on the distinctions actually subsumed under these different labels seems to be remarkably high: March and Simon's (1958: 129) four-fold classification of "problem-solving," "persuasion," "bargaining" and "politics" is overlapping with Olsen's "problem solving," "bargaining," "mobilization" and "confrontation" (Olsen/Roness/Saetren 1982). And it also seems possible to relate Bonoma's (1976) discussion of "bilateral," "mixed" and "unilateral power systems" and Bühl's (1984) emphasis upon dominant orientations toward "values," "interests" or "power" to these more process-oriented classifications of decision making.

For present purposes I will adopt Richardson's generic label of "decision styles" and a three-fold distinction between "problem solving," "bargaining" and "confrontation." At the most general level, each of these "styles" may be characterized by specific value orientations and sanctioning strategies: "problem solving" by the appeal to common ("solidaristic") values and by resort to ostracism and exclusion as the ultimate collective sanction; "bargaining" by the appeal to the individual self-interests of all (necessary) participants and by resort to incentives; and "confrontation" by the appeal to the interests of the dominant individual or coalition and by resort to power and coercion as the ultimate sanction. While these definitions are logically independent from the applicable rules of decision (prescribing "unanimous," "majority" or "unilateral/hierarchical" assent for effective decisions), that does not preclude substantive interdependence. Obviously, "confrontation" under majority rules means something different from "confrontation" under the unanimity rule. In each case, therefore, it is the specific combination of a decision style with a decision rule which will determine the characteristic capacity of the decision system to reach effective agreement on collective policy choices.

Returning, after this exercise in conceptual clarification, to the problems of conflict resolution and consensus formation in joint-decision systems operating under the unanimity rule, one might consider "confrontation" as the least promising style of decision. As German education reformers had to learn the hard way, there is no sense in trying to push people around if you are dependent upon their agreement in the end. Indeed, Gerhard Lehmbruch (1976) has based his incisive analysis of the political dynamics of German federalism during the period of the Social-Liberal coalition squarely upon the idea that there was a fundamental contradiction between the confrontation politics staged by the federal government against the parliamentary opposition, and the manifest need to obtain all-party agreement in the *Bundesrat* for all major policy initiatives. But, of course, confrontation under the unanimity rule is a highly asymmetric game, and there is no reason to assume that the opposition parties should have been equally unhappy about its outcomes.

More generally, "confrontation" under the unanimity rule seems highly serviceable for participants interested in preserving the status quo (or in exacting maximum concessions for their agreement to policy changes). It is the proponents of policy change who depend upon agreement, and who are likely to suffer defeat when a confrontational decision style prevails. And even here there are differences, depending upon whether the exit option is available, and whether it can be employed as a credible threat. In German federalism, exit is generally foreclosed in regulatory programs, but individual *Länder* might opt out of matching-grants programs. In the European Community, however, "secession" also continues to be a live political option which may be invoked in confrontation strategies. Both Charles de Gaulle and Margaret Thatcher, have been able to achieve significant policy changes in this fashion. But, of course, secession might not have quite the same threat value for all member countries, and its credibility might be quite low in the case of countries whose economic stake in, and political attachment to, the Community is known to be very high. On the whole, therefore "confrontation" is indeed the least promising decision style for policy changes and institutional reforms in joint-decision systems. If progress is to be achieved at all, it must be achieved within a "bargaining" or "problem-solving" framework in which it is not possible to short-circuit the requirement of unanimous agreement, and to impose solutions unilaterally.

Of these "bargaining" seems to be the less demanding and, hence, more robust decision style. It is premised upon the assumption that participants will pursue their individual self-interest, and that agreement can only be obtained if its anticipated utility is at least as high for each participant as the anticipated utility of no co-operation (Nash 1950). "Problem solving" in its pure form, on the other hand, is premised upon the existence of a common utility function and the irrelevance of individual self-interest for the decision at hand—either because individual interests are submerged in the common interest, or because they are effectively neutralized through institutional arrangements separating the pursuit of common goals from the distribution of costs and benefits. Furthermore, while disagreement may be an entirely acceptable outcome in "bargaining," it is not so in "problem solving," where the common commitment to the common goal would de-legitimate open non-co-operation. But that does not mean that agreement should be more easily obtained: battles over the proper definition of the common goal, or over appropriate strategies, might indeed be more bitter and divisive than the search for mutually agreeable compromises at the "bargaining" table (Bonoma 1976).

Two further points need to be emphasized. First, the distinction between "bargaining" and "problem solving" is not logically related to the difference between zero-sum and non-zero-sum games. Indeed, in the prototypical exchange

situation analyzed by Nash (1950), bargains will only be struck if individual valuations of tradeable goods are sufficiently different to allow *both* parties to increase their respective utilities. Conversely, zero-sum conflicts over the distribution of limited resources are perhaps better resolved in the "problem-solving" style by recourse to common norms and values and, perhaps, to adjudication, rather than by pure "bargaining," where the have-nots are without recourse against the distribution of original "endowments."

Second, just as "mixed-motive games," combining elements of zero-sum and positive-sum situations, are more important in real-world situations than either of the pure game forms (Bacharach/Lawler 1980), so is there also a wide overlap between "bargaining" and "problem solving" in real decision processes. The empirical distribution may be highly asymmetrical, however. While pure "bargaining" seems to be quite frequent in practice, it is unlikely that there will be many "problem-solving" interactions without an admixture of "bargaining" behavior. Thus, decision styles may evolve and change over time in real-world decision systems, but it is possible that their dynamics will have only one stable resting point at the "bargaining" end of the continuum.

In discussing this hypothesis, it seems useful to distinguish the pursuit of common interests from that of a class of individual interests whose realization does depend upon co-operation. In the case of jointly produced private goods it is indeed likely that purely self-interested exchange relationships may develop into stable networks of mutual dependence in which participants will anticipate, and respect, the self-interest of their partners (Scharpf 1978a). But that will not, by itself, move interactions out of the "bargaining" mode. The same is true of that "cooperation among egoists" which Axelrod (1981) discovered in computer-simulated iterations of the Prisoners' Dilemma and in similarly structured real-world situations (Axelrod 1984). The Prisoners' Dilemma is, after all, one of the "paradoxes of rationality" (Howard 1971) in which narrowly selfish calculations will lead to sub-optimal outcomes in terms of individual self-interest. What has been discovered, following theoretical work in biological evolution (Trivers 1971; Dawkins 1976), is a certain strategy ("Tit-for-Tat") which is co-operative but non-exploitable, and which does so well in long iterations of the game that it tends to drive other strategies out of competition. Thus, co-operation eliminates the "paradox" and allows participants to return to the rational pursuit of their individual self-interests.

By contrast, what is necessary for the "problem-solving" style to emerge is an orientation towards *common* interests, values or norms which are distinct from the individual self-interest of participants (Bonoma 1976: 507) and which, therefore, may facilitate voluntary agreement even when sacrifices in terms of individual self-interest are necessary and cannot be immediately compensated through "side payments" or "package deals." Only when this is possible is there

a good chance that ongoing decision systems operating under the unanimity rule might be able to avoid the "joint-decision trap."

The emergence of such common orientations may be rooted in genuine altruism—a human motive whose possibility is certainly not ruled out by methodological individualism (Sen 1970; Elster 1979: 141) but which, nevertheless, is unlikely to play much of a role in interactions among governments, rather than among individuals. More pertinent may be the perception of a common "identity" defined in terms of an ethnic or cultural homogeneity or a "community of fate" derived from shared perceptions of a common history, of a common "manifest destiny" (or common ideological goals), or of a common vulnerability. As Peter Katzenstein (1984, 1985) has pointed out, it is the latter characteristic which helps to explain the greater ability to achieve policy consensus of the smaller European states, as compared to the larger ones. And it is worth emphasizing that the perception of a common vulnerability may be derived not only from the exposure to external military or economic threats, but also from the living memory of fratricidal internal conflicts, as in the cases of Austria and Finland—which may also explain the rapid evolution of neo-corporatist arrangements in post-Franco Spain (Pérez-Díaz 1985).

Unfortunately, neither German federalism nor the European Community have been able to profit much from such perceptions of common identity or common fate during the last decade or so. In Germany, the post-war ideology of "social partnership" is eroding under the impact of the world-wide recession (Vobruba 1983) and party-political confrontation during the period of the Social-Liberal coalition did reinforce ideological divisions in the political arena. Europe, on the other hand, has certainly profited from the traumatic memories of two world wars. But once the European Defense Community had failed, the overriding problems of common European vulnerability, protection against Germany and protection against the Soviet Union, were institutionally entrusted to NATO (and substantively to the United States), rather than to the Community. In most other regards, of course, the present European condition is one which tends to emphasize historic, ethnic, cultural, ideological and economic diversity, rather than identity, at least when compared to the smaller European states which, in some cases, are doing very well under the near-unanimity rules of consociational democracies (Lehmbruch 1967; Lijphart 1975; Katzenstein 1984).

The question is, therefore, whether "problem solving" does have any chance at all in joint-decision systems which do not have the benefit of a traditional sense of common identity or an overriding perception of common vulnerability? There is a certain parallel here to early sociological discussions of *Gemeinschaft* and *Gesellschaft,* and to the pessimistic hypothesis, entertained by Tönnies (1963) and Freyer (1964: 182), of an unidirectional erosion of the traditional

motivational resources of *Gemeinschaft*. But, of course, at the interpersonal level, *Gemeinschaften* are newly created all the time, and the same is true in modern industries, where they have been rediscovered under the new label of "clans" or the old one of "communities" (Ouchi 1980; Streeck/Schmitter 1984; Hollingsworth/Lindberg 1985). But it is also true that the evolution of "communal" or "solidaristic" norms among egoistic actors (who are not part of a traditional community, or shocked into solidarity by the awareness of their fatal vulnerability to internal conflict) must be a fragile process which is easily reversed.

This is true even under the best of circumstances, when the non-negative-sum character of the common enterprise is fully recognized by all participants. The willingness to accept unilateral sacrifices, on the understanding that they will not be exploited but reciprocated by others when the occasion arises, presupposes a high degree of mutual trust. If that is not yet established, but needs to be built into the process itself, the most fatal risk is *bona fide* disagreement over the purpose and direction of the common enterprise, which is easily misinterpreted as defection from the common endeavour. When that happens, any unilateral retaliation is likely to provoke more suspicion and even harder retaliation, setting in motion that downward spiral of "sacrilege" and "just retribution" which Victor Pérez-Díaz (1985) found in the Basque conflict. Thus, the absence of any strong moral, ideological or idealistic commitment on all sides is almost a necessary precondition for the *gradual* evolution of communal norms. But in the absence of such non-egotistic commitments it is also hard to see how community interactions might rise above the calculus of individual self-interest.

The best hope of avoiding this "double bind" exists, of course, under conditions of continuous economic growth, when the common enterprise is clearly a positive-sum game from which all are profiting. And if it is possible to establish agreement on common criteria for the distribution of benefits and contributions under these benign circumstances, there is at least a chance that the agreement might hold even when the nature of the game changes to zero-sum or negative-sum.

On theoretical grounds, there is indeed reason to assume that commonly accepted "rules of fairness" may evolve from the interaction of purely egotistical participants (Baumol 1982; Runge 1984). Similar processes of rule generation must have been going on in German federalism and in the European Community as well, or else even the limited degree of mutual accommodation and adaptation to changing circumstances, which they have in fact achieved, would have been impossible. But given the absence of a more fundamental ideological agreement on common values, purposes and strategies, one would also expect such rules to be relatively simple and "obvious" in the sense defined by Schelling (1960) and, hence, quite rigid in the face of changing circumstances.

In our studies of joint decisions in German federalism, we have indeed discovered a number of such rules which all seem to follow from a common logic of conflict avoidance or conflict minimization under conditions of continuing goal dissensus (Scharpf/Reissert/Schnabel 1976: 62, 218–235; 1978). The most important one, governing institutional change, will be discussed in the next section. More pertinent to the present discussion are two rules governing the distribution of federal funds among the *Länder.* According to the first, all *Länder* must be allowed to benefit *equally,* according to some simple and straightforward formula, such as the number of inhabitants or, perhaps, the number of registered automobiles for the allocation of road-building funds. But if equality cannot be maintained, the fall-back rule seems to require that the losers in relative terms must at least receive their past share in absolute terms.

The fall-back rule is, of course, what one would expect from individualistic bargaining, with status quo policy as the base line for everyone, while the first rule has some claims to greater dignity. In jurisprudence and philosophy, formal equality is justified as the measure of distributive justice which should be applied in the absence of more compelling criteria based upon either unequal needs or unequal contributions (Noll 1984; Rawls 1971). As it is difficult, under conditions of party-political competition, ideological heterogeneity and significant differences in size, wealth and economic conditions, for the German *Länder* to agree upon substantive criteria of unequal need and merit, it is perhaps not surprising that formal equality, in the form of uniform conditions and per capita formulas, prevailed in most of the joint programs in West Germany. But the rule obviously does not explain the highly unequal allocation of contributions and benefits among the member countries of the European Community, or in German regional assistance.

In both cases there was, at least originally, a rough agreement on the recognition of unequal needs and deserts which, in the EC, was presumably based upon the perception of a fundamental asymmetry of interests between West Germany and the rest of the Community. If the Germans were seen as the major beneficiaries of a common market for industrial goods, it was only fair that they should bear the major burden of EC financial contributions, and that they should benefit less from Community programs. A slightly different justification could point out that the Community lacks the mechanism of horizontal transfer payments which were used to reduce fiscal inequalities among the German *Länder* long before the invention of joint programs (Franzmeyer/Seidel 1976). Some EC programs, such as the Regional Fund and the Social Fund, should thus be regarded as functional equivalents to fiscal equalization (Reissert 1979) which, of course, would preclude reference to formal equality as the relevant criterion of justice.

When the same contribution rules were applied to the United Kingdom, however (or now to Portugal), they had distributive consequences which certainly the British did not consider fair. Yet, under the unanimity requirement, the Community was unable to agree on new rules which would have redefined the criterion of fairness in the light of the new situation. Instead, the decision style changed from a search for just solutions to "bloody-minded" bargaining and even confrontation, and it took the combined threats of British exit and of the bankruptcy of CAP to achieve even the *ad hoc* adjustments of 1984. Apparently, rules of fairness that depart from formal equality are less "obvious" in the sense defined by Schelling (1960) and, therefore, more difficult to redefine consensually in the face of changing circumstances. If they are challenged, the joint-decision system is more likely to revert to the calculus of pure individual self-interest than to adjust its standards of fairness.

This does not mean that consensus is now impossible, and that joint-decision systems will necessarily destroy themselves through self-blockage. In an ongoing system without exit, and with "pre-emption," pressures to reach some kind of agreement are very powerful, indeed (Weiler 1982: 49). But the terms of agreement are likely to be defined by a "bargaining" logic in which the benefits received under the present policy become the base line below which nobody will settle. In the case of regional assistance in Germany, additional federal funds were required for add-on programs dealing with the new problems of declining industrial areas. In the absence of a federal government with independent resources, or of an "hegemony" that could be exploited (Olson/Zeckhauser 1966), "log rolling," "package deals" and "side payments" are the typical modes of conflict resolution in decision systems confronted with a plurality of veto positions (Taylor 1980).

Given the claims to a substantive "intelligence of democracy" associated with seemingly similar patterns of bargaining in American pluralism (Lindblom 1965; Dahl 1967), it is perhaps necessary to spell out more precisely what I consider the deficiencies of "bargaining" in joint-decision systems. They are not primarily related to the difference between "disjointed incrementalism" and an over-ambitious concept of "synoptic problem solving" (Braybrooke/Lindblom 1963). What is important, instead, is whether analyses (and disagreements) relating to the best way of achieving *common* goals can, or cannot, be effectively separated from disagreement over the *individual* distribution of costs and benefits. If members distrust the fairness of distribution rules, they will be tempted, or even forced, to link substantive and distributive issues. Using their veto on substantive choices in order to improve their distributive position, they must contribute to the interminable haggling over package deals and side payments that are characteristic of all EC decisions. But, of course, distributive issues are legitimate

even in a *Gemeinschaft,* and if they cannot be neutralized by agreed-upon rules of fairness, they must somehow be settled in negotiations.

There are, however, many decision situations in which adequate compensation is impossible—either because the losses involved would be of a non-quantifiable, qualitative nature, or because of uncertainty over their future incidence and magnitude, or finally because of the negative-sum character of the decision situation itself. The first case is of considerable importance not only under conditions of ideological disagreement, but even more so when considerations of national "sovereignty," or *Länder* "autonomy," or interference with established bureaucratic routines and networks of interaction, come to play a significant role. It is under such conditions that the imperatives of "conflict avoidance" and "non intervention" have their strongest impact upon the substance of joint decisions in Germany, and the same mechanisms seem to restrict the directive effectiveness of Community policies and of their implementation (Laffan 1983). The second case seems to be particularly damaging under conditions, labeled the "interdependence trap" by Paul Taylor (1980: 374), when the costs of an advantageous policy proposal are well defined and certain, while the benefits are more diffuse and uncertain. In the third case, finally, the negative-sum character of the overall situation may not be generally appreciated while participants are bargaining over the avoidance of individual losses. It is plausible that these difficulties became more acute when the world economic environment changed from benign to hostile in the 1970s (Ziebura 1982).

In all three cases, however, the outcome is similar: Individual losses expected from a policy option which would be collectively optimal, cannot be adequately compensated through side payments. Under such conditions, therefore, "bargaining" is likely to lead to solutions which are unable to achieve realizable common gains or to prevent avoidable common losses.

To summarize a perhaps overly involved line of argument, unanimity is a decision rule which can claim welfare-theoretic optimality, most plausibly, for single-shot decisions. In ongoing joint-decision systems, from which exit is precluded or very costly, non-agreement would imply the self-defeating continuation of past policies in the face of a changing policy environment. Thus, pressures to reach agreement will be great. The substance of agreement will be affected, however, by the prevailing style of decision-making. In its ability to achieve effective responses to a changing policy environment, the "bargaining" style is clearly inferior to the "problem-solving" style. But the preconditions of "problem-solving"—the orientation towards common goals, values and norms—are difficult to create, and they are easily eroded in cases of ideological conflict, mutual distrust or disagreement over the fairness of distribution rules. Thus, reversion to a "bargaining" style of decision making was characteristic of

German federalism during the 1970s, and it seems to have been characteristic of the European Community ever since the great confrontations of the mid-1960s. The price to be paid is not simply a prevalence of distributive conflicts complicating all substantive decisions, but a systematic tendency towards sub-optimal substantive solutions. In short, it is the combination of the unanimity rule and a bargaining style which explains the pathologies of public policy associated with joint decisions in Germany and in Europe.

Joint Decisions and the Dynamics of European Integration

At this point, we can return to the concerns raised in the introduction. Why is it that real developments since the mid-1960s—the frustration without disintegration and resilience without progress—have disappointed hopes for a dynamic deepening and widening of European integration and invalidated predictions of an inevitable return to the intergovernmental relations of sovereign nation states? An explanation has been derived from the decision logic inherent in the particular institutional arrangements of the European community. Relating these findings to both the optimistic and pessimistic prognoses of the future course of European integration, the following conclusions appear to be warranted.

First, the early optimism of neo-functional integration theorists was based upon the expectation that a "new political community, superimposed over the pre-existing ones" would emerge through the gradual shifting of the loyalties, expectations and activities of political elites toward the new European arena (Haas 1958: 16). The basic mechanism driving the process of political integration was identified by Ernst Haas in the concept of "spill over" which, essentially, meant that narrowly defined European decision functions would have lateral effects on other interests which, in turn, would redirect their demands, expectations and, eventually, loyalties to the European political process. As a consequence, the support for European integration among interest groups and political parties would grow, and governments would realize that further sabotage or evasions were politically unprofitable. Hence, the powers of European institutions would be enlarged, with the consequence of further spill overs eventually bringing about a genuine political community and the acceptance of a full-fledged federal authority (Haas 1958: XXXIII/IV, 3–31, 283–317).

While later interpretations by neo-functionalists, including Ernst Haas himself, have been more cautious, differentiating and, ultimately, even agnostic in their predictions (Haas 1964, 1971; Haas/Schmitter 1964; Lindberg 1963;

Lindberg /Scheingold 1970; Schmitter 1969, 1970; Scheingold 1970), they have continued to place their primary emphasis upon the interaction between European decisions and the interests, expectations, activities and loyalties of interest groups, political parties, politicians and bureaucrats, in short: upon the perspectives and actions of a plurality of political elites, rather than upon the institutional self-interests of national governments operating within the constraints of particular institutional arrangements at the European level (Bulmer 1983: 353). As William Wallace (1982: 64–65) has put it: "The success of the neo-functional approach depended upon national governments not noticing—in effect—the gradual draining away of their lifeblood to Brussels."

The tendency to treat institutional arrangements not as a powerful independent variable, but merely as the resultant of economic, social and political interactions, was even more characteristic of the older, "functionalist" school of international organization, as illustrated by David Mitrany's dictum (1975: 27) that "in the last resort, the form of government and its laws and institutions are shaped and reshaped by the restless flux of the community's social pressures." And the same non-institutional perspective is, of course also characteristic of the "communications" approach to political integration developed by Karl Deutsch (1953) and his collaborators (Deutsch et al. 1957, 1964; Merrit/ Russett 1981).

The re-emergence of "inter-governmentalism" in the European Community after 1966 (Wallace/Wallace/Webb 1977: 24–25; Taylor 1983: 60–92) came as a disappointment to all such theories of political integration, giving rise to several varieties of *ad hoc* explanations emphasizing either changes in "background" variables external to the theory, or the historical uniqueness of de Gaulle and his personal intervention. By contrast, and with the benefit of hindsight, my explanations assume explicitly that "institutions do matter."

Given this premise, the two most powerful institutional conditions affecting the processes of European integration are, first, the fact that national governments are making European decisions and, second, the fact that these decisions have to be unanimous. The "joint-decision trap" set up by these two conditions is responsible for the pathologies of substantive public policy described and analyzed above.

But joint-decision systems are a "trap" in yet another, and more important sense. They are able to block their own further institutional evolution. This possibility has been overlooked by functionalist and neo-functionalist writers, and even William Riker, the most agnostic student of federalism (1966), had assumed that in any federal arrangement one of two tendencies, "centralizing" or "peripheralizing," must eventually win out (Riker 1964: 6), with the "structure of the party system" as the controlling variable (1964: 129–136). While

peripheralized federalisms will gradually fall apart, centralized federalisms will "become more like unitary or imperial governments in time" (Riker 1964: 7). But neither outcome is happening in either the EC or Germany. The institutional arrangements of German federalism are quite stable, and the European Community seems to be securely "stuck between sovereignty and integration" (Wallace 1982: 67). Our studies of joint decisions in German federalism have discovered a mechanism that preserves the institutional status quo: it is the political priority of substantive solutions over institutional reforms.

All through the 1970s, the German federal government was confronted with urgent problems of unemployment and inflation that seemed to require vigorous action at the national level which, however, depended upon the collaboration of the *Länder*. Even though the majority of the *Bundesrat* consisted of *Länder* governments controlled by parties in opposition to the Social-Liberal federal government, collaboration was never flatly refused. If that had been the case, the legitimacy of the *veto* position of the *Bundesrat* could have become a major political issue which might have strengthened centralist forces. As it was, the *Länder* were always willing to compromise on substantive policy, and the federal government was too hard pressed politically to refuse the compromises which were offered. In the process, however, the institutional position of the *Länder* was continuously improved. Fiscal resources were shifted from the federal level to the *Länder,* precisely during the decade when the federal government was more activist and interventionist than ever before. During the same period, the *Länder* have time and again consented to enlarge the substantive responsibilities of the federal government, but they have also increased their own control over the exercise of these responsibilities. In order to avoid this gradual erosion of its institutional position, the federal government would have had to provoke the direct confrontation of the *Länder* over institutional issues. But under the pressure of urgent substantive problems, it was never willing to risk the complete blockage of joint-decision processes in the (uncertain) hope of improving its position in the longer run. Acting as a "locally maximizing machine" (Elster 1979: 4), the federal government contributed to the tightening of the ropes that reduced its own ability to act.

The situation is even more one-sided in the European Community. In the absence of a European government with a popular political base of its own, all possibilities of institutional transformation are entirely determined by the self-interests of national governments. And even those among them which most vigorously support activist and expansionary European policies are likely to hedge their bets when it comes to relinquishing their veto powers. Conversely, the "reluctant Europeans" among member governments have been much more willing to accept disagreeable compromises on substantive policy than to weak-

en their own institutional control over the substance of future decisions. As a consequence, the jurisdiction of the Community has expanded, and Community law has achieved the effectiveness of the legal order of a federal state—but the price has been "an ever closer national control exercised in the decision processes" (Weiler 1982: 46–47).

Thus, the establishment of the European Council should be interpreted as a symbol of the increasing importance of European policy choices and as an attempt to assert the control of national policy generalists over the vertical alliances of policy specialists dominating the Council of Ministers as well as the European Commission. But that only means that it is national heads of government, rather than national ministers, who are likely to tighten their grip in European policy making (Bulmer 1983). Nor are these conclusions controverted by the packages of compromises and reforms culminating in the "Single European Act" of 28 February 1986 which seems to have ended the long period of confrontations and deadlock of the 1970s and early 1980s. Spain and Portugal were finally admitted and interim settlements for the budget issues were found. Even more spectacularly, governments committed themselves to complete the "internal market"—"an area without internal frontiers in which the free movement of goods, persons, services and capital is assured"—by the end of 1992 (Article 13), and they also renewed their aspirations toward an "Economic and Monetary Union" requiring the convergence of national economic and monetary policies (Article 20).

Compared to these substantive commitments, whose implementation continues to depend upon the agreement of national governments, the institutional changes which were adopted seem to fall far short of the visionary goals of achieving "genuine political unity" through the creation of "effective democratic institutions" that had been asserted only a year before (Report of the Dooge Committee 1984). To be sure, on a long list of routine decisions, qualified-majority voting in the Council (which always would have been possible) is now explicitly provided for in the Treaty—and it is apparently practiced quite frequently, with governments preferring to be outvoted, rather than having to agree formally to an inevitable but unpopular Council decision. It remains to be seen whether the weakening of the pressures toward consensus will be outweighed by the lower threshold of agreement. At any rate, a long list of more important decisions, and all further evolutions of the Treaty structure, are explicitly reserved for unanimous voting, and the general principle under which all members may exercise a veto in matters affecting their vital national interests remains unchallenged. Ironically, the very limited efforts to strengthen the powers of the European Parliament not only have taken the form of adding another institutional hurdle to European decision making, but have reinforced

the practical significance of unanimity within the Council (where it is necessary to override objections or amendments of the Parliament).

On the basis of German experience, one would expect that even the formal relaxation of the unanimity rule may not make much of a difference in practice. As long as it is still national governments that are making European decisions, their common interest in preserving their institutional veto is likely to prevail as well (Everling 1980). In that regard, all neo-functionalist hopes that learning processes would lead to an institutional transformation seem to have been misplaced. The "transformation group" (Piaget 1973: 14; Deutsch 1977: 23) of a joint-decision system does not seem to include the self-transformation into a simpler system based upon binding majority decisions. Or, as Helmut Schmidt once remarked with a view to German federalism: "Any attempt to reform a complex constitution can only increase its complexity."

If that is so, two of the crucial spill-over mechanisms, which neo-functionalist theory expected to create external political pressures for more integration, seem to be blocked or seriously weakened. First, the reorientation of economic, social and political interests toward the European level remains incomplete. As long as European decisions continue to be made by national governments, the interests affected by them will be mediated by national governments as well. Of course, interest groups will also operate at the European level, but ultimately it is still national governments which they will have to persuade. As a consequence, nationally specific definitions of group interests, and of party-political ideologies, will be maintained and reinforced, rather than amalgamated into European interest associations (Averyt 1976) and European political parties. In that regard, the tendencies toward the segregation of interests and ideologies inherent in federal, as compared to unitary, states are even more pronounced among the member states of the Community (Kirsch 1984: 122). By the same token, there is less reason to expect a transfer of the demands, expectations and loyalties of political elites from the national to the European level.

Second, there is much less reason to expect that "goal frustration" should lead to "politicization" and, ultimately, to a redefinition of goals and the "transcendence" to a higher level of political integration (Schmitter 1969: 164). If the iron grip of national governments cannot be broken, the decision logic of European institutions will continue to reproduce the substantive pathologies discussed above. Beyond a certain point, surely, political frustration and exasperation over the inefficiency and inflexibility of European policy making, and over its structural inability to respond to crises creatively, may not lead to renewed demands for "a more perfect union" but, rather, to cynicism and indifference or to a renewed search for national remedies, however imperfect and limited, for the problems which the Community seems to handle so poorly. As was the

case with joint policies in West Germany, the dynamic movement toward greater European integration may have been retarded and, perhaps, reversed, not by the ideological strength of nationalism or by the obstructions of a Charles de Gaulle or a Margaret Thatcher, but by the pathological decision logic inherent in its basic institutional arrangements.

But why is it, then, that the Community didn't disintegrate long ago? As in the case of German federalism, an adequate explanation of its continuing resilience needs to consider two levels of interest, functional and institutional. At the functional level, it is clear that at least some of the benefits predicted by the economic theories of integration have in fact been realized. This tends to be more true for the benefits of "market integration" than of "policy integration" (Pelkmans 1980) or of "negative," rather than "positive," integration (Taylor 1980: 384–385). But as it is uncertain, even in the industrial sector, whether the common market could be maintained in the absence of a substantial commitment to common (and compensatory) policy measures in such areas as the Social Fund, the Regional Fund and Industrial Policy, one probably could not have the one without the other. In other words, to the extent that joint policies are addressing, however inadequately, real problems which could not be handled at the level of member governments, these problems would simply reassert themselves if the joint-policy system were to be dismantled.

The functional argument is not controverted by the fact that not all economic-policy problems can be handled at the Community level (Ziebura 1982), or that some of the smaller European countries outside of the Community (Switzerland, Austria, Finland, Sweden and Norway) have, on the whole, done better during the world-wide recession of the 1970s than similar countries within the Community (Denmark, the Netherlands, Belgium and Ireland). As all of the successful outsiders are dependent upon industrial exports to the Community, they may simply have been free riders profiting from the creation of the common market and from the Community's relatively liberal trade policies in the industrial sector. Exporters of agricultural goods, on the other hand, like Denmark, Ireland, Greece, Spain and Portugal, had every incentive to join the Community in order to evade CAP's prohibitively high protective barriers. Thus, the appeal of economic integration remains alive, and it is even reinforced, at least for the European Left, by the realization that the internationalization of capital markets has destroyed any hopes for Keynesian full employment policies at the national level (Pelkmans 1980: 344–345; Scharpf 1987: Chapters 11–12). Unfortunately, if my understanding of the "joint-decision trap" is correct, hopes for an effective "European Keynesianism" are likely to be futile as well.

At the institutional level, the Community is unequivocally supported by the self-interest of the vertical alliances of policy specialists—interest associations,

national ministries and parliamentary committees, and the large contingents of specialized lobbyists, bureaucrats and politicians operating at the European level. They all profit from the availability of additional resources, and of additional points of access to political decision processes, providing additional opportunities for playing the game of influence and obstruction which is their *raison d'être*. Of course, they also must cope with the political frustration, among their clienteles or electorates, over the impact of sub-optimal or even counter-productive European policies. But, as in German federalism, the political effect of voter frustration is largely neutralized by the very diffusion of responsibility and accountability which is characteristic of joint-decision systems (Scharpf/Reissert/Schnabel 1976: 236).

Similar cost-benefit calculations tend to stabilize the Community from the perspective of national policy generalists—heads of government, finance ministers and parliamentary budget committees—if their countries are among the net beneficiaries of the Community budget. Net contributors, on the other hand, find themselves locked into an ongoing decision system whose direction they could only hope to change significantly by either assuming the burdens and costs of hegemonic leadership or by threatening to leave the Community altogether. As it is, the only pretender to hegemonic status, West Germany, is too weak or too egoistical to assume the burdens of leadership, while confrontation strategies are unlikely to work for countries whose interest in, and attachment to, the Community is known to be very great. Thus, the Community is likely to remain secure as long as care is taken to concentrate net contributions to the Community budget upon those countries which would have most to lose economically and politically by its dissolution and, in particular, by the disintegration of the common market.

By way of summary, it is now possible to define the "joint-decision trap" more precisely. It is an institutional arrangement whose policy outcomes have an inherent (non-accidental) tendency to be sub-optimal—certainly when compared to the policy potential of unitary governments of similar size and resources. Nevertheless, the arrangement represents a "local optimum" in the cost-benefit calculations of all participants that might have the power to change it. If that is so, there is no "gradualist" way in which joint-decision systems might transform themselves into an institutional arrangement of greater policy potential. In order to be effective, institutional change would have to be large-scale, implying the acceptance of short-term losses for many, or all, participants. That is unlikely, but not impossible (Elster 1979). And, of course, the system might be jolted out of its present equilibrium by external intervention or by a dramatic deterioration of its performance which would undermine even its "local optimality" for crucial participants. Thus, I have not described a deterministic world, even though

the logic of the "joint-decision trap" may provide as close an approximation to structural determinism as one is likely to encounter in the social sciences.

Some Tentative Extensions

Our analyses of *"Politikverflechtung"* pose the question of whether or not the findings can be generalized. We tended to emphasize the specificity of the historical case from which the conclusions were derived (Scharpf 1978b) but nevertheless we attempted to formulate the findings in the language of universalistic propositions. The present essay claims that these propositions also help to explain the European experience. In effect, these cases may be instances of a universal decision logic inherent in particular "patterns," in the sense discussed by von Hayek (1967), of institutional arrangements. This conclusion offers a few speculative suggestions about other areas of potential application.

Clearly, the "joint-decision trap" is not inherent in all forms of *de facto* unanimous decision making, even if we exclude (as one should) single-shot encounters. By the same logic, one should probably also exclude all forms of ongoing associations from which exit is very easy, either because their benefits are of marginal value to members, or because they could easily be substituted from another source. Furthermore, it seems also appropriate to exclude associations in which the tension between common and individual interests could not arise because member interests are complementary, and costs low in comparison to the benefits of association. Cliques, clubs and business consortia might fall into that class. More doubtful candidates for either inclusion or exclusion are organizations with member interests that are partly complementary and partly competitive, but where members are not expecting each other to pursue anything but their own, individual self-interest. Many forms of long-standing vertical relationships between suppliers and customers fall into that category, but also horizontal cartels and "free collective bargaining" between employers and trade unions. I would also include here the "co-operation among egoists" in long sequences of the Prisoners' Dilemma and similar real-world situations. In my view, cases in this category would not provide valid tests for the "joint-decision trap" hypothesis. While an outside observer might perceive potential "common" interests and, hence, benefits from "problem solving," participants may have good reasons to define their mutual relations purely in "bargaining" terms. Being where they want to be, they are not in any meaningful sense in a "trap."

But even if we limit the discussion to ongoing joint-decision systems without exit, in which "common" interests have a normative validity that is separate

from, but not necessarily superior to, the individual self-interest of participants, and in which "problem solving" would be the more efficient style of decision making, we would still cast the net too wide. "Problem solving" is, after all, a style of decision making that is frequently encountered in decision situations which are formally operating under hierarchical or majority decisions rules, even though there may be *de facto* unanimity for most practical purposes. Indeed, that may be the secret of their success: "participative management" (as distinguished from "*laissez-faire* management") is likely to profit from the creativity and intelligence of employees precisely because disintegrative tendencies are held in check by a hierarchical authority that has abdicated some, but not all, of its functions. Conversely, formally egalitarian decision situations might profit from the *de facto* hierarchical role of one hegemonic member—as exemplified by the powerfully integrative role of Prussia in Bismarck's Germany. Similarly, one might suspect that "consociational democracies" and even American-style "pluralism" would not work quite as well if obstinate minorities did not have to reckon with the possibility that the formal rule of majority decision might still be invoked against them. The precarious stability of "problem solving," and the tendency to revert to the "bargaining" style is, thus, likely to manifest itself most clearly in joint-decision systems in which *de facto* unanimity is not backed up by the formal possibility of unilateral or majority decisions or by the clear preponderance of power of a hegemonic member.

Even within these definitional constraints, however, there seems to be a wide range of institutions to which the logic of the "joint-decision trap" might plausibly apply. Faculty self-government (in the absence of a powerful president or dean) might be one example. Legalized communes of squatters in West Berlin (tied to their houses by the sunk costs of rebuilding them) could be another. Further candidates could be connubia, business partnerships and joint ventures, political coalitions, military alliances, "neo-corporatist" arrangements and a wide variety of permanent inter-organizational networks. They are all likely to be confronted with tensions between a recognized common interest and the individual self-interest of participants; they all would profit from a "problem-solving" style of decision making, if only distributive conflicts could, somehow, be neutralized; and they all should be exposed to the entropic push toward "bargaining." At the same time, they all should have difficulties in adopting a decision rule (majority or hierarchy) that could avoid reversion to the bargaining style at the expense of membership control over the substance of decisions.

Thus, it should be possible to test the "joint-decision-trap" hypothesis under an extremely wide variety of institutional conditions. More interesting, from my point of view, would be the opportunity provided by such empirical studies to identify more precisely those factors that are able to influence the changes of

decision styles, from "bargaining" to "problem solving" and *vice versa*, in joint-decision systems. Given an increasingly interdependent world, all mechanisms and strategies that might help to avoid the "joint-decision trap" ought to be of very considerable scholarly and practical interest.

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2 Community and Autonomy: Multilevel Policy-making in the European Union (1994)

Introduction

The completion of the internal market of the European Union has created a political dilemma for western Europe from which there is no easy escape. On the one hand, the capacity of member states to shape the collective fate of their citizens by means of their own policies has been reduced. Aside from the factual constraints and limits to action generated by integration into the world economy and the globalization of capital markets, the formal policy-making capacities of the western European states have been significantly limited by the guarantee of the four basic freedoms of movement within the internal market—of goods, persons, services and capital. Thus western European nation states have less authority today to resolve economic or economically generated problems than they had twenty years ago.

On the other hand, the policy-making capacities of the Union have not been strengthened nearly as much as capabilities at the level of member states have declined. In spite of the Commission's monopoly on policy initiatives and the return to qualified majority voting in the Council of Ministers, the important decisions of the Community continue to come out of multilateral negotiations between national governments. They are cumbersome and time-consuming, and they are easily blocked by conflicts of interest between member states.

These conditions are hard to change. National governments, which also control the constitutional development of the Community, resist any reduction of their powers (Scharpf 1988). But as long as the Community lacks its own democratic legitimation, normative reasons also speak against the rapid diminution of the powers of these governments. In the absence of European media, European political parties, and genuinely European processes of public-opinion formation, constitutional reforms could not, by themselves, overcome the present democratic deficit at the European level (Grimm 1992; Kielmansegg 1992; Scharpf 1992a). In the short term, at any rate, expanding the legislative and budgetary powers of the European Parliament could render European decision processes, already much too complicated and time-consuming, even more cumbersome.

In reaction to Maastricht, some now hope for a re-nationalization of policy responsibilities, and they want to halt or even reverse the process of European integration. This is definitely not my view. But it seems to me equally implausible that national governments could simply continue to enlarge the competencies of the European Union, while comforting themselves with the thought that they would still be able to control actual decisions in the Council of Ministers. The problem-solving capacities of member states and the integrity of their democratic processes are impaired even by agreed European decisions (and even more so by European deadlocks). There is no longer any question that European democracies discredit themselves when, for an ever-growing number of urgent problems, national political leaders admit their importance by calling for "European Solutions," while in Brussels interminable negotiations will, at best, lead to compromises that are declared unsatisfactory by all concerned, and for which nobody is willing to assume political responsibility.

Thus, even after Maastricht, the aim must be to improve the policy-making capacities of the European Union. However, it appears equally important to defend or win back the problem-solving capacity of member states. At first glance, these seem to be contradictory goals, which might be combined only if the respective areas of jurisdiction of the Union and the member states were clearly separated, and if policy formation processes at both levels were uncoupled. But this is exactly what cannot be presumed.

Separate or Interlocking Powers?

The separation of powers was characteristic of the original model of United States federalism. There, the federal government and the states were expected to discharge their respective legislative, fiscal and administrative responsibilities independently of one another. By contrast, in the German tradition of interlocking federalism, the legislative and fiscal powers of the nation as a whole are almost all exercised by the federal government. But, for the formulation of its policies, the national government usually depends on the agreement of state governments in the *Bundesrat* and for their implementation it must rely on the administrative systems of the states.

During the post-war period, the implicit compulsion to reach consensus among independent governments differing in their party political make-up was widely viewed in a positive light. It was seen as another device for preventing the abuse of state power by dividing and constraining its exercise (Hesse 1962). In the reformist political climate of the early 1970s, however, and in the economi-

cally turbulent period thereafter, academic and political discussion has focused more on the corresponding disadvantages of interlocking federalism (Scharpf et al. 1976): The dependence of national policy on the approval of state governments reduces the ability of the federal government to act flexibly and decisively in coping with new and rapidly changing problems. Conversely, being tied to uniform federal rules, state governments also have little autonomy to develop their own solutions to specific regional problems. Moreover, the predominance of negotiations between the federal and state levels generally lessens the effectiveness of parliamentary controls on both levels; state parliaments, in particular, usually find themselves called upon merely to ratify outcomes which they are not expected to influence. This is a major cause of the much lamented decline of parliamentarism at the state level in Germany (Große-Sender 1990).

In terms of formal organization, the European Union has followed the German rather than the American model. The Union does not have its own administrative base, and its resolutions require the approval of the national governments represented in the councils of ministers and in the European Council. Thus in Europe as well as in Germany, effective policy-making can only result from negotiations between politically autonomous governments. Nevertheless, these formal similarities should not obscure the significance of substantive differences: the German federal government can draw on its parliamentary and electoral legitimation to exert political pressure on the states, and in negotiations it can bring to bear the weight of its larger budget. In contrast, the European Commission is completely dependent on the governments of the member states in both political and fiscal terms. Thus, in institutional terms, the centre is much weaker in Europe than it is even in Germany, and important cultural and socio-economic differences also point in the same direction.

Even though the interlocking German system of federalism can only act through negotiations, agreement between the states and between the federal and state governments was, at least before German unification, greatly facilitated by three factors: by a relatively homogeneous political culture and nation-wide public opinion that was primarily interested in political issues at the federal level; by political parties, operating at both levels, whose competition served to discipline the pure pursuit of state interests; and by a high degree of economic and cultural homogeneity. All these facilitating factors are absent in negotiations at the European level.

The European Union (EU) is, both in regard to political culture and in socio-economic terms, less homogeneous than any functioning nation state. Moreover, in contrast to most nation states, the desirability of "uniform living conditions" in Europe cannot even be assumed (Majone 1990a). In addition, European-level politics also lacks the unifying factors of party competition that transcend

the bounds of member states and of a public opinion whose primary focus is on central-state political issues. Thus, in its negotiations with member states, the Commission can neither count on interests and action orientations that are largely similar, nor mobilize party loyalties and use the pressure of public opinion in its own support. Without a common foundation in an encompassing, normatively binding political system with effective sanctions, the parties involved in European-level negotiations confront one another as independent actors, each in pursuit of its own highly distinct, and often opposing, interests, each oriented in terms of its own culturally stabilized interpretation of the situation.

It is true, of course, that even negotiations between heterogeneous parties may result in policies that promote the common interest—but such negotiations are difficult and always threatened by failure. As a rule, their success presupposes complicated deals for compensating interests that have been, or claim to have been, adversely affected (Scharpf 1992b). In short: even in comparison to the complicated and time-consuming processes of interlocking federalism in Germany, the policy-making capacities of the EU are strictly limited, and it will be almost impossible to increase them significantly in the immediate future.

This suggests two normative conclusions. On the one hand, the limited policy-making capacities of the EU ought to be used sparingly, and only for issues that need to be settled on the European level. On the other hand, an effort should be made to restrict as much as possible the negative repercussions of European integration on the problem-solving capacities of national politics. In this regard, the interlocking federalism of Germany, where the states have practically lost all legislative powers, would be a most unsuitable model indeed. The question is whether, structural similarities notwithstanding, the practice of European policy-making can avoid the course taken in German federalism.

Subsidiarity, Dual Federalism and Federal Comity

At present, hopes rest on the explicit incorporation of the subsidiarity principle in the Maastricht Treaty, which is supposed to constrain the presumed trend towards an expansion, and extensive interpretation, of European competencies. There is no question that this may have some influence on the general political climate in Europe. But if subsidiarity is expected to provide justiciable constraints on European competencies, Article 3b of the Maastricht Treaty provides few grounds for optimism. It reads:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

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

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

To begin with, the principle is not supposed to apply to matters under exclusive European jurisdiction—which, however, is nowhere explicitly defined. Second, in view of the extreme differences in the economic development and financial and administrative capacities of member states, it will always be possible to argue—if the matter falls within the purview of European powers at all—that "the objectives of the proposed action cannot be sufficiently achieved by the Member States." And finally, there will be hardly any field of public policy for which it will not be possible to demonstrate a plausible connection to the guarantee of free movement of goods, persons, services and capital—and thus to the core objectives of the European Union.

Under such conditions, the European Court would be well advised to respect the political discretion of the legislative institutions responsible. The US Supreme Court, in any case, has desisted since 1937, for just such reasons, from setting constitutional limits on the federal power to regulate "interstate commerce" (which corresponds most closely to the core competencies of the European Union). In the same way, the German Federal Constitutional Court has consistently refused, when reviewing exercises of "concurrent federal powers" under Article 72 (2) of the Basic Law, to challenge the (mostly implicit) assumption of the legislature that there was a "need for federal regulation" in order to "assure legal and economic unity." Regardless of the presence or absence of a subsidiarity clause, the same outcome is to be expected if a multilevel constitution is constructed according to a unipolar logic. This, ironically, is always the case when such a constitution seeks to limit the scope of central government by enumerating its (primarily economy-related) responsibilities and competencies, while reserving to the constituent states the unspecified residual of governmental authority. Under such conditions, and with only minimal respect for the maxims of judicial self-restraint in the grey areas of the constitution, it is much easier for courts to be permissive in interpreting the explicitly enumerated powers of central government than it would be for them to provide conceptual substance, and substantive protection, to the unspecific notion of residual state powers.

The outcome could only be different if the constitutional system were structured according to a bipolar rather than a unipolar logic, specifying the

core responsibilities and competencies of both levels of government with equal emphasis. If an exercise of central government power were challenged under such conditions, courts would not merely be called upon to examine the factual conditions that might justify the measure in question, but they would also have to consider its potential impact on state authority. As a consequence, judicial review (and, in anticipation, political debate) would need to balance claims of equal constitutional legitimacy in the light of specific cases (Scharpf 1991). An important example was provided by the doctrine of "dual federalism" which the US Supreme Court had applied before the "New-Deal revolution" of 1937. It had recognized a "police power" reserved to the states whose sphere the federal government was not permitted to invade, even in the exercise of its own "commerce power." Conversely, the states were also prevented from encroaching upon the federal prerogative of regulating interstate commerce. Dual federalism ultimately broke down when the expansion and growing interdependence of government activity at both levels frustrated the search for clear lines of demarcation between federal and state areas of responsibility. Since federal programs appeared to be indispensable in the economic crisis of the 1930s, dual federalism was jettisoned and, as far as the Supreme Court is concerned, the federal government now has a blank cheque whenever it chooses to employ the commerce power *vis-à-vis* the individual states (Hunter/Oakerson 1986).

The case law of the German Federal Constitutional Court shows, however, that this was by no means a logically inevitable conclusion. In its interpretation of the federal constitution, the court recognizes the existence of positively defined state responsibilities in the area of education and cultural affairs, including the regulation of the media (BVerfGE 6, 309; 12, 205). At least in this area of *"Kulturhoheit,"* therefore, German constitutional law must also cope with the implications of "dual federalism" in a highly interdependent world. Unlike the pre-1937 US Supreme Court, however, the German Court never assumed that the spheres of federal and state responsibilities could be clearly separated. Thus, it had no difficulty in acknowledging that the federal government, when exercising its own powers, might also pursue goals pertaining to cultural policy. By the same token, it is also presumed that the states, in exercising their cultural responsibilities, may employ measures that could interfere with the exercise of federal powers (e.g., with the power to conduct foreign relations). At the same time, however, both levels of government are obligated, even when acting within the limits of their uncontested jurisdictions, to act in due consideration of the responsibilities of their counterparts on the other level, and to avoid interference as far as possible. This principle of "federal comity" *(Bundestreue)* is supposed to

> set limits to the egoism of federal and state governments in as far as their constitutional authority would otherwise have given them the freedom and opportunity to "ruthlessly" realize their own conceptions and exclusively pursue their own interests. (BVerfGE 31, 314, 354f.)

Thus, the recognition of a bipolar constitutional order prevents the one-sided orientation of judicial review towards the enumerated powers of the central government, which is otherwise characteristic of federal states. It requires the court to balance competing jurisdictional claims with a view not only to their substantive justification, but also to the manner in which powers are exercised. The criterion is *mutual compatibility,* and the characteristic outcome is not the displacement of one jurisdiction by the other, but the obligation of both to choose mutually acceptable means when performing the proper functions of government at each level.

Applying this logic to the European Union, one would have to demand judicial recognition or, better still, the explicit specification of reserved powers of national (and subnational) governments in the constitutive treaties. The Maastricht Treaty already makes a start in this direction by postulating, in Article F (1): "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy." This would need to be further developed. Ultimately, of course, the content of the identity-related reserved powers of member states must be defined by political processes rather than scholarship. There is reason to think, however, that in the relationship between the Union and its members, just as in federal-state relations within the nation state, the core of reserved rights would lie in the protection of the cultural and institutional identity of the members. This certainly includes education and cultural policy and the shaping of the country's internal political and administrative institutions and procedures. In addition, one probably would also have to include historically evolved economic and social institutions. Neither the nationalized health service in Great Britain nor the corporatist self-administration of social-security systems in Germany, neither the legalistic "works constitution" in Germany nor the informal practices of workplace-based industrial relations in Great Britain should as such be a legitimate object of European-wide harmonization (cf. Wieland 1992).

But how much would be gained in practical terms by the recognition of reserved powers of national (and subnational) governments? The European Union is primarily and legitimately charged with safeguarding the four basic freedoms and regulating transnational problems—which also defines the obvious sources of potential conflict. The two opposing principles of national identity and transnational openness do not designate concrete subject areas between which a more or less precise dividing line could be drawn. Instead they define

perspectives from which certain matters may be evaluated and regulated. The television directive, for instance, whose constitutionality was challenged by the German states, regulates aspects of a branch of the service sector which is of indisputable economic significance. On the other hand, the states are equally justified in pointing to the importance of media policy for their cultural autonomy. Similarly, rules for the recognition of semesters studied abroad or of foreign educational degrees doubtlessly interfere with national or subnational cultural autonomy, but their direct relation to freedom of movement in a unified European market is equally indisputable. The same holds for the conflict between the granting of voting rights to EU citizens in local elections and the institutional autonomy of subnational governments, or between a European company law and national systems of industrial relations.

In short, just as the US Supreme Court's post-1937 decisions have denied the possibility of substantively defined areas of state jurisdiction that are beyond the reach of federal commercial power, so there must be no fields of national or subnational competence which cannot be touched by European measures safeguarding the four basic freedoms or regulating transnational problems. In an increasingly interdependent world, the goal can no longer be the clear separation of spheres of responsibility in accordance with the model of dual federalism.

The crucial question is, therefore, whether the relatively vague maxims of federal comity, which have not really been a major focus of German constitutional discourse, can acquire the analytical rigour and practicality to resolve the central dilemma of European polity. The answer would have to be negative if the jurisdictional difficulties of multilevel policy-making were a zero-sum game in which any consideration for the responsibilities of another level of government necessarily entailed corresponding sacrifices in the realization of one's own goals. If that were the case, Europe would also be involved in the basic power conflict between national and subnational authorities which, in the history of nation states, has almost inevitably ended either in complete centralization or in disintegration (Riker 1964; Hoffman 1966). Under such conditions, the maxims of federal comity might, at best, result in dilatory compromises, equally unproductive and unsatisfactory to all.

My article is intended to show that this need not be the case: There are forms of multilevel policy-making in which central authority, instead of weakening or displacing the authority of member states, accepts and strengthens it—and in which member states, for their part, will respect and take advantage of the existence of central competencies in devising their own policies. My supporting arguments will be developed in three steps. First, I will refer to the example of technical standardization in order to show that different forms of co-ordination

can be used to achieve similar purposes, while differing significantly in the degree to which they restrict the freedom of co-ordinated subsystems. Second, I will argue that the European Commission has begun to experiment with techniques of regulation which are less restrictive of national policy choices than the previously practiced strategy of harmonization—and which, for this reason, are also less likely to be blocked by disagreement in the councils of ministers. Finally, I seek to show that this new Commission strategy can only succeed if the member states also adopt policies that are more compatible with the objectives of the European Union.

Digression on the Co-ordination of Technical Systems[1]

The European Union is not, and cannot be, a unitary nation state; it can at best be a multilevel political system in which national and subnational units retain their legitimacy and political viability. Thus, while for (many) nation states centralization and political, cultural and legal unification were (and still may be) considered legitimate purposes in their own right, that is not true of Europe. The legitimacy of European rule-making must rest on, and is limited by, functional justifications.

At the highest level of analytical abstraction, central government rules in a multilevel system may serve three functions: redistribution of resources among constituent units, co-ordination for the prevention of negative external effects and for the achievement of collective goods, and co-ordination for the better achievement of private goods. Apart from redistribution (which so far has not become a central objective of the European Union), these same purposes are also relevant for the increasingly important attempts at (international) technical standardization; for instance, in the fields of telecommunication and information technology. Since the problems of technical standardization are by now relatively well understood, an analogy seems helpful for the understanding of European options.

In technical systems, standardization serves two different functions, which are equally relevant for the integration of previously separate markets. On the one hand, the goal is compatibility among *functionally heterogeneous components* in order to facilitate interaction or exchange between the elements of a larger system. Individual telephones have to be connected to the telephone system via central exchanges; software programs have to run on computer hardware. On the

1 I wish to thank Philipp Genschel for his helpful suggestions and criticisms of this section.

other hand, the standardization of *functionally homogeneous* components is useful for exploiting economies of scale and positive "network externalities." For fax users, the system becomes more attractive the more other users can be reached through the network; at the same time, the larger market allows producers to reduce unit prices or to amortize the higher development costs of more attractive products which, again, will increase the size of the market. However, both these purposes can be achieved through rather different techniques of co-ordination—technical unification, interface standardization and conversion technology—and through a variety of different co-ordination processes—hierarchical imposition, negotiations and reciprocal adjustment. It is these differences which are interesting from the perspective of multilevel political systems.

Initially, many technical systems began their evolution in the form of technically unified solutions that were hierarchically imposed within a single organization. Functionally heterogeneous components were integrated through a unified design, and functionally homogeneous components were technically identical. In telecommunications, for instance, national monopolies (public or private) set the technical specifications for telephones, connecting lines, network exchanges and transmission technologies. If that was assured, it was less important whether the monopolist also manufactured the telephones, laid the lines and constructed the required equipment, or whether (as in Germany) this work was contracted out to private companies (Werle 1990). Gateways between technically different national telephone systems had to be established through bilateral or multilateral negotiations; and communication across these gateways was quantitatively and qualitatively inferior to intra-system communication.

In the case of computer systems, on the other hand, suppliers initially developed their own models, employing unified technical solutions from processors and operating systems, data formats and software applications all the way to peripheral input and output devices—all of which were completely incompatible with the technical solutions adopted in other models. Co-ordination through technical unification thus reached only as far as the market share of the computer model of a particular supplier. When, at the end of the 1960s, it appeared that IBM might in fact have a worldwide monopoly with its mainframe/360 model, there were political responses which compelled the firm to reveal the interface specifications of its computers. This created a new market for "interface-compatible" third-party printers, monitors, mass-storage and input devices, and software packages for IBM computers, and it ultimately led to the emergence of a market for conversion technologies (adapters, converters, emulators, gateways) that facilitated data exchange between incompatible systems.

With the rapid advances in computer technology and the even more explosive expansion of markets for mini- and microcomputers, monopolistic co-

ordination of the whole industry is no longer a possibility. At the same time, the need for interaction between computer systems and components of different suppliers has rapidly increased. In other words, the need for co-ordination has far outstripped the capacities of hierarchically integrated organizations to impose unified technical solutions. As a result, even the market for mainframes is now invaded by "open systems" in which hardware solutions must be compatible with several operating systems, while operating systems can be run on the hardware of diverse suppliers. The precondition is no longer simply the disclosure of interface specifications but, increasingly, interfaces that are explicitly defined through negotiation in large numbers of committees in which hardware and software suppliers as well as important users are represented.

Exactly the same development has occurred in telecommunications. Here, too, the quantitative and qualitative increase in the importance of transnational communications outstripped the co-ordinating capabilities of national monopolies. At the same time, the operators of national telecommunications systems have lost their monopoly on the supply of end-user equipment, value-added services and, increasingly now, even on the operation of networks themselves. The rapidly growing need for transnational and transfunctional co-ordination is being met by an increasingly diverse network of functionally specialized standardization committees with regional or worldwide jurisdiction. In addition to the public and private operators of telecommunications networks, these committees also include manufacturers, service providers, and users from different areas of technology and branches of industry (Farrell/Saloner 1992; Genschel/Werle 1992; Genschel 1993).

Being dependent on voluntary collaboration, these committees are not, of course, in the position to impose unified technical solutions hierarchically. Their ability to achieve any results at all depends on broad consensus; and even then the standards so defined are recommendations which will be effective only to the extent that firms find it advantageous to adhere to them. For that reason, the committees cannot aim at the maximal technical unification which was characteristic of hierarchically imposed solutions; instead, they seek to achieve compatibility by standardizing the interfaces between different hard- and software components. Moreover, in areas where conflicts of interest have prevented even interface standardization, there is now a market for conversion technologies which provide gateways and networking options between incompatible systems.

Judged exclusively by the criterion of technical efficiency, unified technical solutions would probably score highest in a comparative assessment (Farrell/Saloner 1985, 1992). Informational requirements, training costs, communication difficulties and inventory costs are all minimized, and economies of scale can be exploited in research, development, production and marketing. By comparison,

in interface standardization, the range of feasible communications is likely to be more restricted, and certain incompatibilities must almost always be tolerated. When co-ordination must be achieved through conversion, technical efficiency will be even lower, and the development of conversion technologies will impose additional costs.

However, the most perfect form of co-ordination by unified technical solutions also has serious disadvantages for the innovative capacities of socio-technological systems. The more aspects of components are standardized, and the more tightly they are coupled, the greater the prerequisites, repercussions and hence the costs of any change, and, consequently, the greater the resistance to innovation. By contrast, when interfaces are being standardized, elements will be less fully specified and more loosely coupled. Hence individual components can be changed and improved independently of each other, as long as the same outputs and inputs are transmitted across the interface. Nevertheless, interface co-ordination is also able to ensure access to larger networks of compatible units and thus to create larger markets, which provide the economic incentives for developing innovative hardware and software products. Finally, conversion-based co-ordination places even fewer obstacles in the way of innovative developments, but their lower degree of technical efficiency, and hence their uncertain acceptance by the market, may also reduce economic incentives for innovation.

But these criteria of technical and economic efficiency are probably not the most decisive factors determining the choice between different forms of co-ordination. What matters more are the substantive implications of institutional constraints. It is true that, under conditions favoring "natural monopolies," unified technical solutions may also prevail through processes of mutual adjustment in competitive markets (Arthur 1988). More generally, however, the imposition of unified solutions, which must completely eliminate the technical choices of competitors and component suppliers, depends on strong capacities for hierarchical control. These may be provided by the state, and they are available within hierarchically integrated private sector firms. But as co-ordination needs have transcended the boundaries of national and organizational hierarchies, co-ordination through unified technical solutions has become much more difficult, and has lost its dominant position.

By contrast, interface standardization and converter technologies, which put fewer constraints on the design latitude of individual components, have gained in importance. Since participants generally have a common interest in achieving co-ordination (even if they differ in their preferences for a specific solution), standardization can usually be achieved through voluntary agreement in co-ordinating committees, or through mutual adaptation in the market (or through a combination of both mechanisms; see Farrell/Saloner 1988). In other

words, the rapidly growing need for transnational and transfunctional technical co-ordination can only be met by methods and procedures that no longer try to maximize uniformity, but which nevertheless are able to secure practically sufficient degrees of technical compatibility.

Co-ordination in European Policy-making

The relevance of this digression on technical co-ordination to the problems of European policy-making is apparent. The member states of the Union can also be described (in ideal-typical overstatement) as hierarchically integrated systems, in which unified solutions can be put into effect without the agreement of all those involved. However, at least since the completion of the internal market, the actual need for co-ordination in Europe has gone far beyond the capacity for hierarchical co-ordination within the framework of the nation state. For the reasons discussed above, the European Union itself is not in a position to exercise powers of hierarchical control effectively. Thus, by analogy, one could also expect that co-ordination at the European level will succeed only if, and to the extent that, the range and intensity of attempted co-ordination is reduced.

Yet the differences between different types of co-ordinating needs must not be overlooked. In fact, the co-ordination of transnational "large-scale technical systems" in transportation, telecommunications and energy (Mayntz/Hughes 1988) plays an important role in Europe. One example is air traffic control, where already in the 1950s the attempt to implement a technically unified hierarchical solution (EUROCONTROL) failed in the face of national resistance. Thus, national air traffic control systems continued to coexist side by side, each with its own type of radar equipment and with mutually incompatible computer systems; but even with technical improvements, this arrangement could no longer cope with the rapidly increasing volume of air traffic in the 1980s. Nevertheless, plans for a hierarchically integrated, unified solution were not revived. Instead, in 1990 agreement was reached on the EATCHIP program which, while maintaining the organizational autonomy of national systems, will first standardize the interfaces for data transmission between national control centers, and subsequently develop a joint procurement policy, joint training programs and a joint system of flight-data processing (Resch 1993).

Thus, we have here another instance in which interface standardization has proved to be a kind of "saddle point solution"—from a technical point of view it is minimally adequate, while from an institutional perspective it represents the maximum sacrifice of autonomy that could be reached, in the absence of hier-

archical enforcement capabilities, through voluntary agreement among national actors. Presumably, the situation will be similar in other instances where Europe-wide co-ordination is attempted for existing large-scale technical systems, such as electric power networks, high-speed rail transport or even videotext. It seems that unified technical solutions only have a chance in negotiations among states, as well as among firms, when completely new systems are to be introduced, as in the case of the mobile digital telephone network.

But while in the case of large-scale technical systems, transnational co-ordination is necessitated by technical interdependence, the need is less obvious for other European policy issues. A car that satisfies French emission standards can also run in Denmark; Spanish steel is none the worse for not having been produced according to the German large-scale furnace regulation; and foreign teachers could probably provide language instruction even without a German degree. If European regulations are considered necessary, this, as it were, artificial need for co-ordination arises from the discrepancy between the economically motivated decision to complete the internal market, on the one hand, and the continuing differences among national regulations governing production, training and access to markets, on the other hand. Under the treaties, some of these national regulations could be removed as non-tariff barriers to free trade. But in cases where national regulations are legitimated by valid concerns for the environment, work safety and consumer protection, Europe was, and indeed is, faced with a choice of different co-ordination strategies to achieve a greater degree of compatibility among national legal systems.

Admittedly, the possibility of choice was not initially perceived. Until the mid-1980s, European harmonization strategies were clearly motivated by the goal of attaining maximal uniformity, and EC directives were notorious for attempting to regulate all matters in the most comprehensive fashion possible, and down to the smallest detail. However, the institutional difficulties associated with this approach became ever more obvious. The Luxembourg compromise of 1966 had made EC action dependent upon unanimous agreement in the councils of ministers. As a consequence, harmonization was bogged down in cumbersome and time-consuming processes which could never keep up with the inventiveness of national regulatory practices. Thus, attempts at harmonization may in fact have impeded, rather than expedited, the removal of national barriers to European free trade. Moreover, even when uniform European rules were finally adopted, their practical application still depended upon highly diverse patterns of implementation in national administrative systems. In short, the attempt to integrate the European market by trying to "unify" the diversity of national regulations through harmonization was, under the institutional conditions of the EC, a game that could not be won.

The Commission responded in its 1985 white paper on the completion of the internal market by announcing that, in the future, harmonization would be replaced by the obligation placed on all member states to recognize national decisions on product licensing (Kommission 1985).[2] In effect, this would have completely abandoned all attempts at hierarchical or negotiated co-ordination in favor of a form of co-ordination by means of mutual adjustment in which the "competition among national regulatory systems" would have been decided by the consumer (or, in the case of educational and training systems, by the employer). Since, however, consumers could only be expected to respond to those qualities of a given product which visibly affected their use—and not to the local conditions of its production—compulsory mutual recognition would ultimately have amounted to competitive deregulation for certain types of environmental or work-safety rules (Scharpf 1989).

This was, however, apparently not the intention. The Commission has instead developed new regulatory methods, which uphold the goal of European co-ordination, but nevertheless seek to reduce the difficulties of consensus-building and minimize the practical importance of differences in the implementation conditions existing in various national administrative systems. These solutions differ according to whether a product-related (or mobility-related) regulation is involved or a production site-related one.

1 There are clear economic considerations favoring European harmonization of product-related regulations of work safety, environmental and consumer protection: European industries remain at a disadvantage *vis-à-vis* their US and Japanese competitors if their enlarged "home market" still requires adjustment to twelve different regulatory systems. Thus, there was little resistance from industry when the Commission proceeded to reform the extremely slow and cumbersome process of harmonization. Under the new procedure the Council of Ministers will only decide on legally binding "principles" of product safety, whose detailed specification is then left to non-governmental committees on standards, such as CEN, CENELEC or ETSI (Kommission 1990, 1991). National organizations on standards as well as European associations of the affected industries are represented on these committees, but there is also some representation of unions, consumers and environmental groups (whose organization on the European level was often initiated, or at least supported, by the Commission). The standards agreed upon in these committees are not legally binding. However, products that

2 A further step was the partial transition from the unanimity rule of the Luxembourg compromise to voting by qualified majority, which somewhat improved the institutional capacity of the EC to adopt uniform solutions.

conform to them are presumed to be in accordance with the legally binding safety principles and must be automatically admitted in all member states. Firms are free to deviate from the agreed standards, in which case, however, they carry the burden of providing conformity with the safety principles (Voelzkow 1993; Eichener 1993).

The more abstract formulation of safety principles has made it easier to reach agreement in the Council of Ministers. Governments need no longer fight to the last detail for the interests of their national industries; they can leave this to the representatives of affected interests in the standards committees. Even there, moreover, agreement is facilitated by the fact that it is ultimately left to the firms themselves whether they want to conform to the agreed norms or pursue their own solutions at their own risk. Those who choose to conform, however, are protected against the vagaries of national administrative procedures by the presumption that their product meets legally binding European requirements. Thus, the new standardization process not only facilitates consensus-building in the Council of Ministers, but also eliminates the problems of non-uniform implementation at the national level.

2 The economic necessity of European co-ordination is much less evident in production-related regulations than in product-related regulations. By definition, what is involved here are not trade barriers that would prevent gasoline from refineries with high toxic emissions or chemicals from factories with low worker-safety standards from being marketed; the repercussions of free competition on production sites with high environmental protection or work-safety costs are involved here. Hence, unlike the case of product-related safety standards, European interventions cannot be directly justified in terms of the guarantee of the four basic economic freedoms. According to the principles of free trade, countries with a low priority for environmental protection ought to be able to benefit from this comparative advantage in the European-wide competition among production sites. Conversely, countries with a high preference for environmental protection would have to pay for it through higher factory productivity or lower wages (Streit/Voigt 1991). However, this argument ignores the possibility that, in a unified internal market, the unconstrained "competition among regulatory systems" could have the structure of a "prisoner's dilemma," in which even countries with a high preference for environmental protection would drive each other to competitive deregulation. Regulations against "ruinous competition" among European production sites may, therefore, be economically legitimate, even though here, in particular, interest conflicts among countries will make it difficult to reach agreement.

It is thus understandable that the EC has so far dealt with production site-related regulations in only a few areas, such as in clean air policy, where European-wide co-ordination could be justified not only by considerations of equal competition, but also by the need to prevent the external effects of trans-border air pollution. It is interesting to note, however, that the Commission has changed its regulatory strategy several times in this area (Héritier 1995). Initially, directives were "intromission-related," defining air-quality standards at the local or regional level, but these ran into serious implementation problems and had little practical effect (Knoepfel/Weidner 1980). In the 1980s, therefore, the Commission took the German large-scale furnace regulation as its model; this limited the maximum permissible emissions of certain types of industrial and power plants without regard to existing differences in local air quality. But, owing to the resistance of Great Britain and other countries with relatively low levels of air pollution, the limits that the Council of Ministers was able to pass did not, admittedly, represent very high standards. In the mean time, the Commission has returned to air-quality standards, on which it is easier to reach agreement, but they have supplemented these with procedural directives regulating the methods of measuring air pollution, the criteria for environmental impact assessments, rights of participation in evaluation and licensing procedures, and public access to all the data obtained in these ways (Héritier 1993, 1995).

Given the basic legitimation problems and conflicts of interest associated with production site-related regulations, the new course of the Commission seems to be a highly plausible strategy. By setting uniform (though not particularly high) emission standards, a lower limit was defined which at least reduces the temptation for national governments to gain major competitive advantages by forgoing environmental protection. If the Commission had tried to go further by prescribing uniform higher standards, it would have exceeded its mandate. But what it can, and eventually will, do is to create informational and procedural opportunities for political processes at national and subnational levels which will critically examine and adjust their own levels of aspiration. This would be no mean accomplishment—and it is perhaps more than national governments and administrations will willingly implement.

3 Mobility-related education and training policy provides another example of the present strategy of the Commission. Here, too, only very slow progress has been made in harmonizing national regulations for training and examinations. By contrast, the scholarship and grant programs for student and teacher exchange (COMETT, ERASMUS, LINGUA) have been relatively successful; they have now created a dense network of co-operating

> educational institutions and, especially at polytechnic level, a whole series of joint (multinational) courses of study. This has aroused interest, among the participating institutions and their associations, in shared criteria for the mutual recognition of training certificates and periods of study, and in the development of common curricula. As a consequence, some observers have even identified an "autodynamic" convergence of European higher education systems with regard to the duration and organization of courses of study, admission standards, curricula and substantive content—which in turn is preparing the ground for future directives on the mutual recognition of educational certificates (Teichler 1989; Schinck 1992).

All three of the above examples reflect the efforts of the Commission to reduce the need for consensus in the Council of Ministers. Perhaps in anticipatory response to discussion of the subsidiarity principle, the previously predominant technique of fully "unified" harmonization is being supplemented or replaced by other, less conflict-prone co-ordinating techniques. Apparently, the intention is now to avoid, as far as possible, the detailed establishment of substantive norms in the Council of Ministers which would then have to be converted into national laws and administratively implemented in the member states. Instead, the aim is to take the greatest possible advantage of corporatist, quasi-governmental or subnational processes of norm formation, concretization and enforcement. However, the three examples also demonstrate that the alternative procedures have highly divergent costs for individual member states.

Thus, the new procedure for regulating equipment safety definitely reduces the need for consensus in the Council of Ministers, where agreement is now only needed on the safety principles, rather than on the details of regulation. As a consequence, the policy-making capacities of the EC are increased and, at the same time, national parliaments are spared the indignity of having dutifully to transform into national law all the over-detailed directives emanating from the Brussels bureaucracy. Moreover, European industry is left with sufficient room for innovation. But, clearly, this form of reduced political involvement will be attractive only to member states, such as Germany, which are already used to delegating considerable norm-setting authority to corporatist or professional associations (Voelzkow 1993). For them, the transition to European standardization procedure may even amount to an increase in national influence. In those countries, however, where corporatist self-regulation has so far played a major role, because the state has retained control over the definition of technical standards of work safety, environmental and consumer protection, the shift to European committees on standards implies an abdication of political responsibility, a loss of national influence and, possibly, even a loss of political legitimacy.

As is true of the delegation of authority to corporatist standardization associations in the field of product-related regulation, the shift towards informational and procedural requirements in the field of air-quality policy is also not equally attractive for all countries. In the German legal and administrative culture, for example, the dominant focus is on substantive law, whose application is fully controlled by an elaborate system of judicial review, while the procedural aspects of administrative decisions are treated as a relatively minor concern (Scharpf 1970). Precisely the opposite is true of the practice of US regulatory agencies, which served as the point of reference for British environmental policy reforms in the 1980s, and which now defines the strategy of the European Commission (Majone 1990b, 1992). As a consequence, from the point of view of German administrators and regulated firms, the new procedural directives of the Commission involve more far-reaching and uncomfortable changes of past practices than would have been true of a further tightening of substantive emission standards, while the opposite is true for Great Britain (Héritier 1995).

Finally, in the field of education and training, development is still in a state of flux. But there is at least a chance here that the European Union may avoid the high degree of legislative standardization characteristic of the German model of interlinked federalism. There is a possibility that non-governmental forms of self-co-ordination will be able to provide the transnational compatibility among educational institutions which is a prerequisite of personal mobility in a unified European market. This would be in keeping with the American model, where self-organizing accrediting institutions play a central role in defining and monitoring the standards of educational establishments and specific courses of study, while direct federal regulations are of only minor importance (Wiley/Zald 1968). If this pattern were to prevail in Europe, it would again be more acceptable for those countries that already rely to some degree on the autonomous self-government of their universities and professions, while the costs of adaptation would be higher in countries where schools, universities and the professions are strictly regulated and administered by the state.

Contours of a Multilevel Policy System

These few examples are sufficient to show that it is even difficult to find a common understanding of what type of European policy would be most heedful of the political and institutional autonomy of national and subnational polities. In my view, this has two implications. On the one hand, the criteria for European solutions that are heedful of member state autonomy cannot be defined

exclusively in terms of the institutional status quo of the member states or of their short-term costs of adaptation. They must relate, instead, to the future constitution of a multilevel European polity which will require complementary adjustments of the forms of governance at both the European level and that of member states. Second, given the general difficulty in defining forms of European regulation compatible with high degrees of member state autonomy, there must be a more precise and restrictive definition of the types of problem for which co-ordination at the European level is indeed indispensable. Objectively unnecessary "over-co-ordination" is even more damaging in the European Union than it is in German federalism (Scharpf 1988).

Moreover, both conditions are closely connected. The connection is obvious if one looks at the American system of secondary and higher education which continues to exist under the authority of the individual states, with only a minimal degree of federal regulation and without a German-style standing conference of state ministers of education. However, in a fully integrated economy and a highly mobile society, the absence of "harmonization" through central government regulations, or explicit self-co-ordination among the states, seems tolerable only because the states themselves have not attempted to establish tight controls over their educational establishments, or to insist on the close linkages between the educational and occupational systems typical in Europe. Given the enormous diversity and qualitative differences among secondary schools, colleges and universities, it would, for example, be completely impossible to make university access generally dependent on the graduation certificates of secondary schools, as is common practice in Europe. Instead, colleges and universities are free to select their students according to their own criteria. Among these criteria, however, the applicants' scores in the Scholastic Aptitude Test (SAT) play a special role. The test is administered nationwide (and even internationally) by a private testing organization; almost all college applicants take it; and secondary schools preparing their students for college must, at the very least, take the requirements of this test into account in the design of their curricula.

Thus, in the terminology of technical co-ordination, the SAT fulfills the function of a standardized interface between high schools and colleges. It makes the transition between systems possible, without divesting schools of their freedom to design their own curricula and colleges of the freedom to define their own admissions criteria. A somewhat greater degree of standardization is reached in the field of professionally oriented studies through the accreditation of medical and law school programs by the major professional associations (the American Bar Association, the American Medical Association). Moreover, at least in medical training, this is also a precondition for admission to the nationally administered certification examination (Döhler 1993a, 1993b). For law

students, on the other hand, admission to the legal profession continues to depend on bar exams administered by the bar associations of individual states. Thus, there are no national regulations of legal education and no uniform rules governing the examination of law students at the end of their studies. Indeed, individual states are not even obligated by federal law to recognize the bar exams of other states. Instead, every law school defines its own curriculum and its own graduation requirements according to its own judgment, and there are private cramming courses in preparation for the bar exams of individual states. In the terms of technical co-ordination discussed above, what we have here is in fact nothing more than a conversion-based solution.

The American example shows two things. The need for central government harmonization is drastically reduced if member states shape their own regulations so as to facilitate, rather than restrict, interstate mobility. At a minimum, they must provide opportunities for outside applicants to achieve conformity to national standards without having to bear excessive costs. Even more important, by reducing the scope and comprehensiveness of their own regulations, member states may create space for non-governmental forms of self-co-ordination which, in turn, will reduce the need for central co-ordination.

Conversely, the initial regulatory maximalism of the European Community is explained not only by an unthinking analogy to the practice of uniformity-maximizing nation states, but also by the fact that the existing regulations of the member states were not only heterogeneous, but also comprehensive and rigid—and that their effects were not only protectionist but also extremely hostile to transnational mobility. If this is the case, and if European regulatory maximalism can no longer be maintained, the search for European forms of regulation that are more heedful of national and subnational autonomy can only succeed if member states will, with the same zeal, avoid policies that are incompatible with the purposes of the larger Community and with increasing mobility. In this regard, Europe could learn a lot from US practices, which, in a completely integrated economy and a highly mobile society, have so far been able to avoid much of the harmonization of state policies which is generally considered indispensable for the creation of an integrated market in Europe.

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3 Negative and Positive Integration in the Political Economy of European Welfare States (1996)

The process of European integration is characterized by a fundamental asymmetry which Joseph Weiler (1981) accurately described as a dualism between supranational European law and intergovernmental European policy-making. Weiler is also right in criticizing political scientists for having focused for too long only on aspects of intergovernmental negotiations while ignoring (or, at least, not taking seriously enough) the establishment, by judge-made law, of a European legal order that takes precedence over national law (Weiler 1994). This omission is all the more critical since it also kept us from recognizing the politically highly significant parallel between Weiler's dualism and the more familiar contrast between "negative" and "positive integration" (Tinbergen 1965; Rehbinder/Stewart 1984), i.e. between measures increasing market integration by eliminating national restraints on trade and distortions of competition, on the one hand, and common European policies to shape the conditions under which markets operate, on the other hand.

The main beneficiary of supranational European law has been negative integration. Its basic rules were already contained in the "primary law" of the Treaties of Rome. From this foundation, liberalization could be extended, without much political attention, through interventions of the European Commission against infringements of Treaty obligations, and through the decisions and preliminary rulings of the European Court of Justice. By contrast, positive integration depends upon the agreement of national governments in the Council of Ministers; it is thus subject to all of the impediments facing European intergovernmental policy-making. This fundamental institutional difference is sufficient to explain the frequently deplored asymmetry between negative and positive integration in EC policy-making (Kapteyn 1991; Merkel 1993). The most likely result is a competency gap, in which national policy is severely restrained in its problem-solving capacity, while European policy is constrained by the lack of intergovernmental agreement. To the extent that this is true, the political economy of capitalist democracies, which had developed in Western Europe during the postwar decades, is being changed in a fundamental way.

Negative Integration: The Loss of Boundary Control

In the history of capitalism, the decades following the Second World War were unusual in the degree to which the boundaries of the territorial state had become coextensive with the boundaries of markets for capital, services, goods and labor.[1] These boundaries were by no means impermeable, but transactions across them were nevertheless under the effective control of national governments. As a consequence, capital owners were generally restricted to investment opportunities within the national economy, and firms were mainly challenged by domestic competitors. International trade grew slowly, and since governments controlled imports and exchange rates, international competitiveness was not much of a problem. While these conditions lasted, government interest rate policy controlled the rate of return on financial investments. If interest rates were lowered, job-creating real investments would become relatively more attractive, and vice versa. Thus, Keynesian macro-economic management could smooth the business cycle and prevent demand-deficient unemployment, while union wage policy, where it could be employed for macro-economic purposes, was able to control the rate of inflation. At the same time, government regulation and union collective bargaining controlled the conditions of production. But since all effective competitors could be, and were, required to produce under the same regimes, the costs of regulation could be passed on to consumers. Hence the rate of return on investment was not necessarily affected by high levels of regulation and union power;[2] capitalist accumulation was as feasible

1 The pre-First World War period and the 1920s were both times of open capital markets, free world trade and a tendency toward capitalist crisis (Polanyi 1957). In the early 1930s, the major industrial nations responded to the Great Depression with protectionist or even autarkist strategies of competitive devaluation, capital export controls, import restrictions and subsidized exports. As a result, the world economy collapsed. After the Second World War, it took more than two decades of GATT negotiations gradually to re-liberalize international trade, and it took two oil price shocks before the world capital markets were again freed from national control. In retrospect, this gradual transition from closed national economies to an uncontrolled world economy appears to have provided the optimal conditions for "social-democratic" solutions at the national level. Until the mid-1970s, at any rate, Western European societies were able to profit from the economic dynamism of capitalism while stabilizing its fluctuations through Keynesian macro-economic controls, and correcting its distributive inequities through union power and social-welfare policies (Ruggie 1995).

2 In the neo-Marxist political-economic literature, much is made of declining shares of profit in the postwar decades as an indicator of the unresolvable contradiction between the capitalist economy and the democratic state. But since investment would cease when the rate of return on capital becomes negative, governments and unions would become aware of the risks of a profit squeeze for employment and growth—and economies with neo-corporatist institutional structures are in theory, and were in fact, quite capable of avoiding or correcting this strategic blunder (Wallerstein 1990; Scharpf 1991).

in the union-dominated Swedish welfare state as it was in the American free enterprise system.

During this period, therefore, the industrial nations of Western Europe had the chance to develop specifically national versions of the capitalist welfare state—and their choices were in fact remarkably different (Esping-Andersen 1990). In spite of the considerable differences between the "social-democratic," "corporatist" or "liberal" versions of the welfare state, however, all were remarkably successful in maintaining and promoting a vigorous capitalist economy, while also controlling, in different ways and to different degrees, the destructive tendencies of unfettered capitalism in the interest of specific social, cultural and/or ecological values (Scharpf 1991; Merkel 1993). It was not fully realized at the time, however, how much the success of market-correcting policies did in fact depend on the capacity of the territorial state to control its economic boundaries. Once this capacity was lost, through the globalization of capital markets and the transnational integration of markets for goods and services, the "golden years" of the capitalist welfare state came to an end.

Now the minimal rate of return that investors can expect is determined by global financial markets, rather than by national monetary policy, and real interest rates are generally about twice as high as they used to be in the 1960s. So if a government should now try to reduce interest rates below the international level, the result would no longer be an increase of job-creating real investment in the national economy, but an outflow of capital, devaluation and a rising rate of inflation.[3] Similarly, once the territorial state has lost, or given up, the capacity to control the boundaries of markets for goods and services, it can no longer make sure that all competing suppliers will be subject to the same regulatory regime. Thus, if now the costs of regulation or of collective-bargaining are increased nationally, they can no longer be passed on to consumers. Instead, imports will increase, exports decrease, profits will fall, investment decline and firms will go bankrupt or move production to more benign locations.[4]

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3 Conversely, national monetary policy does have the power to attract capital, by setting national interest rates above the international level. But in doing so, it will raise the exchange rate, which decreases the international competitiveness of the national economy.

4 In theory, they could still be passed on to consumers through a devaluation of the national currency. However, regulations and wage settlements tend to affect specific branches of industry, rather than the economy as a whole. The loss of competitiveness may thus not be general enough to be fully compensated (from the point of view of the affected industry) by adjustments of the exchange rate. Moreover, under the conditions of global currency speculation, export competitiveness is no longer the most important factor determining exchange rates. In addition, an independent central bank whose primary goal is price stability is perfectly capable of stabilizing the exchange rate at a higher level than would be justified by the international competitiveness of the national economy.

Thus, when boundary control declines, the capacity of the state and the unions to shape the conditions under which capitalist economies must operate is also diminished. Instead, countries are forced into a competition for locational advantage which has all the characteristics of a Prisoner's Dilemma game (Sinn 1994). The paradigmatic example of this form of "regulatory competition" was provided, during the first third of this century, by the inability of "progressive" states in the United States to regulate the employment of children in industry. Under the "negative commerce clause" decisions of the Supreme Court, they were not allowed to prohibit or tax the import of goods produced by child labor in neighboring states. Hence locational competition in the integrated American market prevented all states from enacting regulations that would affect only enterprises within their own state (Graebner 1977). In the same way, the increasing transnational integration of capital and product markets, and especially the completion of the European internal market, reduces the freedom of national governments and unions to raise the regulatory and wage costs of national firms above the level prevailing in competing locations. Moreover, and if nothing else changes, the "competition of regulatory systems" that is generally welcomed by neo-liberal economists (Streit/Mussler 1995) and politicians may well turn into a downward spiral of competitive deregulation in which all competing countries will find themselves reduced to a level of protection that is in fact lower than preferred by any of them.

If nothing else changes—but what might change is, again, illustrated by the child-labor example. In the United States it was ultimately possible—after the "constitutional revolution" of 1937—to solve the problem through legislation at the federal level. Similarly, in Europe there is a hope, at least among unions and the political parties close to them, that what is lost in national regulatory capacity might be regained through social regulation at the European level. Against these hopes, however, stands the institutional asymmetry of negative and positive integration, which was mentioned in the introduction.

In the abstract, the desirability of negative integration, or liberalization, is not seriously challenged in the member states of the Union. The basic commitment to create a "common market" was certainly shared by the governments that were parties to the Treaties and by the national parliaments that ratified these agreements. It found its legal expression in the "primary law" of Treaty provisions requiring the elimination of tariff and non-tariff barriers to trade and the establishment of a system of undistorted competition. What may not have been clearly envisaged in the very beginning were the doctrines of the direct effect and supremacy of European law that were early on established through decisions of the European Court of Justice. Why national governments should have acquiesced in these decisions has become an interesting test case for competing

approaches to integration theory.[5] In the present context, however, the explanation is less interesting than the effect of their acquiescence. Once the direct effect and supremacy of European law was accepted, the Commission and the Court of Justice had the opportunity to continuously expand the scope of negative integration without involving the Council of Ministers.[6] At the same time, under the Luxembourg Compromise of 1966, measures of positive integration could be blocked in the Council by the veto of a single member government.

The political-economic significance of this institutional asymmetry becomes clear when it is compared to the situation under national constitutions. Even in the Federal Republic of Germany, where neo-liberal theory has gained the greatest influence on the constitutional discourse, the neo-liberal concept of a "social market economy" does not imply the single-minded perfection of a competitive order, but has been defined, by its original promoter, as the combination of the "principle of market freedom with that of social compensation" (Müller-Armack 1956: 243). Moreover, the German Constitutional Court has consistently refused to grant constitutional status to any economic doctrine, neo-liberal or otherwise, insisting instead on the "neutrality of the Basic Law in matters of economic policy." Thus, economic freedom is protected against state intervention only within the general framework of human and civil rights, and the goals of competition policy have no higher constitutional status than all other legitimate ends of public policy. Accordingly, market-creating and market-correcting measures are equally legitimate in principle, and—witness the uneven history of cartel legislation and practice—both have to cope with the same difficulties of finding political support, in a highly pluralistic political system. This is also true in other member

5 Garrett (1992, 1995) interprets the case law of the European Court of Justice in an "intergovernmentalist" frame as the focal point of a latent consensus among governments, whereas Burley and Mattli (1993) point to the existence of serious conflicts of interest. In their ("neofunctionalist") interpretation, the emphasis is on the relative autonomy of the legal system and its effectiveness as a "mask and shield" against direct political intervention. See also Weiler (1981, 1994) and Mattli and Slaughter (1995). What Garrett seems to ignore, within his own frame of reference, is the importance of institutional decision rules: the Court (and the Commission, for that matter) is effectively able to impose outcomes that would not find a qualified majority in the Council of Ministers—but which cannot be corrected by the Council as long as the opposing governments are not themselves able to mobilize a qualified counter-majority (or, when the Court's decision involves an interpretation of the Treaty, unanimous action) in the Council.

6 Negative integration was and is pursued by the Commission primarily through "decisions" and "directives" under Articles 89 and 90 of the Treaty and through action against national infringements of Treaty obligations under Article 169. Of at least the same practical importance is the direct application of European law in ordinary legal disputes before national courts and the possibility, under Article 177, of preliminary rulings of the Court of Justice at the request of any (even inferior) national court. Again, the Council of Ministers is not involved, and national governments will typically appear before the Court only in the role of defendants.

states of the European Community, where, generally speaking, public policy is even less constrained by doctrines of the "economic constitution" type.

It does not follow from the text of the Treaties of Rome or from their genesis that the Community was meant to abolish this constitutional parity between the protection of economic freedom and market-correcting intervention (VerLoren van Themaat 1987; Joerges 1991, 1994a; Groeben 1992). Nevertheless, through the supremacy of European law, the four economic freedoms and the injunctions against distortions of competition have in fact gained constitutional force vis-à-vis the member states (Mestmäcker 1994: 270) while the corresponding options for social and economic intervention (which at the national level would have competed on an equal footing) are impeded by the high level of intergovernmental consensus required for positive integration at the European level.[7]

Positive Integration: The Limits of Intergovernmentalism

While negative integration was advanced, as it were, behind the back of political processes by the Commission and the Court, measures of positive integration require explicit political legitimation. As long as the Luxembourg Compromise was still applied, indirect democratic legitimacy could be derived from the necessary agreement of all national governments in the Council of Ministers. The price of unanimity was, of course, an extremely cumbersome decision process. The Single European Act of 1986 was supposed to change this by returning, for harmonization decisions "which have as their object the establishment and functioning of the internal market" (Article 100A), to the rule of qualified-majority voting in the Council. As a consequence, the decision process has in fact been accelerated, since it is now no longer necessary to bargain for every last vote (Dehousse/Weiler 1990). However, voting strengths and voting rules in the Council are adjusted in such a way that groups of countries united by common

7 According to neo-liberal theorists, the Community was meant to do no more than to establish and safeguard the postulates of economic freedom and undistorted competition in the European market. Hence the expansion of the European mandate, brought about by the Maastricht Treaty, in the fields of environmental protection, industrial policy or social cohesion, is viewed most critically by authors of this school (Mestmäcker 1992; Behrens 1994). In order to minimize potential damage, it is now also postulated that "the rights of individuals, granted by the Treaty of the European Communities, to participate in commerce across national borders [must] not be encroached upon by measures in the service of the newly established competencies" (Mestmäcker 1994: 286). If this were accepted, the constraints on positive integration would be not only political, but constitutional as well.

interests can rarely be outvoted. In any case, the veto remains available as a last resort even to individual countries, and the unanimity rule still continues to apply to a wide range of Council decisions. Thus, the need for consensus remains very high for measures of positive integration.

Nevertheless, the Community is actively harmonizing national regulations in such areas as health and industrial safety, environmental risks and consumer protection (Majone 1993; Joerges 1994b), and it had in fact begun to do so long before the Single European Act (Rehbinder/Stewart 1984). It is also reported that these regulations are indeed defining high levels of protection in many areas (Eichener 1993; Voelzkow 1993; Héritier et al. 1994). How can these findings be reconciled with my claim that positive integration is impeded by the high consensus requirements in the Council of Ministers?

In order to resolve this apparent puzzle, it is necessary to examine the underlying constellation of interests among governments represented in the Council of Ministers.[8] Unanimous or qualified-majority voting rules institutionalize veto positions—and it is analytically true that—*ceteris paribus*—the existence of multiple veto positions reduces the capacity for political action (Tsebelis 1995). But whether this will in fact result in blockages depends on the actual constellations of interests among the participants. If these are harmonious ("pure coordination games") or at least partly overlapping ("mixed-motive games"), unanimous agreement is possible in principle, and effective solutions can be reached in spite of high consensus requirements. Blockages are only to be expected in constellations of conflicting interests—and even then, agreement may be achieved if the losers can be compensated through side payments or package-deals (Scharpf 1992b). Thus, if positive integration in Europe should run into insurmountable barriers, the likely explanation will be conflicts of interests among member states that are too intense to be settled within the institutional framework of the European Union.

Such conflicts do in fact exist, but they are not everywhere, and there is no reason to think that they are always virulent in areas that substantively and procedurally would be defined as positive integration. In order to show this, I

8 I will limit myself here to the simplest form of "intergovernmental" explanation. It is of course true, as has been pointed out by several critics, that actual interaction patterns are much more complex. In addition to national governments (or the ministries represented in specialized Councils), they include at least the "supranational" Commission and "subnational" interest organizations and firms as players in connected games. I also do not rule out the possibility that, in order to explain specific decisions, two-level games and perhaps much more complex models must in fact be employed. Pragmatically, however, it still makes sense first to exhaust the explanatory power of simple, and hence transparent, models—and to add further complications only when necessary. And at any rate, the agreement of the national governments in the Council of Ministers has remained the critical bottleneck in EC decision processes.

will concentrate on the regulative policies of the Community (thus neglecting the fields of foreign policy and security policy, justice and home affairs, common agricultural policy, technology and industrial policy or the social funds). Disregarding for the moment ideological differences, one may generally assume that rationally self-interested national governments will consider three criteria in evaluating proposed regulations at the European level: (a) the extent to which the mode of regulation agrees with, or departs from, established administrative routines in their own country; (b) the likely impact on the competitiveness of national industries and on employment in the national economy; and—where these are politically activated—(c) specific demands and apprehensions of their national electorates.

The exceptional importance of the expected costs of administrative and procedural adjustment in countries that are committed to active regulation has been identified in studies by Adrienne Héritier and her collaborators (1994). It explains conflicts even between countries that have a common interest in high levels of regulatory protection. However, if agreement is reached at all, it is unlikely to reduce existing levels of protection.[9] In the following analysis, I will therefore concentrate on conflicts over economic and political interests.[10]

There, the boundary separating consensual and conflict-prone constellations can be roughly equated with the conventional distinction between product-related and process-related regulations (Rehbinder/Stewart 1984: 10). In the case of product-related regulations, the continuation of different national quality and safety requirements would perpetuate the very fragmentation of European markets which the Treaties of Rome and the Single European Act were designed to overcome. Since all countries agreed to the creation of the single market, it can also be assumed that the common economic interest in unified European

9 Héritier interprets these conflicts as a "regulatory competition," where certain "high-regulation countries" attempt to influence the mode of European regulations in order to reduce their own adjustment costs. In the present context it is useful to point out that this is not the (Prisoner's-Dilemma-like) "competition among regulatory systems," whose most likely outcome is competitive deregulation. In the processes studied by Héritier, all member states would prefer agreement on European regulations at high levels of environmental protection, but they differ about the style of regulation that the Community should adopt. Thus, their competition resembles the "Battle of the Sexes" game discussed below.

10 More differentiated analyses are possible, and may be indispensable in the study of specific cases. In the area of environmental policy, for instance, governments of economically highly developed and ecologically highly impacted countries must respond to the cross-pressures of employment interests in the industrial sector and of environmentally sensitized voters. In less developed countries, by contrast, employment interests may be reinforced by the resistance of consumers to price increases caused by stringent environmental regulations. In either case, of course, government responses should also depend on the relative importance of the affected industries in the country in question.

standards outweighs divergent interests. Thus, while countries might differ in their substantive and procedural preferences, agreement on common standards is in the end likely to be reached. That is not true for process-related environmental and safety regulations,[11] and it is even less true for social regulations of the processes of production (Lange 1992; Leibfried/Pierson 1992). Since they increase the cost of production, national regulation is rendered increasingly difficult under the dictates of international competition. So it is here that "social-democratic" aspirations for re-regulation at the European level would seem to be most pertinent. But it is also here that economic conflicts of interest among member states must be most acute. In order to justify this proposition, a somewhat more precise analysis of interest constellations seems useful.

In the case of product-related regulations, the interest constellation is shaped by the institutional framework. Under Article 30 of the Treaty, "quantitative restrictions on imports and all measures having equivalent effect" are prohibited between member states. Under Article 36, however, such measures are nevertheless allowed if they are "justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants." In other words, if national regulations should in fact serve one of the purposes specified in Article 36, the default outcome in the absence of a common European regime would result in the continuation of fragmented European markets. Assuming that this is a prospect which all countries will want to avoid, they will still differ with regard to the aspiration level of common European regulations. Rich countries will generally prefer higher levels of consumer and environmental protection than poor countries would like to impose on their own consumers. Thus, the resulting constellation of interests is likely to resemble the "Battle of the Sexes" game (Figure 3-1)—a game in which negotiated agreement is generally difficult, but not impossible to achieve.[12]

Moreover, even when European regulations have been harmonized, Article 100A (4) gives countries with a preference for high levels of protection a chance to introduce national regulations applying even more stringent standards. This changes the default outcome in favor of high-regulation countries and increases

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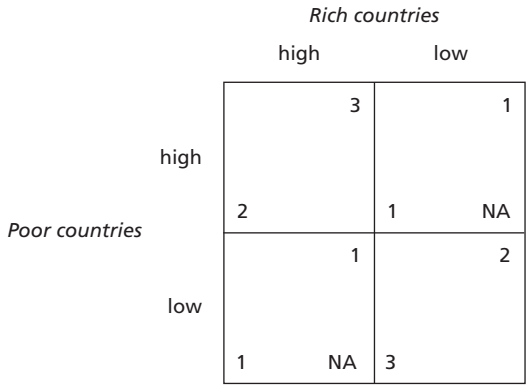
11 Streeck (1995: 10) is correct in pointing out that process-related environmental and safety regulations may create obstacles to trade in the market for machine tools and production plants. For that reason, he includes these in his definition of "market-making," as distinguished from "market-correcting," regulations.

12 Moreover, product-related standardization profits from procedural innovations which minimize the need for consensus in the Council of Ministers by restricting its decisions to the definition of safety principles—whose detailed specification is then left to "corporatist" committees representing the affected industries and national standardization organizations (Eichener 1993; Voelzkow 1993; Scharpf 1994).

Figure 3-1 Preference for high or low European-wide standards in product-related regulations. In case of non-agreement (NA), no common standard is adopted.



their bargaining power in negotiations about the common standard. Thus it is indeed plausible that, by and large, the harmonization of product-related regulations should in fact have achieved the "high level of protection" envisaged for "health, safety, environmental protection and consumer protection" in Article 100A (3) (Eichener 1993).

For process-oriented regulations, however, the institutional framework and the interest constellations are very different. Such regulations do not affect the useability, the safety or quality of products so produced. Steel from furnaces with high sulphur dioxide emissions is indistinguishable from steel produced with the most expensive emission controls—and the same is true for automobiles produced by workers with or without paid sick leave in firms with or without codetermination. As a consequence, there is no way in which Article 36, or any of the other escape clauses contained in the Treaties, could justify excluding, or taxing, or in other ways discriminating against, products produced under conditions differing from those prevailing in the importing state.

Just as in the American child-labor example, the obvious implication is that, in the absence of common European regulation, all member states would find themselves in a Prisoner's Dilemma constellation, in which all would be tempted to reduce process-related regulations, and to cut back on the welfare state, in order to improve their competitive position. By itself, of course, that would facilitate, rather than impede, the adoption of common European standards. The Prisoner's Dilemma loses its pernicious character if binding agreements are possible, and since this is assured in the European Community, European re-

regulation at the level desired by member states should be entirely possible. Yet it is here that the difficulties begin.

There are, first, the differences among national styles of regulation that Adrienne Héritier and her collaborators (1994) discovered in the field of air-quality regulations. As was suggested above, this would constitute a Battle of the Sexes game superimposed on the Prisoner's Dilemma,[13] which, by itself, would not rule out agreement. Greater difficulties arise from manifest ideological differences. Some governments may not share "social-democratic" or "green" preferences for high levels of regulation, and may actually welcome external competitive pressures to achieve deregulation which they could not otherwise push through at home. But since these difficulties may change from one election to the next, they will not be further investigated here. What is unlikely to change from one election to another are conflicts of interest arising from different levels of economic development.[14]

After its Southern expansion, the European Community now includes member states with some of the most efficient economies in the world alongside others that have barely risen above the level of threshold economies. This contrast manifests itself in large differences in (average)[15] factor productivity. Thus, if the economically less developed countries are to remain competitive in the European internal market, their factor costs—in particular their wage costs, non-wage labor costs and environmental costs—have to be correspondingly lower as well. And in fact, industrial labor costs in Portugal and Greece are, respectively, one sixth and one quarter of those in Germany,[16] and differences in the levels of social-security systems (Ganslandt 1993; Sieber 1993) and in environmental costs (Fröhlich 1992) are of the same magnitude.

Now, if these costs were raised to the level of the most productive countries, by harmonizing social-welfare and environmental regulations, the international competitiveness of the economies with lower productivity would be destroyed.

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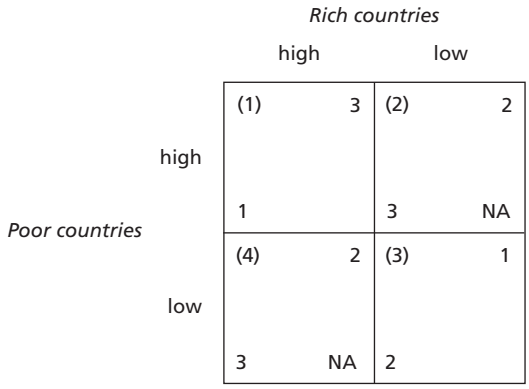
13 Heckathorn and Maser (1987) have labeled this constellation, in which a "cooperative" solution to the Prisoner's Dilemma requires agreement on one of several options that differ in their distributive characteristics, a "Divided Prisoner's Dilemma."

14 In their discussion of environmental policy, Rehbinder and Stewart (1984: 9) focus instead on the distinction between "polluter states" and "environmental states." This appears to be less useful as an explanation of voting behavior in Brussels, since highly developed countries produce more pollution and also have an interest in more stringent, European-wide, environmental regulations.

15 Naturally, Portugal and Greece (just like eastern Germany—Hank 1994) also have islands of above-average productivity, especially in new plants of multinational corporations.

16 According to surveys conducted by the Swedish employers' association (SAF), overall costs of a man-hour in industry ranged in 1993 between 33 Swedish krona in Portugal, 56 krona in Greece and 204 krona in Germany (Kosonen 1994).

Figure 3-2 Preference for high or low European-wide standards in process-related regulations. In case of non-agreement (NA), no common standard is adopted.



If exchange rates were allowed to fall accordingly, the result would be higher domestic prices and, hence, impoverished consumers.

If exchange rates were maintained (e.g. in a monetary union), the result would be deindustrialization and massive job losses—just as they occured in East Germany when the relatively backward GDR economy was subjected to the full range of West German regulations under a single currency. The more enterprises are subject to international price competition,[17] the less democratically accountable politicians in the economically less developed countries could agree to cost-increasing harmonization initiatives.[18] And this is even more true since—in contrast to the relation between East and West Germany—the rich EC countries would certainly not be willing (or even able) to compensate the victims of the industrial catastrophe through massive transfer payments.

Nor would agreement be easier if the costs of social or environmental regulations were not imposed on enterprises, but financed through higher income or consumption taxes. As long as average incomes in the poorest EC countries amount to less than one fifth of average incomes in the rich countries, the less developed EC countries must defend themselves against the European harmonization of environmental and welfare regulations at levels of protection which

17 Of course, the intensity of price competition varies between sectors. For example, in agriculture, "Southern products" hardly compete with "Northern products."

18 Thus, it is not only the opposition of enterprises that stands in the way of a European social policy (Streeck 1995). Governments in economically weaker states must, on their own account, anticipate and try to avoid the exit option of capital.

may perhaps reflect the aspirations and the willingness to pay of citizens in the rich member states, but which are beyond the means of economically less developed countries. Moreover, unlike East Germany in the process of German unification, these countries are fully aware of their own best interests, and the constitution of the European Union provides them with an effective veto. The resulting interest constellation is represented as a game matrix in Figure 3-2.

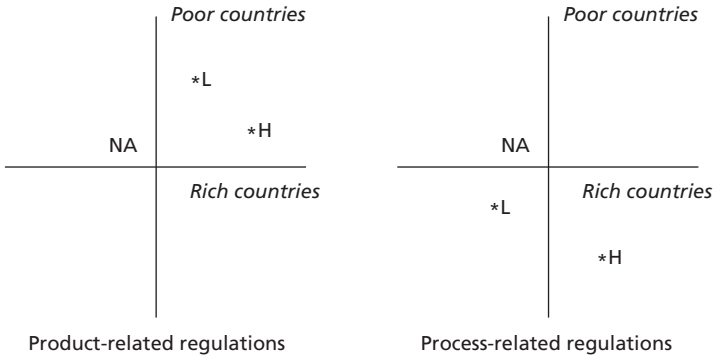
As an illustration, take the case of air-pollution control applied to industrial emissions. Highly industrialized and highly polluted rich countries are likely to have a clear preference for European-wide standards at high levels of protection (Figure 3-2, cell 1), which would also protect their own industries against "ecological dumping," and they would least like to have common (and binding) standards at low levels of protection (cell 3). For the poor countries, by contrast, high standards (cell 1) would amount to the destruction of less productive branches of industry. But even common rules imposing uniformly low standards (cell 3) would be unattractive, since the less productive, indigenous enterprises would then be exposed to the sharper competition of deregulated competitors from countries with high productivity. So, for them, the best outcome would be non-agreement (cells 2 and 4), which would also be the second-best outcome for the rich countries. As a consequence, the status quo is likely to continue.[19]

The differences between negotiations over product- and process-related regulations may become even clearer if the options are represented in the form of two-dimensional negotiation diagrams in which the horizontal and vertical dimensions represent utilities associated with particular outcomes for rich and poor countries, respectively (Figure 3-3). Points H and L represent the location of binding agreements on high standards and low standards, respectively. However, since the origin (NA) is chosen to represent the best outcome that each country could achieve if no agreement on European standards is reached (so that national standards will continue to apply), the negotiation space is effectively limited to the "north-eastern" quadrant above and to the right of the origin.

In the case of product-related regulations, rich countries would prefer agreement on high standards (H), while poor countries would prefer agreement on low standards (L). But both groups of countries would prefer either solution to the outcome associated with non-agreement (NA). Hence both solutions are located within the negotiation space, and agreement on one of them, or on a

19 If the affected branches of industry do not play a major role in the less developed member states, the damage done by European regulations at a high level of protection may be small enough to be compensated by side-payments from the structural and cohesion funds. It is also sometimes suggested that the agreement of some member states to relatively demanding environmental regulations may be a reflection on relatively less demanding practices of implementation.

Figure 3-3 Negotiated agreement on high (H) and low (L) European standards as compared to non-agreement (NA) in the case of product-related and process-related regulations



compromise rule located between H and L, ought to be possible in principle. Of course, under the unanimity rule, bargaining over relative advantage might still drag on, and under unfavorable conditions, negotiations might even fail. Thus it appears completely rational that governments, in the Single European Act, finally agreed to move toward qualified-majority voting specifically for the harmonization of product-related regulations (Article 100A). It permits them to avoid deadlocks and speed up negotiations in constellations where they generally prefer agreement to disagreement.

The situation is different in the case of process-related regulations. Here there is no solution in the upper-right-hand quadrant that would be preferred to the status quo by both rich and poor countries. From the point of view of the poor countries, even the adoption of common European standards at a low level of protection would be worse than the status quo. The rich countries, on the other hand, would prefer to improve their situation by introducing European-wide high-level standards, but this solution could not be imposed against the resistance of poor countries.[20]

To summarize, positive integration at the European level has achieved remarkable progress in the harmonization of product-related regulations, but the harmonization of process-related environmental and welfare regulations is proving much more difficult, while negative integration is effectively restricting

20 Even though the Maastricht Treaty did generally allow for qualified-majority voting on environmental measures (Article 130S), any five of the six countries with the lowest wage and non-wage labor costs in the Union (Portugal, Greece, Spain, Ireland, Britain and Italy) can easily muster a blocking minority against regulations that would damage their competitive position.

national capacities for dealing with the problems generated by the integration of markets for capital, goods and services. If that state of affairs is considered unsatisfactory, one may logically seek for solutions in two directions—either by increasing the capacity for problem-solving at the European level, or by protecting national capacities for effective action even under the conditions of transnationally integrated markets.

Solutions I: Increasing European Problem-solving Capacity?

In the face of pervasive conflict of interest, problem-solving on the European level might be facilitated either through institutional reforms that would increase the capacity for conflict resolution, or through the search for substantive or procedural strategies that are able to reduce conflict to more manageable levels.

Majoritarian Solutions?

Obviously, the capacity for conflict resolution would be most directly strengthened if the Union would continue the move toward majority voting in the Council of Ministers that began with the Single European Act, and gained more ground in the Maastricht Treaty. If decisions generally could be reached by simple majority, the high-productivity countries could, at least for the time being and provided that they are able to agree among themselves, impose high standards on the rest of the Community. But, of course, constitutional changes in the European Union continue to depend on unanimous agreement, and the fact that the Northern enlargement of the Union nearly foundered on the voting issue shows that the presumptive losers are unlikely to agree to a regime in which they might be consistently outvoted. In this regard, the "joint decision trap" (Scharpf 1988) is still in good repair.

Moreover, if it were possible to move further toward majority voting in the Council of Ministers, the debate about the "democratic deficit" in the European Union would resume with a vengeance. As long as the democratic legitimacy of European governance must rest primarily on the agreement of democratically accountable national governments, the citizens of countries whose governments are outvoted have no reason to consider such decisions as having democratic legitimation.[21] In fact, even the cautious expansions of qualified-majority voting

21 The theoretical background of this proposition can only be suggested here (Scharpf 1970). A need for legitimation arises when decisions override the preferences of some affected parties.

in the Single European Act and in the Maastricht Treaty have triggered judicial responses and public debates in the member states which are so critical of the legitimacy of majority decisions in the Council that any further progress will need to be based on more solid foundations of legitimation (Groeben 1992; Weidenfeld 1995).[22]

Many of the critics still assume that the most appropriate solution was defined by the Spinelli draft constitution, which would have transformed the European Community into a federal state with a bicameral legislature, consisting of the directly elected European Parliament as the first chamber with full legislative and budgetary powers, and the Council as a second chamber representing member state interests in the fashion of the German *Bundesrat*. The Commission would then take the place of a European government, elected by and accountable to the European Parliament (Williams 1991; Featherstone 1994). What stands in the way is, of course, the institutional egotism of member state governments that are unwilling to relinquish their own control over European policy-making. But that is not all. Proposals of this type also rest on weak foundations in democratic theory.

Democratic legitimacy is, after all, not merely a question of the formal competencies of a parliament. Representation and majority rule will assure legitimacy only in the context of (a) the pre-existing collective identity of a body politic, which may justify the imposition of sacrifices on some members of the community in the interest of the whole; (b) the possibility[23] of public discourse over which sacrifices are in fact to be imposed for which purposes and on whom; and (c) the political accountability of leaders who are visible to the public and are able to exercise effective power.

Until recently, the European Community was able to rely primarily upon an "output-oriented" form of legitimacy, for which the maximization of common welfare and the fair allocation of costs and benefits are crucial criteria. But as European interventions have become more frequent, more important and their allocative effects more visible, "input-oriented" legitimacy (involving democratic discourse and the democratic accountability of decision-makers) have gained in salience.

22 This is not meant to deny the possibility of non-majoritarian forms of legitimation (Majone 1994a, 1994b; Dehousse 1995). But the respect for expertise, impartiality and procedural fairness which may legitimate the decisions of courts, central banks or American-style independent regulatory commissions is unlikely to do much for the legitimation of the results of political horse-trading in the Council of Ministers.

23 It is often argued that the European Community should not be held to ideal but unrealistic standards of democratic practice which are frequently violated in all member states. In my view, this misses the point. Under modern conditions, democracy can only be defined as a potential or, as it were, a fleet-in-being. It is neither possible nor necessary that *every* matter be dealt with in the full light of public attention, as long as office-holders reckon with the possibility that *any* case may become politicized. When that is assured, the "law of anticipated reactions" must do the rest.

In the history of democratic governance, these preconditions have so far not yet been satisfied anywhere above the level of the nation-state (Calhoun 1993; Dahl 1994). They are not now satisfied in the European Union, and it is certainly not clear that they could be created in the foreseeable future (Grimm 1992; Kielmansegg 1992; Scharpf 1992a, 1993). As of now, in any case, the political–cultural identity of the European Union is still very weak (Wilson/Smith 1993); the lack of a common language is a major obstacle to the emergence of a European-wide public discourse (Gerhards 1993); and, as a consequence, we have no European-wide media, no European-wide political parties and no political leaders with European-wide visibility and accountability. These conditions are not easily changed by constitutional reforms,[24] and as long as they prevail, majority votes in the European Parliament will not do much for the acceptance of decisions in countries or groups whose interests are being sacrificed.

For the time being, at any rate, it is, then, unlikely that institutional reforms could greatly increase the capacity for conflict resolution on the European level. Thus Weiler's (1981) diagnosis, cited at the beginning of this chapter, will continue to hold: in contrast to the legal processes defining and enforcing the supranational law of negative integration, the political processes required for positive integration will retain their intergovernmental character and will be easily blocked when national interests diverge. If that is so, however, it seems worthwhile also to explore the possibility that conflict-minimizing European strategies might nevertheless be able to deal effectively with problems that can no longer be handled at the national level.

Conflict-avoiding Solutions?

There are in fact a whole range of such strategies (Scharpf 1994). One has already been mentioned above. In the harmonization of product-related standards, agreement is facilitated by restricting Council involvement to the formulation of "principles," and by leaving details to be worked out in corporatist standardization bodies. Moreover, in process-related environmental regulations,

24 In my view, further increases in the legislative competence of the European Parliament are not the most promising short-term strategy, since they would also render European decision processes even more cumbersome than they are now. Instead, if the President of the Commission were elected by, and fully accountable to, the European Parliament, this would help to focus media attention on a highly visible position of political leadership; it would require parties in the Parliament to present candidates with a European-wide appeal; and it might, in due course, lead to the formation of European-wide political parties (Weidenfeld 1995). As Dehousse (1995) points out, however, the introduction of party-political orientations in the Commission might render its relations to national governments in the Council more difficult than they are now—an argument that finds ample support in the practice of German federalism.

Article 130T now generally allows any member state to maintain or introduce more stringent protective measures, provided that they "must be compatible with this Treaty" (i.e. with negative integration). Thus, one way to overcome the blockage described above would be to agree on minimum levels of protection that are just barely acceptable to the poor member states, while the economically more advanced countries remain free to maintain the higher standards which they consider necessary.

But how could this be considered an effective solution? For countries that had very low standards to begin with, it is true, the common standard might well require substantial improvements. But high-standard countries would still find themselves in the Prisoner's-Dilemma-like "competition among regulatory systems" that had prevented the American states during the first third of this century from adopting child-labor regulations.

For this problem, a partial solution was provided by the Commission's switch from German-type emissions standards to the air-quality standards favored by the British government (Héritier et al. 1994). Since, on the whole (except for metropolises like Athens), air pollution is more of a problem in the highly industrialized regions of the Community, the seemingly uniform standard will generally require the economically more advanced countries to adopt more stringent anti-pollution measures than are needed in the less developed countries. Thus, the differential impact of air-quality regulation will not only facilitate the agreement of poor countries to higher standards, but it will also protect high-regulation countries against the temptations of competitive deregulation.

But, of course, the lucky accident by which the intensity of the pollution problem varies directly with the ability and willingness of countries to pay for solutions cannot always be relied upon. It would not have worked, for instance, in the paradigmatic case of child-labor regulations. Nevertheless, there may be a generally useful lesson to be learned from air-quality regulations: it is not necessarily true that European harmonization, in order to be useful, must have the same impact on all member states or regions of the community.

Regulation at Two Levels?

More specifically, I am suggesting that the obstacles to agreement on process-related regulations might be considerably reduced by a variant of the idea of a "Europe with variable geometry," which, as far as I know, is not being considered in present discussions of institutional reform of the Community.[25] This sugges-

25 Overviews of earlier discussions and actual practices are provided by Nicoll (1984) and Langeheine and Weinstock (1984). There have also been proposals for a "Europe of relativities"

tion is based on the assumption that the Prisoner's Dilemma game that European countries are forced to play against each other, in the presence of negative integration and in the absence of European-wide harmonization, is not played with equal intensity among all member states. The competition among regulatory systems is likely to be most acute between countries that are in direct economic competition because they produce the same type of goods at similar levels of productivity and of production costs. By contrast, countries producing at very different levels of productivity and production costs are generally not directly competing against each other in the same markets. If this is true, the failure of adopting a single European-wide standard would imply that at least two separate Prisoner's Dilemma games are being played, one among the economically most efficient countries that are able to compete on productivity, and the other one among the less efficient economies that must compete on factor costs.

On this analysis, the solution seems obvious: in order to stop the pressure toward competitive deregulation,[26] there is clearly a need for the harmonization of process-related regulations at the European level—but there is no need for a single, uniform standard. Instead, what would be needed is an explicit agreement on two standards offering different levels of protection at different levels of cost. The rich countries could then commit themselves to the high-standard regulations that are in keeping with their own levels of environmental and social aspirations, while the less developed countries could establish common standards at a lower level that would still protect them against the dangers of ruinous competition among themselves. In the course of their economic development, the lower standard could of course be raised, step by step, and brought into line with the higher one.

Compared to the difficulties of reaching agreement between rich and poor countries on European-wide uniform standards, negotiations on double standards should be much easier (Figure 3-4). Moreover, in contrast to other proposals for a two-speed Europe, the club of high-regulation countries would have no interest at all in excluding applicants who think that their country is able to conform to the more demanding standards. The most difficult choice would have

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which would generally define common European standards in terms of criteria that are sensitive to differences in the level of economic development. For example, the revenue to be raised by an EC-wide environmental tax might be defined as a percentage of GDP in order to avoid disproportional burdens on the less developed member states (Weizsäcker 1989). Similar models are also being discussed in reference to social policy.

26 Remarkably, negative integration in the European Community includes elaborate injunctions against distortions of competition created by subsidies, preferential public procurement and other forms of "affirmative action" favoring national producers—but apparently none against the practices of competitive deregulation.

Figure 3-4 Process-related regulations with the option of a double standard; NA = outcome in the case of non-agreement

Poor countries \ *Rich countries*	high	low	double
high	4 1	2 3 NA	2 3 NA
low	2 3 NA	1 2	2 3 NA
double	2 3 NA	2 3 NA	3 4

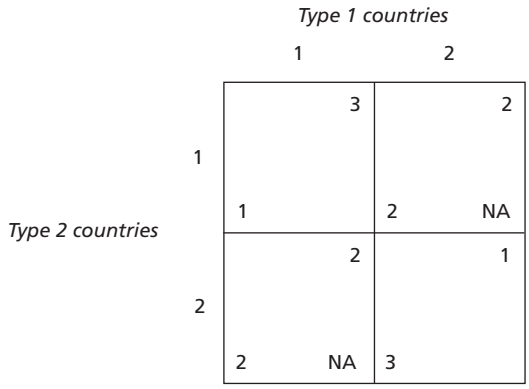
to be faced by countries "in the middle," like Britain or Italy, who would need to decide whether they dare to compete on productivity or must compete on cost.

But What if Institutions Matter?

So far we have looked only at the negotiations between rich and poor countries, and we have assumed that within each of these groups agreement should be relatively unproblematic—provided that national differences in the styles of regulation are not of very high salience. But what has been said applies fully only to the harmonization of process-related environmental regulations. In the case of industrial-relations and social-welfare regulations, by contrast, even harmonization at two levels would run into enormous difficulties because of the much greater salience of qualitative and institutional differences. Thus, while it may be assumed that all countries would prefer a less polluted environment if they could afford it, that assumption of common aspirations cannot be made in the industrial-relations and welfare fields (Esping-Andersen 1990).

Sweden and Switzerland, for example, are economically among the most highly developed countries in the world, and yet they differ greatly in the share of GDP which they devote to publicly provided welfare transfers and services. And

Figure 3-5 Harmonization of welfare and industrial-relations regulations among countries of a similar level of economic development, but with different types of institutions; NA = non-agreement



while Germany and Britain have similar levels of union density, they have different structures of union organization and radically different collective bargaining systems. Even more important is the fact that German industrial relations are embedded in highly developed, and judicially enforced, systems of labor law, collective-bargaining law and codetermination law, while British labor relations have, from the beginning of this century, developed under the maxim of "free collective bargaining" and on the understanding that the law of the state should not interfere with the interactions between capital and labor. Thus, it may be true that, quite apart from any cost considerations or possible side-payments, any kind of legal regulation of industrial relations at the European level would be unacceptable not only to employers but also to unions in Britain. By contrast, unions in Germany, or in Austria and France for that matter, have come to rely precisely on the legal effectiveness and judicial enforceability of state regulations (Crouch 1993). And, of course, these institutional differences are defended by politically powerful organized interests which no government could lightly disregard.

In the fields of social welfare and industrial relations, therefore, the constellation of interests even among countries at high levels of economic development cannot be interpreted as the relatively benign Battle of the Sexes game which we postulated in the field of environmental regulations. Instead, if we assume that the high-regulation group of countries includes two qualitatively different types of institutional arrangements, we would have a game constellation in which both sides might prefer non-agreement over agreeing to a harmonized system of different characteristics (Figure 3-5).

Potentially quite similar constellations of interest are likely to exist in all areas where institutional differences between member states are of high political salience—either because powerful interest groups will defend the institutional status quo, or because the traditional institutional structure has become an element of social and political identities. This is most obviously true of political and administrative institutions themselves, but it is also true of the institutional structures in a great many other sectors which, in all countries, have been protected, in one form or another, against the operation of market forces by the territorial state. Traditionally, at least in Western Europe, these "sectors close to the state" (Mayntz/Scharpf 1995) would have included education and basic research, health care, radio and television, telecommunications, transportation, energy and water supply, waste disposal, financial services, agriculture, and several others.

This is a heterogeneous set, in which the justifications for state involvement vary as widely as the modalities—from the direct provision of services and infrastructure facilities by tax-financed state agencies through customer-financed public or highly regulated private monopolies, and state-supported forms of professional self-regulation, all the way to the state-subsidized private provision of marketable goods and services. What is common to all of them is some form of insulation against unlimited market competition. And what matters here is that the attenuation of market pressures combined with the variety of possible forms of state intervention have generally facilitated the evolution of remarkably different institutional arrangements governing the provision of identical goods and services in the member states of the European Union (see, e.g., Alber/Bernardi-Schenkluhn 1992).

From the point of view of the European Community, practically all these institutional arrangements could be considered as non-wage barriers and, certainly, as distortions of competition. So the logic of negative integration implies that they should be removed—as is currently happening in telecommunications, in air transportation and in financial services. On the other hand, not all of these restrictive and protective institutional arrangements may be without valid justification, so that—under the logic of Articles 36 and 100A, or of Article 76 for that matter, the European harmonization of these sectoral regimes might seem a more appropriate response.

But, then, how could the Council reach agreement on a common European system of financing and delivering health care that would replace the British, Italian and Swedish varieties of national health service systems as well as the French, German and Austrian varieties of systems combining compulsory health insurance and private health care provision with corporatist negotiations between insurance systems and organized providers? Here the obstacles to har-

monization would be at least as great as they are in the field of old-age pensions, where the move from the German pay-as-you-go insurance system to a (perhaps more desirable) common system based on the British two-tier model combining tax-financed basic pensions and (voluntary or compulsory) supplementary private insurance is practically impossible, since the now active generation would be required to pay twice—once for the present generation of pensioners under the old system, and once for their own life insurance under the new system.

A particularly instructive example is provided by the comparison of the telecommunications and energy sectors, which appear rather similar in most economic respects (Schmidt 1995). In both sectors, monopolistic structures had prevailed unchallenged until the mid-1980s, and in both the Commission has been working toward liberalization since then. But while in telecommunications the combination of European liberalization, national deregulation and privatization, and cautious re-regulation at the European level, did succeed with remarkable speed (Sauter 1995), the Commission's repeated attempts to liberalize the European electricity market have so far failed in the Council. As Susanne Schmidt (1995) has shown in her comparative study, one of the two important factors explaining the different trajectories of liberalization is institutional differences.[27] Whereas in telecommunications, institutional structures in all Western European countries had, by the 1970s, converged on a single model of public PTT monopolies which were the owners of the physical networks as well as the suppliers of all services and terminal equipment (Schneider 1995), the electricity sector is characterized by considerable institutional heterogeneity. While there are network monopolies everywhere, these may be nationwide, regional or local; they may be owned by the state, or by private investors; they may be restricted to the generation and distribution of electricity, or they may also distribute gas and other forms of energy. Moreover, there are also considerable differences in the regulatory regimes under which these monopolies operate, and in the basic logic of their pricing structures; and there are, of course, also fundamental differences in the way in which the conflict over nuclear energy is handled in each of the member states. As a consequence, liberalization would affect suppliers in different countries in rather different ways, while the call for "harmonization before liberalization" would confront national governments with the even more unpalatable task of challenging vested institutional interests head on.

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27 The other factor Schmidt (1995: 18) identifies is differences in the "default condition," i.e. the economic outcomes to be expected if there should be no agreement on "coordinated liberalization" at the European level. In telecommunications, technical change and international competition would undermine the economic viability of national PTT monopolies, while in electricity, the stability of existing networks would not be affected by purely economic developments.

The short of it is that there are in fact important sectors for which the European-wide harmonization of national regulatory and institutional systems may not be a feasible option. The question there is whether negative integration should nevertheless be allowed to run its course in all sectors in which existing institutional structures can be interpreted as restraints on trade or distortions of competition. If so, existing balances of values and interests incorporated in specific national institutions will be upset. In some sectors, these costs have been considered politically acceptable—but there is no reason to assume that this will be the case everywhere.[28] Where it is not, negative integration will either be forcefully resisted or its consequence may well be social disintegration and political delegitimation of the kind that was caused in East Germany by the destruction of indigenous institutions.

Solutions II: Restoring National Boundary Control?

It seems useful, therefore, also to think about ways in which limits can be set to the unreflected and quasi-automatic advance of negative integration, motivated purely by considerations of economic efficiency, in the European Community. That is, of course, not much of a problem in areas where liberalization must in fact be achieved through decisions of the Council of Ministers. Governments that are seriously concerned about maintaining existing institutional structures are still quite capable of blocking Commission initiatives—as was demonstrated again in 1995 in the failure of attempts to liberalize the European markets for electricity. Governments have no formal power, however, to prevent the Commission from proceeding against nationally privileged "undertakings" by way of directives under Article 90 (3) of the Treaty,[29] and they have even less control over the Commission's use of its power to issue "decisions" against individual governments under the same article, or to initiate infringement procedures be-

28 In Germany or Britain, for instance, this might mean that compulsory user charges supporting public television could be successfully attacked as a subsidy distorting competition by private networks, and that the monopoly of private physicians in ambulatory health care could be invaded by American-style health maintenance organizations. While both changes might be considered highly desirable in some quarters, it is also clear that they would not find the support of democratic majorities at the national level.

29 On the other hand, governments which, for domestic reasons, might not wish to agree to a Council directive may actually prefer deregulation by way of Commission directives and decisions.

fore the Court under Article 169.[30] Moreover, given the direct effect of primary European law, any individual or corporation could challenge existing national institutional arrangements before a national court, which could then obtain a preliminary ruling from the European Court of Justice under Article 177.

Thus, political controls will not generally work—or, more precisely, they work in a highly asymmetrical fashion. As long as the Council must proceed through qualified-majority or even unanimous decisions, a small minority will be able to block positive action, but very large majorities would have to be mobilized to correct any extension of negative integration through decisions of the Commission[31] or of the Court of Justice.[32] The question, then, is whether it may be possible to use legal instruments to limit the capacity of the Commission and the Court to extend negative integration beyond the limits of what the Council would also find politically acceptable.

In Maastricht, it is true, governments took care to exclude the Court from the areas of "a common foreign policy and security policy" and of "cooperation in the fields of justice and home affairs" (Article L). This is, surely, an indication that the Court's power to convert Treaty obligations into supranational law, and to interpret their meaning beyond the original intent of the contracting parties, has finally become a matter of concern to member states. It is also possible that similar concerns about the Court's role may have contributed to the inclusion of a "subsidiarity clause" in Article 3B (2) of the EC Treaty. If they did, however, that purpose is unlikely to be achieved through the clause itself (as distinguished from the change in the political climate which it symbolizes).

By restricting subsidiarity to "areas which do not fall within [the Community's] exclusive competence," negative integration—which, if it is to be practiced at all, must of course be an exclusive European competency—is left untouched—and, as I have argued, it is negative integration where Commission and Court are able to exercise their greatest, and for national autonomy most

30 In the electricity field, the Commission has initiated such actions against France, Denmark, Spain, Italy, Ireland and the Netherlands. Also, the drive towards liberalization in telecommunications was initiated by a successful infringement action against British Telecom in 1985 (Sauter 1995).

31 For instance, when the Commission issued its terminal equipment directive under Article 90 (3), France was joined by Italy, Belgium, Germany and Greece in initiating an (unsuccessful) Article 173 action against key provisions of the directive. If the directive had not been issued by the Commission, but had been introduced in the Council under Article 100A, the objecting group would of course have been strong enough to prevent its adoption (Sauter 1995: 101).

32 In fact, as Susanne Schmidt (1995: 25f.) argues, the mere possibility of "uncontrolled" liberalization by the Court may persuade opponent governments to agree to "coordinated liberalization" through (less far-reaching) Council directives—in the hope that these will be taken into account in the Court's own interpretation of the text of the Treaty.

damaging, power. Moreover, even with regard to positive integration the subsidiarity clause is unlikely to have much legal effect (Dehousse 1993). Given the heterogeneity of conditions and capacities among the member states, it is hardly conceivable that a court could strike down any European measure that was in fact supported by a qualified majority in the Council of Ministers by denying that "the objectives of the proposed action cannot be sufficiently achieved by the Member States." Thus, it is probably more realistic to see the clause primarily as a political appeal for self-restraint directed at the Council of Ministers itself.[33]

What might make a legal difference, for negative as well as for positive integration, is indicated by the very decision which advanced negative integration by a giant step. In *Cassis de Dijon* (120/78 ECR, 1979, 649), the Court did not hold, as is sometimes assumed, that the "mutual recognition" of products licensed by other member states was an unconditional obligation of member states. Before Germany was ordered to admit the French liqueur, the Court had examined the claim that the German requirement of a higher alcohol content was justified as a health regulation, and found it totally spurious (Alter/Meunier-Aitsahalia 1994: 538–539). If that had not been so, the import restriction would have been upheld under Article 36 of the Treaty, which as was noted above, permits quantitative restrictions "justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants," provided that such measures "do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

Thus, the Treaty itself recognizes certain national policy goals that are able to override the dictates of market integration. Admittedly, the Commission, and the European Court of Justice even more so, have done their best to ensure the priority of negative integration by applying extremely tough tests before finding that a national regulation is neither discriminatory nor a disguised restriction on trade. In fact, the Commission has followed a consistent line, according to which product-related national regulations either will be struck down, under *Cassis,* because they serve no valid purpose, or must be replaced by harmonized European regulations under Article 100A (Alter/Meunier-Aitsahalia 1994). What matters here, however, is the reverse implication: national regulations restricting imports that serve one of the valid purposes listed in Article 36 must be allowed to stand unless, and until, European harmonization is achieved.

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33 This would not be meaningless, since member state bureaucracies may in fact use European directives to circumvent parliamentary controls at home. The same tendency of constituent governments to promote "over-integration" at the central level can also be observed in German federalism (Scharpf 1988).

For product-related regulations, therefore, negative integration does not take precedence over positive integration, and the competency gap mentioned in the introduction is in fact avoided. However, that is not true of process-related regulations, which, since they do not affect the quality or safety of the products themselves, would never justify exclusion under Article 36. Moreover, such regulations must also not violate the rules of European competition law (Articles 85ff.), they must not insulate public service agencies against competition (Article 90), and they must not amount to competition-distorting state aid (Article 92).

What is important here is that these prohibitions apply regardless of whether prior policy harmonization at the European level has been achieved or not. One example is provided by European transport policy, which, along with agriculture, was one of the two fields in which the original Treaty had envisaged a fully Europeanized policy regime (Articles 74ff.). Since, in the face of massive conflicts of interest among the member states, the Council had failed to act for more than twenty-five years, it was ordered by the Court (in a proceeding initiated by the European Parliament under Article 175) to establish at least the conditions of negative integration according to Article 75 (1) lit. (a) and (b). Moreover, the Commission and the Court have intervened against national regulations (such as the German levy on road haulage) that could be interpreted as a discrimination of non-national carriers (Article 76). Against the original intent of the contracting parties, therefore, the European transport market is now being actively liberalized, even though agreement on a common European regulatory regime is still not in sight.

If this state of affairs is considered unsatisfactory, one may need to go further in the direction indicated by provisions like those contained in Articles 36, 48 (3), 56 (1), 66 and 100A (4) which allow restraints on the free movement of goods, persons and services if these restraints serve one of the "police-power" purposes of public morality, public policy, public security, public health, etc. In practice, however, none of these exceptions is still of great importance, since the Commission, and even more so the Court, have interpreted them in extremely restrictive fashion—and the same has been true of other provisions, serving similar purposes, such as the partial exemption of infrastructural or revenue-producing national undertakings from the competition rules in Article 90 (2) or the reservation regarding national systems of property ownership in Article 222. In all these instances, the *de facto* priority of negative integration over national policy preferences and institutional traditions has been re-established through judicial interpretation.

It remains to be seen whether the same fate is also waiting for some of the even more explicit reservation clauses introduced by the Maastricht Treaty, as

for instance in Article 126 (1), which permits the Community only a very limited entry into the education field, "while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity." By its language at least, the clause will only set limits to the narrowly circumscribed educational competencies of the Community, but would not otherwise offer immunity against charges that national education systems might represent restraints on trade and distortions of competition in the market for educational services.

If national policy preferences and institutional traditions should have a chance to survive, it seems that more powerful legal constraints are needed to stop the imperialism of negative integration. A radical solution would be to abolish the constitutional status of European competition law by taking it out of the Treaty altogether, leaving the determination of its scope to the political processes of "secondary" legislation by Council and Parliament. This would, at the European level, create a constitutional balance among competing policy purposes as it exists in all national policy systems. In addition, it might be explicitly stated that national legislation will remain in force unless, and until, it is shown to be in concrete conflict with a specific provision of European legislation. This is the law as it has stood in the United States since the demise of the "negative commerce clause doctrine" in 1937 (Schwartz 1957; Rehbinder/Stewart 1984), and this is the *de facto* state of European law with regard to product-related regulations in the market for goods. It could and should be extended to the markets for services, and in particular to transportation and financial services.

These would be changes which, unlike the subsidiarity clause, would really make a difference, and the Intergovernmental Conference in preparation for "Maastricht II" would have an opportunity to promote them. In addition, it might be worthwhile specifically to enumerate, in the Treaty itself, policy areas for which member states will retain primary responsibility. The most plausible candidates would be the areas discussed above—namely education, culture, the media, social welfare, health care and industrial relations—and, of course, political and administrative organization.

As I have argued elsewhere, this would give the constitution of the Community a bi-polar character, similar to the "dual federalism" which the American Supreme Court had read into the US Constitution before 1937, or to the case law of the German Constitutional Court protecting the *"Kulturhoheit"* of the *Länder* in the fields of education and the media (Scharpf 1991b, 1994; Weidenfeld 1995). There is, of course, no hope that a clear demarcation line between European and national areas of policy responsibility could be defined. But the explicit dualism would force the Court and the Commission to balance the claims for the economic perfection of market integration against equally

legitimate claims for the maintenance of national institutional autonomy and problem-solving capacity in the light of the concrete circumstances of the specific case. Instead of deciding against national regulations whenever the slightest distortion of competition can be identified, the Court would then have to weigh the degree of restriction of competition or mobility, on the one hand, against the importance of the measure for the realization of legitimate member state goals, on the other. What is required, in other words, is the "management of interdependence" (Dehousse 1993; Joerges 1994a) in ways which should deal, in the "vertical" relationship between national and European competencies, with exactly the same tensions between economic and non-economic purposes which, in the nation-state, are accommodated in the "horizontal" dimension, through interdepartmental conflicts that must be settled in the Cabinet or in Parliament.

But what difference would it make if such constitutional changes could be adopted, and, if adopted, if they would have the desired impact on the judicial interpretation of negative integration? The European Community, after all, must remain committed to the creation of a common market, and so it also must retain legal instruments to defend the free access to national markets against the economic protectionism of its member states. Thus, prohibitions against quantitative restrictions on trade and against the discrimination of foreign suppliers would certainly need to remain in place. What could change is the degree of perfectionism with which they are being defined and their, as it were, "lexicographic" precedence over all competing considerations. Even more important: constitutional changes of the type discussed here would protect, or re-establish, the power of national governments to take certain sectors out of the market altogether, or to organize them in ways that restrict the operation of market forces. If that should imply a loss of economic efficiency, it should not be the business of the Community to prevent member states from paying this price.

Social Regulation in One Country?

But even if the legal straitjacket of negative integration should be loosened, and if some sectors should be allowed to remain under the more intense control of the territorial state, that would not generally reverse the fundamental changes in the political economy of capitalist welfare states that have occurred since the end of the postwar period. The larger part of the national economy is exposed to transnational competition, capital has become globally mobile and enterprises are able to relocate production throughout Western Europe without

risking their access to national markets. And as the mobility of economic factors has increased, so the national capacity to reduce the rate of return on capital investments below the international level, either by lowering interest rates or by imposing additional costs on firms, has been irrevocably lost (Sinn 1993). In that sense, there is certainly no path that would lead back to the postwar "golden age" of capitalist welfare states.

From the point of view of political democracy, it would be dangerous to deny the existence of these economic constraints; but it would be equally dangerous to exaggerate their significance. It is true that the capacity for Keynesian macro-economic management is no longer available at the national level, and not yet available supranationally. It is also true that the rate of return from productive investment, which capital owners can exact, has increased considerably. Any attempt, by governments or unions, to reverse these losses by redistributive programs pursued in a national context would be bound to fail.

Beyond that, however, the basic character of the relationship between capitalist economies and democratic states is still the same. As I pointed out above, even in the postwar period, social regulation of the capitalist economy was successful only because costs of regulation that were, in the first round, imposed on firms could, in the second round, be passed on to consumers. As a consequence, returns on investment remained positive, and capitalism remained equally viable in the Swedish welfare state, in the German social market economy or in the American free enterprise system. In other words, the postwar symbiosis of capitalism and democracy could only be successful because ultimately the costs of the welfare state were borne by workers and consumers, rather than by capital owners.

If this "impossibility theorem of redistribution" is accepted, the loss of national regulatory capacity reduces itself to the relatively technical question of where the costs of (new)[34] regulation should be placed in the first round. If they are placed on firms that are exposed to international competition, and if all other conditions remain the same, there will now be a loss of international competitiveness, and a concomitant fall in profits, investment and employment. But, of course, other conditions need not remain the same. The rise in the costs of regulation could be compensated through wage concessions, through a rise in productivity or, as long as European Monetary Union does not yet exist, through devaluation. In effect, these compensatory measures would, again, shift the costs on to workers and domestic consumers.

However, the same result could be achieved more directly and with much greater certainty if, even in the first round, costs were not imposed on firms at

34 Presumably, if an economy has been viable so far, its regulatory costs are reflected in current prices and exchange rates.

all. If new social regulations, such as the German disability-care insurance, were financed through taxes on incomes and consumption, rather than through payroll taxes, enterprises would stay competitive and investments profitable. One example is provided by Denmark, where 85 percent of social costs are financed from general tax revenues. Since the international competitiveness of Danish enterprises is not affected, the (very costly) welfare state apparently does not play any role in current discussions about the international competitiveness of the Danish economy (Münster 1993).[35] Of course, consumable incomes will be reduced, but this is as it would, and should, be in any case.

I do not wish to claim, however, that all objectives of social regulation in the postwar decades could also be obtained in the future without endangering international competitiveness. Even less would I suggest that the growing tax resistance of voters would be easy to overcome.[36] Compared to the postwar decades, the range of choices available to democratic political processes at the national level has certainly become more narrow. But it is not as narrow as the economic determinism of many contributions to the current debate would seem to suggest. Moreover, it can be widened to the extent that countries and regions succeed in developing the comparative advantages of their given institutional and industrial structures in order to exploit their own niches in increasingly specialized world markets. The precondition, of course, is a high degree of policy flexibility, and a capacity to respond to specific locational conditions and changing market opportunities, at all levels of policy-making, European, national and subnational—as well as in management and industrial relations.

Thus, the European economy may indeed need the larger market, and hence common rules, in order to be able to keep up with American and Japanese competitors in branches of production in which economies of scale make a significant difference. But Europe will certainly fall behind if negative integration paralyzes national and subnational problem-solving, while on the European level only unsatisfactory compromises can be reached after long and difficult negotiations.

To succeed in the global economy, Europe depends on more effective European policy-making with better democratic legitimation. But it depends equally on the autonomous problem-solving capacities of national and subnational

35 The major threat to viability of the Danish model, incidentally, comes from European plans to harmonize VAT rates.

36 Here, in my view, is the real reason for the current crisis of European welfare states. Given lower rates of economic growth, rising costs of environmental protection, continued mass unemployment and a growing retirement population, the willingness of blue- and white-collar voters to bear an ever-rising tax burden has become the critical constraint on all policies dependent on democratic legitimation.

polities. While the debate about subsidiarity may help to limit the perfectionism and the rigidities of positive integration, we also need a debate about the need to limit the perfectionism of negative integration. Only if we succeed in both will we be able to combine the economic efficiency of the larger market with the problem-solving capacities of political action on the European level and of democratic politics on the national and subnational levels.

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4 The Problem-solving Capacity of Multilevel Governance (1997)

1 Introduction

The "democratic civilization" of capitalist economies—through government regulation, Keynesian full employment policy, social policy and collective bargaining—was achieved in the aftermath of the rampant protectionism of the 1930s and 1940s when, in response to the most severe depression in the crisis-ridden history of modern capitalism, governments had finally asserted control over the boundaries of their national economies (Polanyi 1957). During the post-war decades, the re-integration of world markets for capital, goods and services was a gradual process, achieved under international regimes that still allowed national governments to protect economic and social systems against external economic shocks to a much greater degree than had been true before 1914 or in the 1920s (Ruggie 1982). In the meantime, however, global economic integration has again surpassed the level that had been achieved before the First World War (Cerny 1994; Ruggie 1995), and with the completion of the European internal market and the impending move toward a European monetary union, the movement of capital, goods, services and labor is as free across the boundaries of European Union (EU) member states as it formerly was across subnational boundaries with national economies. In other words, national governments have again given up, or lost, the effective control over their economic boundaries that they had asserted in the aftermath of the Great Depression.

The articles presented here, most of them based on empirical research, deal with the consequences of economic integration for the problem-solving capacity of political systems. The background assumption, shared by authors celebrating or lamenting the political consequences of economic integration (Mestmäcker 1987, 1994; Streit/Mussler 1995; Streeck 1995a; Kapteyn 1996) can be stated in one sentence: the elimination of economic boundaries creates

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This essay was the "Introduction" to a special issue of the *Journal of European Public Policy*. The reader is requested to bear this in mind when the author refers to "articles in this volume" or to "this introduction." The articles comprising the special issue are listed at the beginning of the reference list.

conditions of regulatory competition[1] among nation states that must constrain the capacity of governments and unions to tax and to regulate mobile capital and firms (Sinn 1993, 1996), whereas political institutions above the national level are not (yet) capable of governing the capitalist economy with the same degree of effectiveness and democratic legitimacy that was achieved nationally during *les trentes glorieuses* after the Second World War.

Empirically, however, the record seems to be more mixed than this assumption would suggest. At the national level, regulatory competition may or may not be manifest, and where it is it may sometimes lead to a "race to the top" instead of the predicted "race to the bottom"; and where national regulation is in fact displaced, international—and in particular European—regulation will not always be blocked or tend towards the lowest common denominator, but may in fact achieve high levels of protection. Case studies and secondary analyses reflecting this empirical variance were presented and discussed in contributions to a conference on the "Problem-solving Capacity of Transnational Governance Systems" at the Max Planck Institute for the Study of Societies, Cologne, 8–9 November 1996, from which the following articles have been selected.[2] In this introduction, I will explore the possibility that the overall pattern may reflect systematic differences in the characteristic constellations of interest which have to be confronted in various policy areas. In doing so, I will begin with the conditions under which regulatory competition may, or may not, constrain national governance capacity.

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1 In the literature, the term "regulatory competition" is used in two different senses. On the one hand, it describes the response of national regulators to the international competition for mobile factors of production and mobile tax bases. This is the sense used here. On the other hand, Adrienne Héritier and her collaborators (1996) use the term to describe the fact that member states of the EU compete with each other in order to influence the content and form of European regulations with a view to minimizing their own adjustment costs.

2 For reasons of space and in the interest of achieving a narrower focus, the following contributions could not be included here: *Cerny, Philip G.* (University of Leeds): Markets as Governance Structures. The Emerging Transnational Financial Regime; *Gehring, Thomas* (Free University of Berlin): Problem Definition and Entrepreneurship in European Environmental Policy; *Grundmann, Reiner* (Max Planck Institute for the Study of Societies, Cologne): The Network Dynamics of Global Environmental Action. What the Concept of Epistemic Community Does Not Tell Us; *Jachtenfuchs, Markus* (Free University of Berlin): Institutional Structure and Patterns of Problem Definitions in the European Union. The Case of the Greenhouse Effect; *Ronit, Karsten and Schneider, Volker* (Max-Planck Institute for the Study of Societies, Cologne): Private Organizations in Global Governance; *Weibust, Inger* (Massachusetts Institute of Technology): Environmental Regulation and Federal Governance. Co-operation under Federalism; *Zürn, Michael* (University of Bremen): Does International Governance Meet Demand? Theories of International Institutions in the Age of Denationalization.

2 Constraints on National Regulation

Economic integration confronts national systems of regulation not only with increasing international competition in markets for goods and services, but also with the increasing mobility of financial assets and firms, and of certain types of highly skilled labor, on which the economic viability of regions and countries depends. The implication is that investors and producers may avoid burdensome national regulations and taxes, and that consumers may avail themselves of products produced under less costly regulatory and tax regimes. *Ceteris paribus*, therefore, the expected result is a form of regulatory competition, described by David Vogel (1995) as a "race to the bottom" or as the "Delaware effect" (named after the American state that was able to attract companies by offering the least demanding standards for their incorporation—Cary 1974). But Vogel has also shown that this consequence is not inevitable, and that regulatory competition may even produce a "California effect" by which states are induced to raise the level of regulatory requirements. There is reason, therefore, to examine the assumptions underlying the Delaware versus California controversy.

First, international economic competition will not directly affect all policy areas. Taking a very conservative view, even now more than half of all jobs in modern economies are in "sheltered" branches in which local producers are serving local demand without being affected by foreign competition. But even where economic competition has become a significant concern of national policy-makers, it will not necessarily result in a "race to the bottom." Just as firms in the market may not only compete on price, but also on the quality of their products or services, so regulatory competition among territorial states may also be on quality, rather than on cost. The question is when one should expect one or the other to dominate.

2.1 Product Regulations

From a neo-liberal perspective, market competition among goods produced under different national regulations should allow consumers to select the optimal regulatory system. To the extent that the argument does not simply express a preference for deregulation, it presupposes a distinction between "product regulations" and "process regulations": rational self-interested consumers would never respond positively to regulations that do not improve the usefulness or safety of products or services themselves. Moreover, even within its proper domain, the argument must presuppose severe information asymmetries between producers and consumers—without which market competition should select the optimal product even in the absence of regulation. However, if it were generally

difficult for consumers to obtain valid information about the quality of certain products, while they have reason to distrust the information provided by better-informed but self-interested sellers, the market may not reward (and hence not allow the production of) superior products, even if the superior quality would be highly attractive to consumers. To overcome this form of market failure, labeled by George Akerlof (1970) as the "market for lemons," may require some form of trustworthy third-party control and "certification." This function may sometimes be performed by private associations,[3] but it is more frequently achieved by the public regulation and inspection of product quality.[4]

When that is the case, national regulations that are comparatively more stringent in assuring high levels of protection against health, safety or financial risks may become a competitive advantage, inducing other governments to upgrade their own regulations in order to protect their firms against attractive, because more highly regulated, foreign competitors. This seems to explain some aspects of the "race to the top" in the case of capital-adequacy regulations in the banking sector (Kapstein 1994; Genschel/Plümper in this volume),[5] or in the upgrading of insider-trading regulations on European stock markets (Lütz 1996).[6]

It seems clear, however, that the certification mechanism could not explain the "California effect" in the case of auto emission standards where it was originally discovered by David Vogel. Not only were there no large-scale automobile producers in California that could gain a competitive advantage (or suffer a disadvantage) from more stringent regulations, but also there was no benefit to individual self-interested consumers that would have generated competitive

3 At the beginning of this century, for example, many educational institutions in the United States were willing to submit to the control of private certification organizations in order to assure students and their parents of the superior quality of the (more expensive) education they were providing (Wiley/Zald 1968).

4 If that is accepted, the interventionist argument for re-regulation at the European level can use the same logic: if national regulation is in fact justified by the existence of market failures, regulatory competition and the rule of mutual recognition would re-create the very same market failure (Sinn 1996).

5 As Genschel and Plümper (in this volume) show, agreement on the Basle accord of 1988—which standardized capital adequacy requirements for banks under the supervision of the thirteen central banks that were members of the Bank of International Settlements—is explained not as the equilibrium outcome of atomistic regulatory competition, but as a result of the high-pressure coalition-building strategies of the American Federal Reserve. But once it was in place, the Basle standard induced non-member states unilaterally to upgrade their own levels of banking regulations so as to avoid competitive disadvantages for their own banks in inter-bank lending.

6 For stock market regulations, just as for the banking accord, the fact that US interlocutors (in this case the Securities and Exchange Commission [SEC]) could plausibly threaten to exclude non-conforming foreign firms from the large and attractive American capital market has been a very important factor.

pressures on producers in other states. Thus, the "California effect" is not really a "race to the top" explained by regulatory competition, but must depend on other conditions. The most important one is institutional: as Vogel (in this volume) points out, federal legislation—the 1970 Clean Air Act Amendments—had specifically authorized California to enact stricter emissions standards than the rest of the United States, and hence to *exclude from its home market* automobiles that did not conform to its own regulations. In that regard, then, the free-trade regime of interstate commerce was suspended, and the state was again allowed to defend its own economic boundaries. Since the California market was large and attractive, firms located in other states had to build cars according to its rules in order to gain access; and since producing to diverse standards is costly, it then made economic sense for automobile manufacturers to lobby for uniform *national* standards even if these had to be set at higher levels than the auto industry would have originally favored.[7]

The institutional conditions permitting the "California effect" to arise exist at the international level where free-trade regimes permit the continuation of certain types of national regulation even though these operate as non-tariff barriers to trade. Thus, Article XX of the GATT (General Agreement on Tariffs and Trade) Treaty allows national measures necessary to protect public morals and the health or safety of human, plant or animal life, and similar public-interest values even though these would otherwise fall under the prohibition of quantitative restrictions. The same is also true of Articles 36 and 100a, IV of the European Community Treaty which, where they are still effective under the *Cassis* doctrine, allow countries to exclude foreign products that do not conform to their own regulations. For a country with a relatively large market, that may be an incentive to impose higher standards—which then may have to be imitated by smaller countries in order to avoid the competitive disadvantage of having to produce to several standards.

We can conclude, therefore, that in the field of product regulations there are two logically distinct mechanisms that may explain why we should not generally expect a race to the bottom. First, foreign products may still be kept out if they do not conform to national regulations serving valid health, safety or environmental purposes. In that case, there is no regulatory competition and thus no downward pressure on countries with high levels of regulation. Second, national regulations may serve as a certificate of superior product quality that is rewarded by the market. When that is true, high levels of regulation may create a competitive advantage for the firms subjected to them, and thus exert a competitive

7 If demand is relatively price inelastic, or if subsidies and tax incentives help to make it so, the auto industry will, of course, gladly be compelled to sell more expensive cars.

pressure on other governments to raise their own levels of regulation. In short, national product regulations may not be affected by negative integration, and if they are, regulatory competition may, under certain conditions, induce a race to the top, rather than a race to the bottom.[8]

2.2 Process Regulations

Neither of these conditions helps to sustain national policies that increase the cost of production without affecting the quality of the product itself. In principle, that is true of environmental regulations of production processes, of social regulations of working conditions, employment security and industrial relations, and of taxes and levies on capital, labor and other factors of production. GATT and World Trade Organization (WTO) rules, it is true, allow states to protect themselves against some forms of "dumping," and to use a variety of general and exceptional "safeguards" to protect threatened industries (Hoekman/Kostecki 1995: Chapters 7 and 8). Within the internal market of the European Community, however, none of these exceptions could be used to keep out products that were produced under conditions that do not conform to national regulations regarding, say, air pollution, work safety, sick pay, codetermination or minimum wages. Since none of these affects the quality of products themselves, national authorities also cannot count on purely self-interested consumers[9] to prefer goods and services produced under more stringent process regulations. Hence, if process regulations increase the cost of products, regulatory competition will generally exert downward, rather than upward, economic pressures on national regulations.

But, of course, pressures may be resisted. Hence the outcome will be determined by the relative strength of the economic pressures that would reduce, and of the political pressures (or the political inertia) that would maintain, existing levels of regulation, and the resulting balance of forces will vary from one case to another. Nevertheless, there are characteristic similarities within specific policy areas which may allow some useful generalizations to be for-

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8 It hardly needs to be emphasized that these are possibilities, rather than certainties, and that competitive conditions must be translated into national policy choices by political actors with their own world views and their own ideological axes to grind.

9 When consumers are not self-interested, information about the process of production may also affect sales. Examples that come to mind are the "union label" on garments in the United States, the "blue angel" certificate for ecologically superior products in Germany, "ethical investment" criteria for industrial equities and the "Brent Spar" boycott of Shell gasoline. Thus it is indeed possible, as was suggested at the Cologne conference, that some aspects of process regulations may become "productified."

mulated. I begin with the empirically most ambivalent area of environmental process regulations.

Environmental Process Regulations

David Vogel (1995, in this volume) claims that in the field of environmental policy not only product regulations, but also existing process regulations, are relatively immune to the downward pressures of economic competition because most of these regulations will add only marginally to the cost of production. The same may be true of existing rules protecting health and safety at work (Eichener 1992, in this volume). Moreover, the cost imposed by environmental and safety regulations will vary from one sector to another, and sectors will be exposed to widely differing degrees to international competition. Thus, the pressure to reduce existing levels of protection will be strongest in internationally exposed industries and in areas where regulation adds significantly to the total costs of production. In other industries, these pressures may be much lower.

However, economics cannot fully explain political outcomes. An equally or more important factor is the *political* salience of the purposes served by the regulation in question, and the strength of the *political* opposition against their dismantling. International economic competition will least affect highly politicized regulations that have the purpose of preventing or abating conditions or activities that are considered harmful in themselves—say, drug dealing, gambling or prostitution. When that is so,[10] economic losses may be accepted as a necessary and anticipated consequence, rather than as a misfortune to be avoided. Thus, some environmental regulations are maintained at the national level even though it is clear that they will drive certain types of production out of the country. Taking both factors together, it is indeed plausible that the empirical record should not provide evidence for a *general* race to the bottom in the field of environmental process regulations.

Taxation of Mobile Factors or Persons

The situation is different in the case of taxation. First, the purpose of taxing capital incomes, profits, property and factors of production is generally (i.e., except in the case of regulatory taxation) revenue collection and, perhaps, redistribution, rather than the abatement of certain types of activity. Thus, tax policy would become self-defeating if it were to destroy the bases of taxation or to

10 Even there, morality has its price, and the ability and willingness to pay it may vary widely in time and place.

drive them out of the country. This is the argument underlying the famous Laffer curve. Now if the taxes of one state can be easily avoided by moving the tax base to another state with lower rates, all states (but in particular relatively small states) will be tempted to cut tax rates in the hope that this will increase their tax base sufficiently to increase total revenue. As a result, other states are forced to respond in kind to prevent the outflow of taxable resources, and all states will end up having lower tax rates for mobile factors than they would have preferred to do, and could have done, in the absence of transnational mobility and international tax competition (Steinmo 1994; Genschel/Plümper in this volume).

If revenue maximization were the only concern, however, the "race to the bottom" should bottom out before zero tax levels are reached. But states are also concerned about real investments and jobs. Pursuing these objectives in the face of international competition, they may be tempted not only to forgo taxation altogether[11] but to subsidize firms and capital instead (Gordon/Bovenberg 1996). It is here, then, that regulatory competition is likely to take its greatest toll in terms of the national capacity to tax mobile factors. Unfortunately, however, while the European Commission is closely scrutinizing state subsidies to individual enterprises in the light of stringent standards of undistorted competition, no such criteria are as yet applied to competitive tax reductions that apply *generally* to capital incomes and business profits.

Social Policy Regulations

Social policy, finally, shares some of the characteristics of taxation and some of environmental policy. Some of its regulations clearly have the purpose of abating certain types of activity—like the employment of children or various types of hazardous or morally obnoxious work. From the point of view of national policy-makers, certain "bad jobs" simply should not exist, and, if they disappear, that should be counted as a social-policy success—even if that success may have an economic price. At the opposite end of the spectrum, financing social security, health care and other welfare transfers and services through payroll taxes has all the characteristics just discussed with regard to taxation. Such rules clearly do not have the purpose of destroying jobs, and they would become self-defeating if that were their effect. For that reason, they are highly vulnerable to the pressures of international regulatory competition.

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11 While Luxembourg is attracting financial assets from its neighbors by not taxing interest payments (Genschel/Plümper in this volume), it does tax the profits of banks located in Luxembourg—and it recently found itself compelled to reduce corporation taxes in response to the possibility that foreign banks might relocate their business to Ireland. Unfortunately, this instance of poetic justice has not yet improved the odds on European tax harmonization.

But most types of social policy regulation are likely to be located somewhere between those extremes. Rules regarding working hours, working conditions, employment security, maternity leave, collective bargaining and codetermination rights of workers are clearly intended to change the nature of the employment relationship, rather than merely taxing it. Their purpose is, in the neo-Marxist jargon of the 1970s, the "decommodification of labor." Nevertheless, this purpose would be frustrated if "commodified" jobs would simply disappear, instead of being transformed. For that reason, social-policy regulations that have (or are perceived as having) the effect of reducing profits and hence capital incomes are also vulnerable to increased capital mobility. The same is true of codetermination rights which, even if they do not impose monetary costs, are perceived as interfering with managerial discretion in organizing the work process—and hence as a burden on capital. Compared to taxation, however, the race to the bottom will at least be impeded by the political commitment of national governments to social-policy purposes and by the resistance of unions and other groups that would suffer from deregulation and cutbacks (Pierson 1994).

In general, therefore, economic integration creates pressures for deregulation on the national level, but the pressure varies from one policy area to another. For product regulations, under narrowly specified conditions, regulatory competition may even create incentives for raising, rather than lowering, existing national standards. Beyond that, product-related national health, safety and environmental regulations may also be unaffected as long as free-trade regimes continue to allow these forms of non-tariff barriers. In the field of taxation, by contrast, increasing transnational mobility will clearly reduce the capacity of national governments to tax mobile factors of production and other mobile tax bases. By the same token, environmental and social regulations of production processes are also affected by downward pressures as transnational mobility increases. But here the forces of resistance to environmental and social deregulation and to welfare cutbacks will be stronger, and thus outcomes are likely to be more contingent, than is true in the case of taxation. In any case, however, the purposes originally served by national regulations would be better protected if what is lost in terms of national problem-solving capacity could be regained through re-regulation at the European[12] or international level.

12 I will not discuss here the question of whether European regulations could be economically effective under conditions of worldwide capital mobility and economic globalization. The answer is likely to vary from one policy area to another, and it also depends very much on assumptions about the probability of protectionist policies of the EU (or of European monetary union).

3 Re-regulation at the International Level?

At the international and European levels, re-regulation must be achieved through negotiations. Since the positions of participating governments (or of small groups of governments under qualified majority voting in the European Community) cannot be overruled, its success depends on the underlying constellation of interests and ideological preferences among the negotiating parties. If these constellations are characterized by pure ("zero-sum") conflict, agreement could not be expected,[13] whereas in constellations resembling a "pure co-ordination" game, agreement and implementation would be equally unproblematic.[14] Beyond these analytically easy (but empirically rare) cases, however, we must deal with mixed-motive constellations where seemingly small differences in assumptions about actor preferences can lead to greatly differing hypotheses. In particular, it is necessary to warn of the tendency, quite widespread among social scientists who are new to game-theoretical explanations, to interpret all constellations in terms of the symmetrical Prisoner's Dilemma (Scharpf 1997a). Such constellations do occur, and they are often highly salient, but they are by no means ubiquitous. Again, therefore, it is useful to consider several policy areas separately.

3.1 Market-making Regulations

Economic integration itself is often represented as a symmetrical Prisoner's Dilemma in the literature—assuming a common interest in creating a larger market that is threatened by the protectionist temptations of individual countries (Garrett 1992; Moravcsik 1993; but see Burley/Mattli 1993). Under these conditions, agreement should be easy, whereas implementation will continue to be problematic. The European Community has solved this problem by enshrining "negative" integration in the original Treaties, and imposing its current judicial interpretation as part of the *acquis communautaire* on all members subsequently joining the Community. Moreover, compliance is anything but voluntary: the Commission may bring legal action against defaulting governments, and private parties may also claim to be aggrieved by violations of European competition law in ordinary cases before national courts.

However, the assumption that market-integrating policies represent a symmetrical Prisoner's Dilemma is not always well founded. Countries and industries

13 Or, rather, agreement would presuppose high levels of pre-existing solidarity and the acceptance of common norms of distributive justice.

14 In determining these characteristics, it is important to keep in mind that what matters are the constellations *among the parties involved in international negotiations*, rather than constellations among the underlying social or economic interests.

are often not similarly placed in relation to the market. Small, open economies have more to gain from liberalization than countries with larger internal markets; and efficient industries will benefit at the expense of hitherto protected competitors. Under such conditions, it is no longer plausible to assume a common interest in market liberalization. In road haulage, for instance, the interest of British and Dutch industries in gaining access to the internal transport markets of other EU member states was by no means reciprocated by similar interests in Germany, France and Italy (Héritier in this volume), and the same asymmetry of interests seems to have so far prevented the liberalization of energy markets (Schmidt 1997, 1998). In these cases, therefore, market-making regulations are difficult to achieve through agreement in the Council of Ministers, but seem to depend on unilateral action by the European Commission and on decisions of the European Court of Justice.

3.2 Product Standards

Product standards, I have argued above, are not necessarily exposed to downward pressures of economic competition since national regulations that serve valid health, safety or environmental purposes are exempt from the prohibition of non-tariff barriers under the GATT as well as under Articles 30 and 36 of the EC Treaty.[15] It is precisely in these areas, therefore, that an interest in realizing the economic efficiencies of a larger market must also imply a commitment to the harmonization of national product regulations. Moreover, since Article 100 of the EC Treaty allows countries to maintain or adopt more demanding standards even after harmonization, countries with a preference for stringent standards are in a relatively strong bargaining position with regard to the level of protection provided by common product rules. At the same time, however, existing national regulations may reflect differences in consumer tastes or in producer interests, or they may be associated with the sunk costs of a large installed base (which explains the failure to agree on common European standards for electrical plugs and sockets). Hence, the harmonization of product standards is likely to resemble the "Battle of the Sexes," rather than a game of pure co-ordination. Nevertheless, it is here, if anywhere, that constellations of interest among national governments and industrial interests should favor effective European problem-solving.

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15 Under the *Cassis* rule of the European Court of Justice, national regulations that are not objectively justified in these terms (in the eyes of the Court) cannot be used to discriminate against imports. In that case, foreign products lawfully introduced in their state of origin must be admitted in all member states under a rule of "mutual recognition."

Contributions to this volume confirm the expectation that European regulation is most successful in the harmonization of product standards. This is not to say that agreement should be easy to reach. On the basis of their in-depth study of food-stuffs regulation, Joerges and Neyer show that, originally, harmonization directives would become bogged down in the Council of Ministers in endless conflicts over economic advantages, regulatory approaches and technical details. Hence the Single European Act of 1987 allowed the Council to delegate to the Commission the task of specifying the detailed requirements implied by very general Council directives. But, realizing that the interests of national producers and consumers would be affected precisely by these "technical" details, the Council also required that they must be specified with the participation of national representatives in "comitology" procedures. Nevertheless, Joerges and Neyer argue, the change in procedure had the effect of facilitating agreement by transforming what would otherwise be difficult "bargaining" processes over the heterogeneous interests represented by national governments into a "deliberative" search among experts for common solutions that could be justified on the basis of scientific evidence.

These optimal procedural conditions do not exist everywhere. Nevertheless, similar success stories of safety and environmental regulations of consumer products are also reported (Vogel in this volume; Pollack in this volume)—which suggests that the underlying constellations of interests must be an important part of the explanation. In all these cases, the common interest of producers in gaining access to a larger market can only be satisfied if the protection of consumer and environmental interests existing in the more advanced countries is maintained. Moreover, business concerns about the costs of regulation are alleviated by the fact that all competing products, including imports from non-EC sources, must conform to the same standard. The same factors also facilitate the harmonization of regulations concerning safety and environmental protection at the workplace (Eichener in this volume; Pollack in this volume). While seemingly dealing with *processes of production*, these standards tend to be incorporated in the hardware and software of machine tools and office equipment; hence divergent national regulations would create non-tariff barriers in the market for investment goods.

In these policy areas, therefore, the most salient conflicts at the international level are likely to arise not from the divergent economic interests of national industries but, rather, from differences in the form and content of existing national regulations that will affect costs of adjustment if one or the other regulatory model is chosen internationally. Thus, in the Basle negotiations on capital-adequacy rules for banks (discussed by Genschel/Plümper in this volume), Switzerland and Germany would have welcomed an international agreement adopting their own type of requirements, but were initially unwilling even to

consider proposals by the United States that would achieve the same purpose by a different approach to regulation. These differences in administrative routines and regulatory approaches seem to be most amenable to being resolved by the procedures and deliberative practices of "administrative supranationalism" that Joerges and Neyer have discovered in their study of comitology.

3.3 Work Safety and Environmental Process Regulations

Turning from product to process regulations, I leave aside environmental problems which, by their nature, could never be effectively dealt with within individual nation states. Border-crossing air and water pollution and "global" instances of the "tragedy of the commons" (Hardin 1968)—like the destruction of the ozone layer or the protection of biodiversity—would always have depended on the problem-solving capacity of international action, and the theoretical tools for analyzing the conditions under which such solutions are likely to succeed are reasonably well developed (Keohane/Ostrom 1994; Mitchell 1994; Oye/Maxwell 1994). What is of interest here are problems of a local or regional scope caused by local processes of production which, as such, have always been, and could continue to be, regulated at local or national levels. If there is, nevertheless, a growing demand for international action, it is likely to arise from the concern of governments and unions in high-regulation countries about the potential effect of stringent national standards on international competitiveness—in which they may be joined (in what Pollack calls "baptist-and-bootlegger coalitions") by business interests attracted by the prospect of a more "level playing field."[16]

But these, unlike the interest in creating a larger market, are not interests that are shared by all member states. As I have argued elsewhere (Scharpf 1996), the European Community includes some of the most productive economies in the world as well as some that have not risen far above the level of threshold economies. Thus common European regulations at levels of protection defined by the most advanced countries might wipe out industries in the less productive economies—just as industry in East Germany was wiped out when West German regulations were applied.

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16 Ironically, some of the most active supporters of European environmental policy, like Denmark and Germany, have also been the champions of a strong "subsidiarity clause" in the Maastricht Treaty. As a consequence, it is now possible to challenge the *legal* competence of the Union to adopt environmental process regulations. Since it is at least doubtful, under Article 3b of the EC Treaty, that the objective of controlling local environmental hazards (as distinguished from border-crossing pollution) "cannot be sufficiently achieved by the member states," the Commission seems to have become more cautious in relying on the "level-playing-field" argument to justify environmental policy initiatives (Golub 1996a).

Nevertheless, contributions by Eichener and Pollack in this volume, as well as the research of Adrienne Héritier and collaborators (1996), have shown that there is in fact a considerable body of European regulations regarding work safety and environmental protection dealing with production processes, rather than product quality. In some of these cases, I have argued above, such regulations have the effect of product standards for machine tools and office equipment, and their adoption should be explained by the conditions favoring market-making policies. And even if supplier interests could not be relied upon, some regulations of production processes would benefit from the fact that existing technologies of production are made obsolete by the electronic revolution. Hence multinational firms, which are also likely to work with the most modern production methods, would lose internal economies of scale if they were to take advantage of obsolete standards in countries with lower levels of national regulation. It is possible, therefore, that these politically influential firms (Coen 1997), and the industrial associations representing them, will support Europe-wide health, safety and environmental standards for production processes, and it is also likely that they will favor high levels of protection which they are better able to meet than their less advanced competitors.

Unfortunately, however, these examples cannot be generalized. In fact, a large number of environmental process regulations at the European level either failed altogether, or succeeded only at the level of the lowest common denominator (Golub 1996b, 1996c). Given the differences in levels of economic development among the member states of the European Community, that should not come as a theoretical surprise. In such cases, opposition to uniform European rules is likely to come from national governments defending less mobile national business, labor and tax-payer interests, rather than from businesses and associations operating at the European level. But in contrast to the harmonization of product standards, this opposition is less easily overcome by the normative orientations and deliberative practices of "administrative supranationalism" described by Joerges and Neyer. Instead, one should expect that process regulations at the level of protection demanded by, say, Denmark, the Netherlands and Germany, are likely to fail at the European level. If they are nevertheless accepted, side payments to "cohesion countries" may have to play a large role, and even then the agreement on common rules may not assure uniform implementation.[17]

17 It may also be true, as Adrienne Héritier and collaborators (1996) found in their study of European clean-air policy, that some member states with less intense pollution problems and low levels of regulation may not be sufficiently interested to participate actively in the formation of policies that seem to have little relevance to their own situation.

3.4 Social Policy

What has just been said applies with even greater force to the international harmonization of social policy, simply because the cost burden on business is likely to be much higher. Again, policy preferences differ between countries, or governments, committed to high levels of welfare-state protection, and countries relying to a larger extent on the self-help of individuals and families, and again, differences in the level of economic development imply widely differing abilities to pay for welfare-state transfers and services, or to absorb the costs of social regulations.[18] But that is not all: even among the more highly developed welfare states structural differences of welfare spending are so important[19] that agreement on uniform rules would be met by enormous political resistance from those groups that would lose from harmonization. Equally or even more important are the institutional differences between "universalist" welfare states that are primarily financed from general tax revenues and "corporatist" systems that rely primarily on employment-based contributions from employers and employees (Esping-Andersen 1990).[20] To move from there to a uniform European system would require revolutionary changes in those countries that would be required to switch to a different type of institutional regime—say, from a publicly financed and publicly provided national health care system to a health insurance system paying for privately provided health services, or from a pay-as-you-go social security system to funded pension insurance. The same is generally true in the field of industrial relations (Crouch 1993). In all these areas, institutional and structural differences even among countries committed to high levels of social protection would create enormous obstacles to the harmonization of social and industrial relations policy by international agreement (Scharpf 1997b; Streeck 1995a, 1995b, in this volume).

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18 Within the EU twelve, the share of GDP committed to social transfers and services in 1993 varied between 16.3 percent in Greece and 33.6 percent in the Netherlands (BMA 1996: 15; OECD 1996b).

19 For instance, in 1993, Italy was spending 51.8 percent of its social-policy budget on old age pensions, Germany 30.6 percent and Ireland only 21.9 percent. On the other hand, Ireland, Britain and Denmark spent over 10 percent of their social-policy budgets, as compared to less than 5 percent in the Netherlands, on transfers and services for families (BMA 1996: 14).

20 In 1993, Denmark financed 81.2 percent of its social budget from general tax revenues whereas France relied on social security contributions for more than 72 percent of social expenditures (BMA 1996: 13).

3.5 Taxation

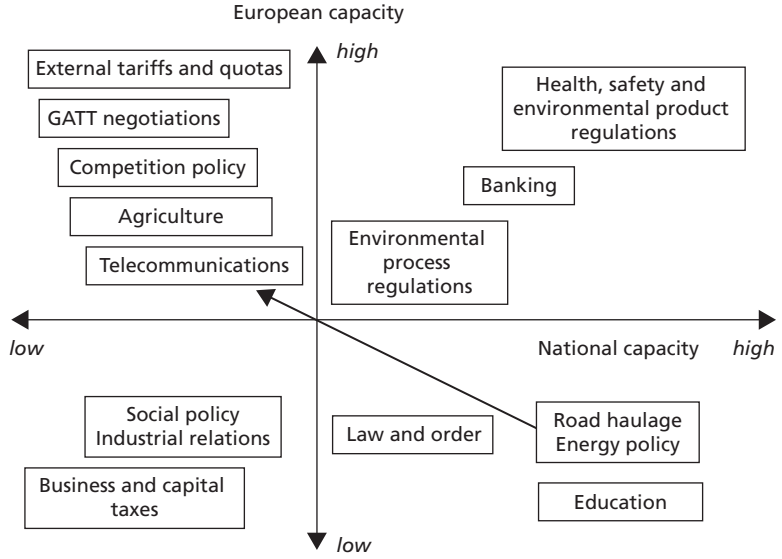
Finally, in the field of capital and business taxes, the same difficulties are again likely to stand in the way of international harmonization. In addition, there are specific difficulties arising from differences in the size of countries. If tax competition is driven by the hope that lower tax rates will be over-compensated by an enlargement of the tax base, that hope must be particularly attractive for small countries whose tax revenues will benefit disproportionately from an inflow of capital from larger countries. Thus, the harmonization of corporate taxes is not even on the agenda of the European Community, and attempts to harmonize withholding taxes on interest income have repeatedly foundered on the opposition of Luxembourg and of the United Kingdom—the former defending its status as a tax shelter for German money, and the latter concerned about its position in financial markets in competition with New York and Tokyo (Genschel/Plümper in this volume).

In taxation as in other policy areas, therefore, national governments are motivated by divergent political preferences. But even if all were single-minded revenue maximizers, it is not true that tax competition would be equally damaging, or tax harmonization equally beneficial, for all member governments. This heterogeneity of interests has so far frustrated all attempts to harmonize taxes on business and capital incomes, and chances are that under the rule of unanimous decisions this blockage will continue. As a consequence, tax competition continues to drive down the share of total government revenue generated by taxes on business and capital incomes (OECD 1996a).

4 Conclusion

The main message of this introduction is methodological, rather than substantive. There is no reason to expect that *general* propositions will accurately describe either the impact of regulatory competition on the national capacity to regulate and tax economic activities, or the capacity of European or international institutions to deal effectively with regulatory problems in those areas where national capacities are in fact undermined. Thus, the fact that existing studies come to widely differing conclusions, some highly optimistic, others deeply pessimistic, need not imply that at least some of these authors must be wrong. Instead, it is likely that the cases studied are dealing with different constellations in which different outcomes should be expected. Thus, if research should not merely provide descriptions of the empirical variance, but aim at theory-based explana-

Figure 4-1 National and European problem-solving



tions and predictions, it will be necessary to identify those factors and causal mechanisms that affect the outcome one way or another.

My own attempt has drawn separate attention to the factors conserving or reducing national regulatory capacities, and the factors facilitating or constraining regulation at the European level. At the national level, regulatory capacity is constrained, first, by the legal force of "negative integration" which rules out national measures that could restrain trade or distort competition. But even where national regulations are legally permissible, the economic pressures of regulatory competition may impose additional constraints. Their intensity varies from one field to another, and the same is true of the strength of the political forces defending existing levels of national regulation and social protection. Thus, the horizontal axis in Figure 4-1 represents a composite measure of these legal, economic and political factors defining the remaining national capacity to regulate.

The vertical axis representing the capacity for European action is again defined by collapsing two sets of factors. In the legal dimension, the Union is able to exercise certain exclusive competencies, whereas in other areas its jurisdiction is tightly constrained or non-existent. In the politico-economic dimension, European capacity is constrained by the need for unanimous, or nearly unanimous, agreement among member state governments in the Council of Ministers. This

need is eliminated for "negative integration" in areas where not only the enforcement of European rules, but also the definition of their substantive reach, is left to unilateral decisions of the Commission and the European Court of Justice. But where Council agreement is required, the policy-specific constellations of interest among national governments and the intensity of conflict inherent in these constellations define the most important constraints on European action.[21]

Figure 4-1 represents my current understanding of where in this two-dimensional conceptualization of national and European problem-solving capacities some policy areas might be located. In the lower-right corner, national policy is not (yet) much affected by negative integration or regulatory competition, whereas in the upper-left corner national policy has been displaced by an exclusive European competence. Neither of these areas is discussed in the present volume. The more "optimistic" contributions (Eichener; Genschel/Plümper on banking; Joerges/Neyer; Pollack; Vogel) tend to focus on policy areas located in the upper-right quadrant, where national regulatory capacities are still legally protected, and where agreement on European (or international) standards is not prevented by massive conflicts of interest. In these policy areas, there is no general loss of overall problem-solving capacity since, if regulation at the international level should fail, national solutions are still available as a fall-back option. The lower left-hand quadrant is the focus of the "pessimistic" contributions (Genschel/Plümper on taxes; Streeck on social policy). It represents the location of policy areas where national capacities are economically constrained by the severe downward pressure of regulatory competition while European action remains blocked by severe conflicts of interest among national governments.

Environmental process regulations not benefiting from market-making considerations are located closer to the centre of the diagram to indicate their in-between character. Since they add to the costs of local production, they are also affected by regulatory competition—but, as Vogel has pointed out, the burden imposed is generally less heavy than the burdens of the welfare state. For that reason, there is less economic pressure on high-regulation countries to reduce levels of environmental protection than in the social-policy field. By the same token, economic conflicts of interest at the European level are likely to be less severe, and institutional differences among high-regulation countries are also

21 In this conceptualization the increasing involvement of the European Parliament just adds another actor whose agreement must be obtained before the Community is able to act. It does not provide majoritarian capacities for conflict resolution, as is generally true of national parliaments.

less likely to impede agreement on common European rules. Nevertheless, agreement is not easy (Héritier/Knill/Mingers 1996), and the instances of failure are sufficiently numerous to consider this an area where European problem-solving capacity is relatively low (Golub 1996a, 1996b, 1996c).

The arrow in the diagram is meant to indicate that there are also important policy areas in which control over policy is shifting from the national to the European level. This has already occurred in telecommunications, where economic competition has weakened the effectiveness of national regulations and where, then, the European Commission, supported by the Court, has taken the lead in requiring deregulation and liberalization even from governments that were not yet ready to go down this road (Schmidt 1997, 1998). The contribution by Adrienne Héritier not only describes and explains the difficult process of transition in the field of road haulage regulation, but also demonstrates that its impact on overall problem-solving capacity varies importantly from one country to another, depending on what had previously been defined as a "problem" by national political processes, and what types of national solution had been in place. Thus, from a Dutch point of view, the liberalization of European road haulage would be considered as a superior solution to the politically salient problems of the industry and its customers in the Netherlands, whereas in Germany, France and Italy Europeanization merely destroyed existing national regulations without being able to deal effectively with the problems that these had been meant to solve. Similar transitions may be under way in the field of energy policy, and perhaps in other areas that were traditionally considered part of the national *service public* as well.

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5 Interdependence and Democratic Legitimation (2000)

The premise of this volume is that Western democracies have in recent decades come to suffer a decline of popular trust or confidence in, or satisfaction with, the performance of their representative institutions, and that this decline needs to be taken seriously as a potential threat to the viability of democratic government (see Introduction, this volume). The terms used here also suggest that the volume starts from an implicit principal-agent model in which citizens-as-principals have grown dissatisfied with the performance of their political agents. If we assume that this is empirically true and that the change does reflect a deterioration of perceived performance rather than the increasing (or increasingly conflicting) expectations of citizen-principals, there are still two fundamentally different working hypotheses that one might advance. Growing dissatisfaction could be caused by a reduction in either the *fidelity* of agents—that is, their willingness to act in the interest of their principals—or the *capacity* of agents to achieve the outcomes expected by their principals. My chapter will focus on one particular type of constraint on capacity: growing international economic interdependence. I will not review the empirical evidence regarding changes in the levels of popular satisfaction except to note the high degree of variance among countries (Newton/Norris and also Katzenstein, this volume). Instead, I will examine the analytical and normative arguments that could link interdependence to citizen satisfaction and, ultimately, to democratic legitimacy. I will argue that one should indeed expect such links to exist, but that their effect on legitimacy is strongly mediated by the distinctive characteristics of national political discourse.

This essay was part of the edited volume "Disaffected Democracies." The reader is requested to bear this in mind when the author refers to "this volume." The chapters to which the author refers are listed at the beginning of the reference list.

Interdependence as a Challenge to Democratic Legitimacy

From the Athenian city-state to the modern nation-state, democratic self-government has been defined by reference to the territorially based constituencies of local, regional, and national governments. There do exist democratically self-governing associations with a geographically dispersed membership—professional associations, labor unions, some clubs, and perhaps some nongovernmental organizations like Amnesty International or Greenpeace come to mind—but the authority that such associations can exercise over their membership is either very limited, essentially depending on voluntary compliance, or exercised "in the shadow of the state," on whose laws and enforcement machinery they must rely when voluntary compliance is not forthcoming. The monopoly of legitimate coercion, at any rate, on which the problem-solving capacity of democratic self-government continues to depend, has been achieved within territorially defined units alone.

However, if democratic self-government is defined by reference to territorial units, it must be vulnerable to increasing military, economic, technical, ecological, and communicative interdependence under which choices made by any one unit will create, and suffer from, external effects. Spill-outs may reduce the effectiveness of domestic choices, and spill-ins may produce domestic outcomes that have not been chosen internally. In the following sections I will explore the reasons why the lack of congruence between the constituencies of democratic governments and the populations that are affected by their decisions poses a major problem for democratic legitimacy.

Input- and Output-oriented Democratic Legitimacy

"Democracy" has a variety of meanings, but when we speak of "democratic legitimacy" we refer to arguments that justify the exercise of governing authority, that is, the authority to adopt collectively binding decisions and to implement these decisions with resources taken from the members of the collectivity and by resort to the state's monopoly on legitimate coercion. Legitimating arguments, then, must establish a moral duty to obey these collectively binding decisions even if they conflict with individual preferences.[1] In the modern era the concept of democracy has become the major foundation of such legitimating arguments. Its basic appeal was most succinctly expressed in Abraham Lincoln's Gettysburg Address by reference to the triple identity of the *governed* ("government of the people"), the *governors* ("government by the people"), and the

1 The presumption, of course, is that governments that lack legitimacy and rely purely on the exercise or threat of superior force will achieve only low levels of governing efficiency.

beneficiaries of government ("government for the people"). But how does Lincoln's formula create a moral duty to obey government?

Leaving aside for the moment the first element, which defines the collectivity that is to be self-governing ("government of the people"), the formula points to two analytically distinct dimensions of democratic legitimation, one input-oriented, the other output-oriented (Scharpf 1970). On the input side, "government by the people" implies that collectively binding decisions should derive from the authentic expression of the preferences of the constituency in question. Legitimate government, in other words, is *self*-government, and compliance can be expected because laws are self-determined rather than imposed exogenously. On the output side, "government for the people" implies that collectively binding decisions should serve the common interests of the constituency. Obedience is justified because collective fate control is increased when government can be employed to deal with those problems that members of the collectivity cannot solve individually through market interactions or voluntary cooperation.

However, by using a singular term for the plural originators and beneficiaries of democratic government, both of Lincoln's criteria avoid the critical question of how the exercise of governing authority and the duty to obey its commands should be legitimated if "the people" is not an organic unity or an aggregate of homogeneous individuals but an association of individuals and groups whose preferences may diverge and whose interests may conflict. From a purely input-oriented perspective, there are two possible solutions to this problem. The first postulates that government should be consensual, based on the widest possible agreement among the individuals and groups affected; the second justifies decisions based on the expressed preferences of a majority of the membership (Lijphart 1984, 1991).

From an input perspective, consensual democracy has first-rate credentials, resting ultimately on the Roman law maxim of *volenti non fit iniuria* (i.e., if you have consented, you cannot claim damages). Its weakness lies on the output side: in the face of divergent or conflicting preferences, the search for consensus may prevent the adoption of any effective solution. Thus, output-oriented concepts tend to favor majoritarian democracy because of its greater problem-solving efficiency (Buchanan/Tullock 1962), but they must then face the problem of assuring that majoritarian policies will indeed serve the public interest. I will return to that point shortly.

To justify majority rule from a purely input-oriented perspective is more demanding than is often assumed.[2] As I have tried to show elsewhere (Scharpf

2 The general assumption is well stated by Michael Greven, who postulates: "The crucial idea from which the legitimacy of government in democracies derives is the possibility of participa-

1997a: Chapter 7), it must ultimately presuppose that the preferences of the majority will somehow include the welfare of the minority—an assumption that rules out both hostile majorities (e.g., Nazi Germany or Bosnia) and the bloody-minded pursuit of rational self-interest. At bottom, therefore, notions of democracy that rely exclusively on the "will of the people" as a source of political legitimacy must assume the existence of a strong collective identity and a pervasive sense of common fate that will override divergent preferences and interests. Only if these Rousseauan assumptions are fulfilled is it possible to treat the preferences of the majority as a true expression of the *volonté générale* that the minority would be wrong to oppose.

In light of the totalitarian potential of the Rousseauan tradition (Talmon 1955) and of pervasive misgivings about the cognitive and normative shortcomings of "populist democracy" (Sartori 1965; Riker 1982), modern democratic theory rarely derives legitimacy primarily from the belief that "the people can do no wrong." Where input elements dominate, theorists take care to restrict the domain of "participative democracy" to the microlevel of local or shopfloor decisions (Lindner 1990) to emphasize procedural safeguards against the dangers of "direct democracy" (Luthardt 1994) or to insist that policy inputs should arise from public debates that have the qualities of truth-oriented deliberations and discourses (Manin 1987; Dryzek 1990; Schmalz-Bruns 1995; Habermas 1996). In effect, the ideal of "deliberative democracy" links input- and output-oriented arguments by insisting on specific input procedures that will favor qualitatively acceptable outputs by regulating "the flow of discursive option- and will-formation in such a way that their fallible results enjoy the presumption of being reasonable" (Habermas 1996: 301). I will return to this point below.

In any case, input-oriented justifications of majority rule are everywhere complemented by output-oriented criteria with a negative and a positive thrust. In addition to requiring that governments achieve effective solutions to collective-action problems, output-oriented criteria must also specify what governments should *not* be allowed to do if they are to be considered "government for the people." The emphasis here is on institutional arrangements that are meant

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tion by all citizens, based on the mutual recognition of their civic and political equality. […] Precisely because and if this is true, democratic theory implies that the outcome of political will-formation has a claim to recognition and legitimacy even among those whose arguments failed in the discussion and whose preferences were defeated in a vote" (Greven 1998: 480, my translation). But why should the mere opportunity to participate on an equal basis have the force of legitimacy? At bottom, the argument seems to rest on the assumption that you have no reason to complain if you have fought and lost in a fair fight. Under the conditions of modern mass democracies, this logic may indeed be relevant for political candidates, but it is harder to see why it should persuade individual citizens.

to protect against the danger that the governing power of the majority will be used to the detriment of minorities or individuals, and to assure that these powers will be used only to further the common interests of the constituency rather than the special interests of officeholders and their clienteles. These institutional arrangements include constitutional guarantees of individual rights, an independent judiciary, and checks and balances as well as the mechanisms of representative democracy, which provide opportunities for public debate, reflection, and criticism that are thought to discriminate against self-serving policy choices (Habermas 1962; Elster 1986) and that also attempt to ensure the accountability of office-holders to the electorate.[3]

Countries differ greatly in the extent to which their institutions emphasize the negative requirements of output-oriented legitimacy by creating vetoes and electoral vulnerabilities that make it more difficult to coordinate and employ the policy resources available to government as a whole in the pursuit of coherent and effective policy choices (Tsebelis 1995). The differences between, say, the concentration of power in the British "Westminster Model" and the dispersion of power in the present German constitution (with coalition governments, an opposition veto in the federal chamber, an activist constitutional court, and an independent central bank) are rooted in historical experiences and path-dependent courses of institutional evolution, and there is no reason to expect convergence (Pierson 1997).

By contrast, regarding the positive dimension of problem-solving effectiveness, democratic theory has generally built on the foundations of the sovereign "Westphalian" state. It is taken for granted that the democratic state, like its absolutist predecessor, is potentially omnipotent within its own territory and able to control its borders. There are physical constraints on internally available resources, of course, and boundaries may be violated by outsiders, but within these limits, the democratic state is as capable as its nondemocratic predecessors and competitors of taxing its residents, regulating their actions with the force of law, requisitioning their property and services, and requiring them to risk their lives in its defense. Any limits on these capabilities are thought to be self-im-

3 Representation and accountability based on general elections have been thought to counteract the dangers of self-interested majorities since the Federalist Papers (Cooke 1961). The argument can be restated in rational-choice terms if it is first assumed that, for any individual voter, voting is a "low-cost decision" (Kirchgässner 1992), meaning that the probable effect on individual self-interest is so low that it is reasonable to think that at least some voters will be motivated by public-interest considerations (Brennan 1989). If that is granted, the anticipation of a public-interest-oriented swing vote creates strong incentives for office-holders to select policies that can be publicly defended as serving common rather than special interests (Scharpf 1997a: Chapter 8).

posed, whether by constitutional norm or political choice. In principle, then, the state has the means to achieve all normatively and constitutionally acceptable domestic purposes, and governors are held accountable for failing to do so.

Interdependence and the Loss of Congruence

If this now seems an unrealistic ideal in light of growing international interdependence, it is one that was closely approximated in the recent past. In the first three decades following the Great Depression and the Second World War, Western democracies finally learned to control the cyclical crises of their economies, and they were able to meet the aspirations of their citizens with full employment, growing incomes, rising levels of education, reduced inequality, and enhanced social security in times of unemployment, sickness, and old age. It is only now realized, however, to what extent this "Great Transformation" (Polanyi 1957) depended on the fact that, after the rampant protectionism of the 1930s and the Second World War, capitalist democracies were for a time able to control their economic boundaries. Goods and services that did not conform to domestic regulations or threatened the survival of domestic producers could be excluded, capital outflows could be prevented, and immigration was tightly controlled. Under these conditions, nations could choose among a wide range of options, and while the Scandinavian welfare states differed greatly from the German social-market economy or post-New Deal America, all were equally viable economically and legitimated by broad political support.

During these golden decades, interdependence increased only slowly under an American-led international regime of "embedded liberalism" (Ruggie 1982), and pre-1914 levels of international integration in product and capital markets were not surpassed until the 1980s (Hirst/Thompson 1995; Bairoch 1997).[4] In the meantime, however, the nation-state has once again lost control over its economic boundaries. This is most obvious within the European Union, where the completion of the unified market for goods, services, and capital has now been topped off by monetary union. Beyond Europe repeated rounds of GATT and WTO negotiations have drastically reduced tariff and non-tariff barriers to

4 These data are often cited to suggest that, because "globalization" is nothing new, there is no reason to be concerned about its political impact. But that argument forgets that international capitalism before 1914 and again in the 1920s was characterized by deep economic crises. Before 1914 political democracy was underdeveloped in most countries, and the level of political aspirations—and hence the potential impact of economic performance on political trust—was much lower than it is now. In the interwar period, however, the crises of international capitalism had serious, and in the case of Germany catastrophic, consequences for the viability of democracy.

trade in goods and services, and the explosive increase of transnational money flows has eliminated any chance of protecting national capital markets.

Consumers are thus free to buy goods and services regardless of their national origin; firms are free to produce anywhere without endangering access to their home market; capital is free to take advantage of profitable opportunities for investment or speculation around the globe and around the clock; and workers are free to choose where they work, at least within the European Union. Because they are held accountable for the economic and social welfare of their constituents, however, governments must be concerned about the potential loss of jobs when demand for locally produced goods and services declines, firms relocate production to other countries, capital owners prefer the investment opportunities offered elsewhere, high-skilled workers emigrate, and taxpayers or their taxable resources leave the nation.

The Impact of Regulatory Competition

Because of the mobility of economic actors and factors, there is now a much greater degree of interdependence not only among the formerly compartmentalized national economies, but also among national policy choices that affect the economy. If one government cuts its social security contributions, that reduces the competitiveness of products from countries that have not done so, and if one country cuts its rate of corporate taxation, that creates incentives for firms to relocate. Thus, it is wrong to think that only firms are in competition with each other. Under economic interdependence, nation-states find themselves competing for market shares, investment capital, and taxable revenues, and that competition constrains their choices among macroeconomic, regulatory, and tax policy options.

From the perspective of democratic legitimacy, therefore, economic interdependence raises two problems. On the one hand, the growing importance of external effects undermines the congruence between "the people" who are being governed and "the people" who are supposed to govern. Choices that may be legitimated in one country (e.g., the interest-rate policy of the German Bundesbank) may have a direct impact on the economy of another country (e.g., unemployment in France) in which this choice was not, and would not be, democratically legitimated. In effect, this reduces the ability of all governments to achieve the purposes that are salient for their citizens. On the other hand, the competition for mobile factors of production and taxable assets imposes a redistributive bias on national policies that shifts burdens from mobile actors and the owners of mobile assets onto immobile actors and the owners of immobile assets. Again, there is no reason to expect that these policy shifts would

necessarily be legitimated by corresponding shifts in the authentic preferences of citizens in the competing countries.

Both of these changes are widely interpreted on the normative level as a loss of democratic legitimacy, and on the empirical level they may generate dissatisfaction with the government of the day and perhaps a more general disaffection with the democratic political system as such that would be reflected in political abstention, alienation, or growing support for system-critical movements and radical political parties. Increasing economic interdependence is thus thought likely to generate problems for democratic legitimacy on the national level. Before I examine this conclusion more closely, it is necessary to examine whether international or supranational solutions might avoid, or at least alleviate, the problems faced on the national level.

Supranational Remedies?

If territorially limited government is considered ineffective in the output dimension as well as unresponsive in the input dimension, territorial enlargement and functional centralization would seem to address the problems of interdependence. This, at any rate, is the standard prescription of fiscal federalism (Oates 1977); it is the logic behind the long-standing recommendation to overcome the deficiencies of joint decision-making in German federalism by merging several *Länder* to create larger units with fewer externalities (Scharpf 1988); and it is, of course, the logic driving European political integration.

Centralization is generally justified in output-oriented terms, but that is plausible only if it is also assumed that decisions at the higher level are taken under majoritarian or hierarchical rules and cannot be blocked by constituent governments. By contrast, from an input-oriented perspective, centralization appears problematic even within the nation-state, where a central government acts with clear democratic legitimacy. If citizen preferences differ but policies must be uniform, centralization will necessarily reduce the goodness of fit between preferences and policies (Buchanan/Tullock 1962: Chapter 6).[5] It is at the supra-

5 Both the assumption and the conclusion can be questioned. In the Jacobin tradition of French democracy, centralization is considered desirable precisely because it imposes uniformity and hence civic equality (V. Schmidt 1990). Conversely, centrally imposed policies might at least in theory provide for differentiated solutions that would fit the differing conditions or preferences of subgroups or regions within the larger constituency or territory. One example is the Spanish constitution, which grants differing degrees of autonomy to different regional units. In general, however, the empirical association between centralization and uniformity seems to be quite strong.

national level, however, at which the centralizing solutions that are justified by output-oriented arguments become truly problematic. In the following sections I will discuss these problems by reference to the European Union.

The Preconditions of Majority Rule

Governing systems that can overrule dissenting interests need to be legitimated, and before it is meaningful to talk about either input- or output-oriented arguments with regard to the European Union, it is necessary to discuss a precondition that is usually taken for granted in a national context: the definition of the constituency that is to be governed by majority rule. In Lincoln's triad this is "government of the people" that I slapped above and that Giovanni Sartori (1965: 26) found to pose "insoluble problems of interpretation." The difficulties are well illustrated by countries in which ethnic, linguistic, or religious divisions seem to undermine the legitimacy of majority rule (e.g., Canada, Belgium, the former Czechoslovakia, Bosnia). In other countries cleavages of a similar nature do not have nearly the same delegitimating effects (e.g., Switzerland, the Netherlands, the United States). Regardless of the main criterion of sameness or difference, it seems obvious that a "we-identity" (Elias 1987) that is shared by the members of the community is a logically necessary precondition of democratic legitimacy.

On the input side we-identity is necessary to justify "my trust in the benevolence (and perhaps even solidarity) of my fellow citizens" (Offe 1998: 17), which implies that the welfare of the minority must also be included in the preference function of the majority. On the output side we-identity is necessary to define membership in the community whose common interests are thought to justify governmental action even if it should entail individual sacrifices. In neither dimension is it possible to name a single set of necessary and sufficient criteria for what constitutes an effective we-identity; common language, culture, religion, history, and institutions play important but varying roles. There is also no reason to assume that only one specific type of group can be invested with a collective identity. Individuals may identify with different frames of reference—religious, partisan, territorial, local, regional, national, European, and so on—in different contexts or for different reasons. Moreover, collective identifications may differ greatly in their intensities and thus may legitimate rather different levels of sacrifices and involuntary redistribution.

Although the willingness to accept sacrifices for the purpose of solidaristic redistribution seems remarkably high at the level of established nation-states (Hicks/Swank 1992), it also seems clear that no political unit above the national level has as yet developed a we-identity of comparable intensity. This is true even of the European Union, which has gone further than any other

supranational or international organization toward establishing institutions that resemble those of constitutional democracies on the national level. But even if further institutional reforms invested the directly elected European Parliament with the full range of competencies of a national parliament, there is no reason to think that its majority decisions could legitimate heavy sacrifices imposed on a dissenting minority. As Joseph Weiler (1996: 523) succinctly observed, "Democracy does not exist in a vacuum. It is premised on the existence of a polity with members—the Demos—by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a Demos. Simply put, if there is no Demos, there can be no operating democracy." To drive the point home, Weiler constructs a counterfactual:

> Imagine an *Anschluss* between Germany and Denmark. Try and tell the Danes that they should not worry, since they will have full representation in the Bundestag. Their screams of grief will be shrill not simply because they will be condemned, as Danes, to permanent minority-ship (that may be true of the German Greens too), but because the way nationality, in this way of thinking, enmeshes with democracy is that even majority rule is only legitimate within a Demos, when Danes rule Danes.

Turning to Europe, he concludes that "it is a matter of empirical observation that there is no European Demos not a people, not a nation."

It is hard to deny this conclusion, and with each territorial expansion the hope that the multiple peoples of Europe will soon develop a common political identity and a common space of political communication has receded further into the future. This is not meant to discourage efforts that could advance political integration.[6] For the time being, though, the European Union cannot yet rely on the foundation of a collective identity strong enough to legitimate majority rule.

The Limits of Supranational Legitimacy

If Europe has yet to meet the preconditions of a majoritarian democracy, that severely limits its capability to act in the face of politically salient disagreements. The European Union is now relying for the legitimation of its policy outputs

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6 Jacques Delors recently made a plausible proposal. It would require European parties to nominate their own candidates for the office of president of the European Commission in European elections. This would not only force governments to nominate the winning candidate for confirmation by the European Parliament, but it would also focus public attention in all member states on the competition for a highly visible European office, and it would put European issues on the agenda of the European election campaign, which has been dominated by purely national concerns. Although this option could be realized without revising the treaties, European parties have yet to respond.

on a combination of hierarchical and consensual decision-making processes. Hierarchical authority is most clearly exemplified by the European Central Bank (ECB), which, under the rules adopted in the Maastricht Treaty, was designed to be even more independent of political pressure and accountability than the German Bundesbank, which it will replace as the author of monetary policy for the members of the European Monetary Union. But whereas the formal independence of the ECB and the scope of its hierarchical authority were legitimated by the explicit and highly politicized decisions of national governments and parliaments, much less political attention has been paid to the expansion of the authority of the European Court of Justice (Weiler 1982). Nevertheless, the authority of the Court, together with the active use of independent enforcement powers granted to the European Commission, has been used to define and enlarge the reach of "negative integration," that is, the laws that restrict the capacity of national governments to interfere with the free movement of goods, services, labor, and capital throughout the internal European market (Scharpf 1996). The most important extension of authority was achieved through the application of European competition law to formerly protected services like telecommunications, air, road, and rail transport, and energy supply, which had been exempted from full competition in practically all European countries (S. Schmidt 1998). Even though this step might have strained the authority of the law to its limits, the legitimacy of judicial law-making has not been seriously undermined.[7]

By contrast, European processes of "positive integration," or active regulation of the economy, depend on broad political agreement. Admittedly this cannot be equated with the classical model of intergovernmental negotiations. The European Parliament is rapidly approaching the point at which its veto cannot be overruled in most important fields of European legislation, and the practical importance of the European Commission's monopoly on legislative initiative (in addition to its unilateral enforcement powers) can hardly be overestimated. Nevertheless, the approval of national governments represented in the Council of Ministers is ultimately decisive for the adoption of European legislation, and even though decisions by qualified majority are possible in an increasing number of areas, the requirements are so steep that small groups of governments with similar interests cannot be overruled. Most Council decisions are adopted by broad consensus.

If European legislation thus avoids the threat to political legitimacy that would be posed if substantial interests could be overruled by self-interested majorities,

7 In the face of growing political unease, however, the Court and the Commission themselves have recently become more sensitive to the limits of negative integration (Scharpf 1999).

one of two consequences is likely to follow: either policy choices are blocked by disagreements among national governments, or the burden of legitimating European policy solutions is shifted back to the member states. In either case, the outcome adds to the difficulties of democratic legitimation on the national level: either problem-solving deficits persist, or policies must be accepted that may not, on the input side, conform to the authentic preferences of national constituencies or that may not, on the output side, be optimal solutions when judged in terms of the national interest. Because there are, in fact, areas where EU policy-making is highly effective, and others where the problem-solving capacity of the Union is very low (Scharpf 1997b), both types of legitimacy problems must be dealt with on the national level. I will begin with an examination of the input-oriented problems that arise on the national level precisely because European policy-making does succeed in producing effective outputs.

International Problem-solving and National Preferences

To clarify the implications of internationally agreed upon policies for national democracies, I will refer to a highly simplified model of intergovernmental negotiations (see Figure 5-1). Assume that three countries, A, B, and C, face a problem that none of them can solve nationally, but that can be solved by means of international cooperation among all three countries. Although all of them dislike the status quo (located at SQ = 0), each country prefers a different solution, located (in a unidimensional and interval-scaled utility space) at points A = 1, B = 3, and C = 5, respectively. Assume also that these "ideal points" are determined, *ex ante* and by means of strictly input-oriented procedures, by the citizens (i.e., the median voter) in each country. If we further assume that negotiators from each country are strictly bound by citizen preferences, it is clear that none of the cooperative solutions can win the agreement of all three countries and that the undesirable status quo will continue. Thus, if negotiations are to serve any purpose at all, the governments must be allowed to agree to solutions that diverge from the *ex ante* preferences of their citizens—provided that the solution chosen increases the welfare of the country (i.e., reduces the distance from the country's ideal point) in comparison with the status quo.

Figure 5-1 Negotiations in single-issue space

Figure 5-2 Welfare losses in negotiated agreements

	SQ	A	B	C
Loss for A	–1	0	–2	–4
Loss for B	–3	–2	0	–2
Loss for C	–5	–4	–2	0
Joint losses	–9	–6	–4	–6

If only the *ex ante* positions of each country are considered, the sole acceptable solution would be point A, which represents the lowest common denominator outcome. It satisfies the preferences of the most "conservative" country A and is still preferred to the status quo by B and C. However, the famous Coase Theorem tells us that negotiations could do better. In the absence of transaction costs, they should be able to achieve an overall welfare maximum (Coase 1960). If distances from each country's ideal point are interpreted as welfare losses, this welfare maximum (i.e., the minimum aggregate loss) is located at point B rather than at point A. But because that solution is less attractive to country A than the status quo, it needs to be bought off by side payments, say, one unit each from countries B and C, which they could well afford to pay from the gains that they would achieve if the agreed-on solution is point B rather than A.

So far, so good. For each country, this outcome is the best that it can reasonably expect to reach in a world in which solutions cannot be unilaterally imposed but depend on the voluntary agreement of all parties involved.[8] In that sense the output-oriented legitimacy of the negotiated outcome would be assured. But what about input-oriented legitimacy? To appreciate the difficulties here, it is useful to consider the preconditions for achieving Coasian outcomes in the real as distinguished from the model world.

In order to achieve the welfare-maximizing outcome, the parties must somehow overcome the "Negotiators' Dilemma" (Lax/Sebenius 1986; Scharpf 1997a: Chapter 6) that arises from the simultaneous presence of common interests (in finding the best overall solution) and competitive interests (in maximizing one's share). This implies that all aspects of the situation—available policy options, their likely effects, and all participants' valuations of these effects—would have to be transparent to all of the parties involved. In addition, the parties would need to agree on a normative rule for distributing the costs and benefits of cooperation. These are extremely demanding preconditions. They depend to a large degree on the development of mutual trust, or at least mutual

8 The negotiated solution would not necessarily be the one preferred by the median voter in a larger country because negotiations tend to equalize the bargaining powers of the participating countries regardless of differences in the size of their populations.

understanding, among the negotiators.[9] If these preconditions are not met, the Negotiators' Dilemma will induce self-serving negotiating strategies that produce inferior outcomes or frustrate agreement altogether.

With regard to input-oriented legitimacy, this analysis seems to lead to two dismal conclusions. First, it is clear that negotiations cannot reach their optimal outcome (i.e., the outcome maximizing total welfare for the group of countries as a whole) without systematically departing from *ex ante* citizen preferences in most or all countries. Second, and more important for our purposes, the specific reasons for these departures cannot be fully communicated to the constituencies in each country. If mutual understanding and trust among negotiators is an essential precondition for negotiating optimal solutions, it follows that intergovernmental negotiations are unlikely to succeed in the glare of publicity, and if that is so, there will inevitably be a communication gap between the international and national levels of this two-level game (Putnam 1988).

It is this systematic gap that poses the most serious threat to democratic legitimacy. Where it exists the opposition in each country can claim not only that the outcome does not conform to *ex ante* citizen preferences, but also that the national interest was sold short by incompetent or disloyal negotiators.[10] To rebut this claim credibly, a government would have to argue that this was the best that could be obtained under the circumstances and disclose inside information about feasible options and its informed guesses about the true preferences and options of the other governments—none of which could be fully scrutinized and verified in public or parliamentary debates.

Moreover, given the difficulties of renegotiation, governments can no longer afford to be responsive to criticisms and suggestions raised in public debate, even if agreements need to be approved by parliament or referenda. Instead, they must present each agreement as a fait accompli, a take-it-or-leave-it proposition whose rejection will cause the collapse of the international effort. In addition, given the joint responsibility of all negotiating governments, no single government can in truth be held accountable for the ultimate outcome.[11] Thus,

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9 The difficulties of reaching agreement are reduced, and the approximation of Coasian outcomes is facilitated, if negotiations are "embedded" in stable networks, and conditions can be further improved by means of institutional arrangements that increase transparency, provide for the good services of an "agenda setter," and generate mutual trust through the evolution of normative regimes (Scharpf 1997a: Chapter 6).

10 In the early years of the Federal Republic of Germany, when Konrad Adenauer had to defend the disappointing outcome of negotiations over the "occupation statute," he was attacked by the leader of the opposition as being "the chancellor of the Allies."

11 Exactly the same criticism is directed at interstate and federal-state negotiations in the joint-decision system of German federalism (Scharpf 1988).

intergovernmental negotiations disable the institutional mechanisms that link government action to the expressed preferences of constituents or to the scrutiny of parliaments, political parties, and public debate.[12]

The need to discipline domestic preference formation has always frustrated demands for a "democratic" foreign policy (except under hegemonic conditions when one government can impose its domestically generated preferences on external partners). What is new is that increasing transnational interdependence now inflicts the same compulsion on ever larger areas of what used to be purely domestic policy choices. In effect, then, the more policy choices move from the national level to the level of intergovernmental negotiations, the more the institutions designed to assure input-oriented influence and accountability lose their effectiveness.[13]

Legitimate Democracy without Omnipotence

We seem to confront a dilemma. As interdependence increases, the nation-state finds its range of policy options exogenously constrained, and some previously legitimated policies become less effective, more costly, or downright unfeasible—which must be counted as a loss of democratic self-determination even if new options are added to the policy repertoire. It is true, however, that constraints do not rule out choice, and it may be possible to achieve former (or newly agreed upon) policy objectives by means of new policy instruments (Scharpf 1999). In that event output-oriented legitimacy may be maintained, but the new policy instruments must be adopted either through domestic processes that are extremely sensitive to international constraints or through international negotiations. Either way, the increase in output effectiveness seems to carry a high price in terms of input-oriented legitimacy.

The Inevitable Corruption of Input-oriented Legitimacy?

On the input side the growing importance of external economic and institutional constraints directly challenges conventional notions of popular sovereignty and expectations that governments should carry out the "will of the people."

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12 The same argument, without democratic-theory pretensions, supports the proposition that European integration is strengthening national governments in relation to other national and subnational political actors (Moravcsik 1993, 1994).

13 For an early recognition of the problem, see Kaiser (1971).

Governments must increasingly avoid policy choices that would be both domestically popular and economically feasible out of respect for GATT rules and European law or as a result of decisions made by the WTO, the European Commission, or the European Court of Justice. Other policy choices that would be both legally permissible and domestically popular must be ruled out because they could have disastrous consequences for the international competitiveness of national producers, the confidence of investors, or the stability of the national currency.

In addition, as external legal and economic constraints multiply under conditions of growing international interdependence, the role of experts and specialized knowledge will increase to an extent that may render the role of authentic but untutored popular preferences practically insignificant. This is all the more true if solutions must be achieved by means of international negotiations. In short, citizens' approval is becoming ever less sufficient for assuring, or even for justifying, policy choices, so input-oriented legitimating arguments will become less plausible, and national governments must increasingly depend on output-oriented legitimation alone.

This is already happening. As more and more domestic policy areas have become internationally interdependent, governments are ever more tempted to rely on the argument that foreign policy should override domestic political considerations to immunize policies with an international dimension against the demands and criticisms of domestic public opinion, political parties, parliaments, and other democratic input processes. To the extent that they succeed, legitimating arguments take on a paternalistic and technocratic character, asserting that under difficult circumstances and in a dangerous environment, any demands for more direct participation and control would only make the government's difficult job even more difficult. When that argument is accepted, partisan controversies and political attention at the national level are likely to be diverted in two directions: toward personalities and scandals on the one hand, and policy outcomes (rather than policy choices) on the other hand. Elections will revolve around either candidates and their personal qualities and deficiencies or the performance of the stock market, the level of unemployment, the rate of inflation, the size of the public-sector deficit, or even natural disasters like floods and earthquakes, without regard for whether the government was in fact responsible for these outcomes. In other words, input-oriented politics in general, and political accountability in particular, will lose their connection to, and their disciplining effect on, policy choices.

Toward Internationally Embedded Policy Discourses?

Can it be otherwise? A positive answer requires a reconsideration of the role that input-oriented mechanisms can and should play in the democratic process. I begin by returning to the discussion of intergovernmental negotiations. The objections made above from an input-oriented direction are compelling only when they are raised against negotiated solutions for problems that could just as well have been dealt with at the national level. In German federalism we have indeed identified instances in which the practice of joint decision-making went far beyond the "objective" need for coordination in the face of interdependency (Scharpf 1988), and the same may be true in some European policy areas as well. But as economic interdependency increases, these instances will become rarer, and the input-oriented critique of intergovernmental negotiations will be weakened. As for problems that cannot be solved within the boundaries and means of the nation-state, the relevant criterion for judging solutions cannot be conformity to the particularistic preferences of citizens of that state. Any country that is not a hegemon must also consider the interests of necessary partners in a cooperative solution. Preferences formulated within a national frame of reference are relevant for defining the "ideal points" of a country's negotiators, but it is not reasonable to expect that negotiated outcomes should conform to these national aspirations. Instead, the most for which one can legitimately ask within a national frame of reference is that the outcome be better than the "best alternative to the negotiated agreement" (BATNA), and that it approach nationally defined aspirations as closely as possible, given bargaining conditions and the BATNA positions of the other countries.

This implies that democratic theory can no longer treat popular preferences as exogenously given. To be normatively relevant, they must relate to policy outcomes that are feasible within the international context in which the choice must be made. Thus, "democratic decisionism" (Greven 1998) and the assumption of omnipotence associated with popular sovereignty are no longer theoretically viable options. Within the context of input-oriented theories, these requirements are met by concepts of "discursive" or "deliberative democracy," which insist on procedures of "will-formation" that are supposed to lead to "reasonable" conclusions (Habermas 1996). In trying to avoid the pitfalls of unrefined populism, however, Habermas and others tend to insist on extremely demanding procedural preconditions that would assure a very high degree of moral and intellectual sophistication in public debates. In the tradition of critical theory, these demands are not necessarily meant to be practicable; if they could be approximated, political discourse would be restricted to a small elite of philosopher-kings.

The policy-oriented discourses that are going on within existing Western democracies are, indeed, largely elite affairs. They are conducted by politicians, interest group representatives, prominent experts, and journalists under the filtering, amplifying, and distorting conditions of the media. Discussion takes place in policy communities with specialized publics of interested nonelites, and these specialized discussions are linked to the more general political discourses carried on among policy generalists in governments, parliaments, political parties, associations, and the media on issues that could potentially catch the attention of the wider public and affect electoral outcomes. It is in these interwoven patterns of communication among specialists, generalists, and communicators that problem definitions are proposed and rejected, policy options are presented, criticized, and justified, political performance is evaluated, and political trust and, ultimately, legitimacy are generated, eroded, or destroyed.

These communications surely will not approximate the ideal debates of philosopher-kings: they are often polemical in style and motivated by self-interest rather than by a search for truth. What matters, though, is that they are conducted in public and allow statements to be supported and contradicted in ways that may catch the attention of nonelites. The importance of these two conditions—publicness and contestation—can hardly be overstated. Publicness works as a powerful censorship mechanism (Elster 1986), discriminating in favor of public-regarding communications. It simply would not do to justify publicly a political demand or policy proposal on purely self-regarding grounds. Although that does not rule out self-serving communications, self-interest is forced to masquerade as public interest, at which point the possibility of contestation allows competing interests or public-interested critics to challenge such claims.

From the perspective of democratic theory, public discourses can serve two critical mediating roles in the relationship between governors and the governed (V. Schmidt 1997, 1998). On the one hand, they greatly reduce information costs for nonelites. Reasonably interested citizens have a chance to sort out the pros and cons of policy proposals and form an opinion of government performance either in terms of their own self-interest or in terms of the public interest, and these opinions may then enter into their electoral choices. On the other hand, public discourse provides a sounding board for governors to try out problem definitions and policy solutions, and an early warning system regarding issues that might achieve electoral salience. This is critical if the mechanism of anticipated reactions is to link policy choices to voter reactions (Scharpf 1997a: Chapter 8).

What matters for input-oriented democracy is the quality of these public discourses. They can perform an orienting and legitimating function if they communicate the wider framework of ongoing policy controversies, the defini-

tion of the situation, and the political aspirations in light of which problems and options can be meaningfully considered. For the individual citizen, such discourses provide the context within which it is possible to make sense of what is happening and respond to specific policy. For the public as a whole, orienting discourses provide the stimuli in response to which the electoral expression of political support or opposition can indeed claim, and bestow, a maximum of democratic legitimacy.

But how would a practical reformulation of "discursive democracy" provide a promising perspective on the legitimacy deficits associated with increasing international interdependence? The answer lies in the connection between its orienting and legitimating functions. To maintain legitimacy even under conditions of international interdependence, national policy discourses must avoid the suggestion of omnipotence that still infects not only conventional notions of popular sovereignty but also mutual recriminations among governments and oppositions: governments claim exclusive credit for everything that seems to go well, while oppositions blame them for everything that seems not to. Instead, orienting discourses can provide a realistic picture of the country's present place and future options in an institutionally and economically integrating world, reassess policy goals with a view to their feasibility under international economic and institutional constraints, and emphasize the search for policy instruments that are still viable under these constraints.

When it is made clear that important goals can no longer be achieved through purely national action, the possibility of pursuing them through internationally coordinated or supranational action will be understood as a gain, rather than a loss, of collective fate control. If that is acknowledged, the national interest can no longer be defined in solipsistic terms, and policy options must be discussed in light of the relevant decision rules and constellations of actors at the international level with an empathetic understanding of the preferences, worldviews, and capabilities of the other countries involved. As a result, the information and communication gap discussed above will be greatly reduced. National policy discourses will shadow more closely the real choices that governments face at the international level, and governments will have fewer opportunities to escape from accountability by referring to fictitious external constraints.

Is this an impossible ideal? I think not. The economies of small European democracies have long been much more open than those of larger European states, let alone Japan and the United States, so they have never been able to control their policy environments or indulge in fantasies of omnipotence (Katzenstein 1984, 1985). Nevertheless, their economies have done very well, and some of them are also much more successful in coping with the current challenges of economic interdependence and systems competition than their larger, previ-

ously more self-sufficient neighbors. They also seem to enjoy higher levels of public confidence and political satisfaction than larger countries that have only recently felt the full thrust of international economic interdependence (Katzenstein, this volume).

It seems plausible, therefore, that the secret of the economic and political success of small and open countries like Switzerland, Austria, Denmark, or the Netherlands lies precisely in their ability to conduct policy discourses that are based on a realistic understanding of their own capabilities and constraints and to focus debates on those policy alternatives that might be feasible and effective in an international policy environment that is characterized by high degrees of institutional integration, economic interdependence, and regulatory competition (Visser/Hemerijck 1997). Under these conditions public opinion will not proceed from particularistic definitions of policy problems and goals, and when that is assured, the existence of international constraints and the need for international cooperation are not experienced as a delegitimating disappointment because they will have been taken into account from the start. For these countries democratic legitimacy does not presuppose omnipotence and is not challenged by awareness of their interdependence.

Although there is no reason why the larger democracies, too, cannot come to live with international interdependence, they need to learn from the successful small and open countries that orienting discourses require political leadership. They cannot merely reflect untutored popular preferences but must impose the discipline of Freud's "reality principle" on public policy debates. If they do not, international problem-solving will remain domestically vulnerable to populist appeals to wishful thinking, nostalgia for past national grandeur, resentment of foreign influences, or xenophobia. It is the responsibility of policy elites to communicate the extent to which international involvement, cooperation, and trustworthiness have become a precondition for effective pursuit of the national interest. If they succeed, policy discourses in even the larger countries should be able to maintain the tenuous linkage between the perceptions and preferences of nonelites and policy choices that are effective under the constraints of an increasingly interdependent international environment—and there will be no reason to fear that international interdependence will undermine democratic legitimacy.

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6 Democratic Legitimacy under Conditions of Regulatory Competition: Why Europe Differs from the United States (2001)

1 Introduction: Is There a European Democratic Deficit?

Unlike the United States, the European Community was not, and could not have been, founded as a democratic nation state. Originally, the legitimacy of its limited governing functions was solidly based on *intergovernmental* agreement. Among the—democratically legitimized—governments and parliaments of the Six, the political commitment to create a common market was unequivocal, and the *supranational* actions of the European Commission and the European Court of Justice to promote market integration were justified by that fundamental commitment even where they went against the preferences of individual governments in the given case (Garrett 1992; Moravcsik 1998).

Ostensibly, that was also true of the Single-Market program of 1986, even though the intergovernmental basis of legitimacy was weaker because of the more active role of the Delors Commission in designing the agreement, and the less complete understanding of its far-reaching implications among some governments and ratifying parliaments. Even the move toward monetary union and the establishment of a *supranational* European Central Bank was an *intergovernmental* project promoted by France when it was realized that its commitment to a hard currency had made French monetary policy dependent on choices that were made by the *Bundesbank* with a view to the state of the *German* economy rather than to the European economy that was in fact governed by it (Verdun 1996; Moravcsik 1998; Dyson/Featherstone 1999).

So why is it that the legitimacy of the supranational institutions that were created through intergovernmental agreements ratified by democratically legitimized national parliaments is now under challenge? Why is it that seemingly academic concerns about a "European democratic deficit" (Williams 1991) were raised to the status of a serious constitutional issue in the Maastricht decision of the German Constitutional Court? Why have they motivated the Amsterdam Summit to greatly enlarge the competencies of the European Parliament? And

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This contribution is based on Scharpf (1999).

why did the Cologne Summit put the issue of a European constitution on the agenda of the next Intergovernmental Conference? In my view, there are two explanations for the remarkable political salience of the alleged democratic deficit of the European Union: one pragmatic, the other more fundamental.

Pragmatic Reasons

The pragmatic reason is that the European Union's institutions, designed to organize a mere customs union among six Member States, are considered inadequate for a union with 15 members and a vastly expanded range of competencies, and will become totally unworkable when Eastern enlargement further increases the number of governments represented in the Council and the number of Commissioners among whom the Union's portfolio must be subdivided. It is also realized, however, that even the changes which everybody considers minimally necessary for the continued performance of the Union's present functions—fewer Commissioners and a general move to majority decisions in the Council—will reduce the control of individual national governments over European policy choices to an extent that would finally destroy the plausibility of the intergovernmental legitimization arguments that still must support the exercise of European powers.

The European Trilemma of the Democratic Welfare State

If these pragmatic concerns explain the current search for institutional fixes that might convey independent legitimacy on Union decisions that can no longer be said to be under the control of democratically legitimized national governments, the second argument sees the democratic deficit arising from a more fundamental political-economic trilemma of European integration. It exists because of characteristics of the European constellation that are quite different from the situation in American federalism.

The first part of the trilemma arises from the fact that the democratic legitimacy of European nation states is much more closely associated with welfare-state achievements than is true of American States. There, the creation of a nationwide "internal market" had preceded efforts to build a welfare state. At the State level, these efforts were largely impeded by economic and legal constraints. On the one hand, economic competition among producers in different States created conditions of "regulatory competition" among State governments which practically prevented all of them from adopting regulations—for example, regarding the employment of child labor—that would have reduced the competitiveness of local production. On the other hand, the "negative commerce

clause" doctrine of the Supreme Court prevented States from protecting local producers against imports from other States that were produced under less stringent regulations. As a consequence, even in States with "progressive" majorities welfare-state provisions remained at a minimal level (Skocpol/Amenta 1986).

In Europe, by contrast, national welfare states had reached their full development in the early post-war decades, when advanced industrial democracies were still in full control of their national economic boundaries. In the absence of regulatory competition, the solutions could be much more generous than in the US, and they could also differ from one country to another in the type of functions assumed by the state, the level of generosity of the benefits provided, and the institutional structures through which benefits were provided. But regardless of fundamental differences between universalistic Scandinavian welfare states, Continental varieties of "social-market economies," or the Beveridge model of Anglo-Saxon countries (Esping-Andersen 1990), citizens have come to base their life plans on the expectation that certain functions, but not others, would be provided by the welfare state—with the consequence that their fate and that of their families would in fact depend on the stability of these expectations. If these expectations were massively disappointed, the fundamental "social contract" and hence democratic legitimacy would indeed be in question.

The second part of the trilemma arises from the fact that the Member States of the European Union have become irreversibly committed to a pervasive program of European economic integration whose very success is now confronting national welfare states with the same kind of regulatory competition that had impeded the development of social policies in the American States. There, however, a solution became available after the New Deal constitutional revolution, when the Supreme Court finally allowed political responsibility for welfare state functions to be exercised at the federal level. In Europe, by contrast, the transfer of welfare state functions to the EU level is effectively ruled out for pragmatic and normative reasons. The trilemma, in short, exists because EU Member States cannot want to shed their welfare-state obligations without jeopardizing the bases of their legitimacy; they cannot want to reverse the process of economic integration which exposes national welfare states to regulatory competition; and they cannot want to avoid regulatory competition by shifting welfare-state responsibilities upward to the European level.

It is the third part of the European trilemma which I will primarily discuss here. In doing so, I will begin with a brief theoretical discussion of the preconditions of democratic legitimacy; then I will explore how these are affected by European integration. I will conclude with an examination of European policies that could strengthen national efforts to cope with the constraints of regulatory competition.

2 Legitimacy: Effective Problem Solving and Democratic Accountability

Legitimacy is here understood as a widely shared belief that it is my moral duty to comply with requirements imposed by state authorities even if those requirements violate my own preferences or interests, and even if I could evade them at low cost. In the absence of such beliefs, compliance would depend exclusively on the effectiveness of controls and the anticipation of sanctions—which, as the decline and fall of the socialist dictatorships demonstrated once again, greatly reduces the efficiency of governing.

As Max Weber has shown, there is—theoretically and historically—a considerable variety of beliefs on which the legitimacy of government may be based. Yet in this day and age, and in Western societies, "democratic" legitimization has come to be seen as the only game in town—which of course does not rule out disagreement about the specific conditions that could support claims to this type of legitimization. In my view, it is useful here to distinguish between two types of legitimizing arguments. On the one hand, "input-oriented" claims presuppose that in a democratic polity the powers of government must be exercised in response to the articulated preferences of the governed—which, in the language of Abraham Lincoln's Gettysburg Address, refers to "government *by the people*." On the other hand, "output-oriented" legitimization arguments demand that democratic government should advance the common good by dealing effectively with those problems that are beyond the reach of individual action, market exchanges, and voluntary cooperation among individuals and groups in civil society—which, in Lincoln's terms, emphasizes the dimension of "government *for the people*."

In constitutional democracies, the capability for *effective* action is thought to be assured by the potentially comprehensive authority of the territorial state over the resources and action choices of its subjects, exercised through powers of legislation and taxation whose enforcement is backed by the monopoly of legitimate coercion. To assure the responsive and public-interest oriented exercise of these powers, democratic constitutions rely on free media of communication, public debate and political parties, and the electoral accountability of key office holders, as well as on institutionalized checks and balances. But while democratic constitutions vary greatly in the way, and in the extent, to which the exercise of public power is circumscribed by the institutionalization of judicial, legislative, and federal veto positions, no polity would be considered democratic that does not make office holders invested with authority to exercise public power directly or indirectly dependent on, and hence responsive to,

the—anticipated—preferences and the subsequent judgment of constituents, expressed in free and general elections.

The Problem: Loss of Effective Control at the National Level

The "European democratic deficit" is usually discussed with reference to institutions and policy processes at the European level, where the preconditions for direct democratic accountability are clearly not realized. Its primary effect, however, is felt at the national level, where European integration is weakening the problem-solving effectiveness as well as the accountability of governments with seemingly impeccable democratic credentials.

Economic Constraints and Regulatory Competition

The main impact of European integration is economic. With the completion of the internal market, and now with monetary union, national boundaries have lost their effectiveness as obstacles to the free movement of goods, services, and capital. As a consequence, the nation state has lost the power to protect national producers against foreign competitors producing under more business-friendly regulatory and tax regimes. By the same token, producers and investors are now free to chose the most attractive location in Europe without jeopardizing their access to the home market. Since governments depend on producers and investors to assure the employment and incomes of their citizens, economic integration creates conditions of regulatory competition which reduces the effective capacity of all Member States to tax mobile factors of production and capital profits or to impose market-correcting regulations that are considered a burden on business. To the extent that such policies had responded to the political aspirations of constituencies, the new constraints are also experienced as a loss of responsiveness and democratic accountability.

Legal Constraints of "Negative Integration"

In order to bring about economic integration, the European Community had to develop legal prohibitions—corresponding to the "negative commerce clause" doctrines of US constitutional law—that abolished not only national tariffs and quantitative restrictions on imports, but also all other measures that had the effect of restricting or distorting free international competition in the European markets for goods and services, or the free movement of capital across national borders.

In fact, however, the "negative integration" of European markets has gone much further, requiring the abolition of national subsidies to declining regions

or industries and the liberalization—and, in practical effect, the privatization and deregulation—of a wide range of infrastructure services and facilities, such as telecommunications and postal services, airports and airlines, railroads and road haulage, electricity and natural gas, or job placement services, which in most European countries had been provided directly by the state, by licensed monopolies, or by highly regulated cartels. In addition, monetary union has eliminated national control over interest rates and exchange rates, and has severely constrained the capacity of national governments to employ the remaining instruments of macroeconomic policy for employment-increasing strategies.

In the judgment of most economists, these changes did increase economic efficiency, and many of them have clearly benefited European consumers—usually at the expense of employment in hitherto protected and hence less efficient branches. But there is also no question that the range of available policy choices, and hence the capacity of governments to respond to the preferences of their citizens—which may emphasize values that cannot be reduced to measures of economic efficiency—have been significantly constrained. This is true not only of macroeconomic, industrial, and regional policies but also of the capacity to tax mobile factors of production and capital incomes, and of the capacity to regulate employment conditions with a view to strengthening workers' rights or to equalize primary incomes. Intense competition and high capital mobility rule out cross-subsidization, so that in principle each job must be able to earn its own cost plus adequate profits in competitive markets. If governments and unions should still try to intervene through minimum-wage laws or solidaristic wage policies, the outcome would not be greater equality but the loss of those jobs which are priced out of the market.

In short, European integration has significantly reduced the range of policy instruments available, and the range of policy goals achievable, at the national level. To that extent, the effectiveness as well as the responsiveness of government, and hence democratic legitimacy, are seen to have been weakened—at least in those countries which, in contrast to Britain, have not completely converted to neo-liberal preferences.

European Solutions?

There is a hope—certainly among unions and left-of-center political parties, but also among the members and staff of the Commission and the European Parliament—that the American experience of the New Deal period (Skocpol 1995) could be repeated in Europe: namely, that the regulatory capacity that was being lost at the national level might be regained through regulations at the European level. Economically, the parallel is of course not perfect because the US in the

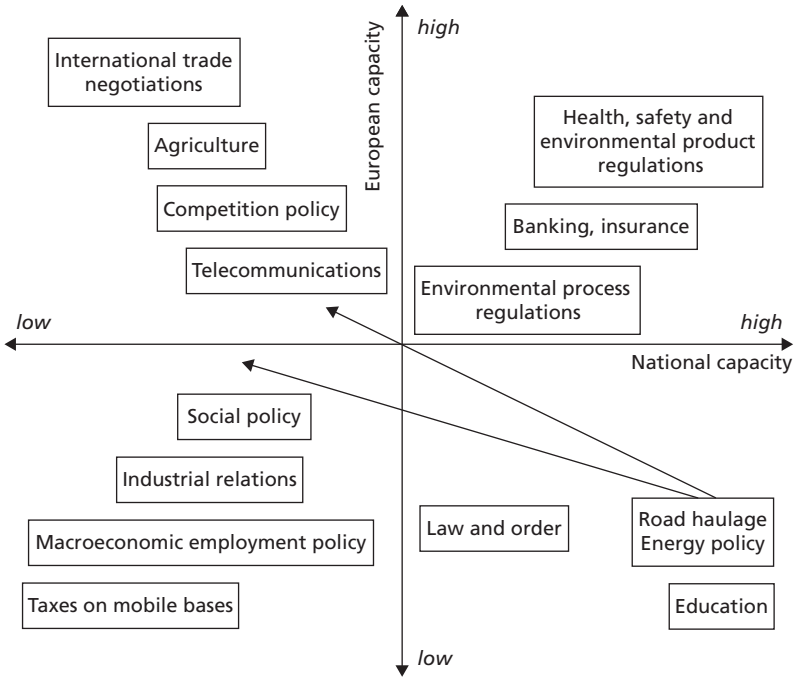
1930s was practically decoupled from the world market, whereas the EU is part of the WTO free-trade regime and completely integrated into worldwide capital markets. Nevertheless, the EU internal market is so much larger than the national markets of Member States that regulatory options which are economically unfeasible at the national level could indeed be realized by European legislation.

Status Quo: A Problem-solving Gap

Under the present institutional conditions of the European polity, however, such hopes are mostly disappointed. The Community started out as an intergovernmental negotiation system whose decisions, under the Luxembourg compromise, depended on unanimous agreement of member governments in the Council of Ministers, and hence were easily blocked by conflicts of interest among these governments. Nevertheless, the Commission and the European Court of Justice were able to advance European integration through direct legal action against the violation of—extensively interpreted—Treaty provisions which, under the doctrines of "supremacy" and "direct effect," were able to override national legislation. But these legal strategies were mainly effective in expanding the reach of "negative integration" in order to remove national barriers to trade and free competition. Market-correcting policies of "positive integration," by contrast, continued to depend on political agreement in the Council of Ministers.

There, however, European problem-solving capacity is severely constrained by multiple vetoes since decisions must be taken either unanimously or by qualified majorities—a condition that was in no way improved by the expansion of co-decision rights of the European Parliament, which mainly had the effect of strengthening another veto position and weakening the agenda-setting power of the Commission (Tsebelis 1994). That is not meant to say that positive integration must generally end in a "joint-decision trap" (Scharpf 1988) where divergent national interests lead to blockage or will at best allow solutions at the lowest common denominator. There are indeed policy areas where national interests converge sufficiently to allow even very demanding European regulations. This is particularly true for the harmonization of safety and environmental standards for industrial products, where governments were often willing to accept the demands of countries with high national standards in order to assure uniform conditions and free access throughout the internal market (Eichener 1997; Pollack 1997). Similarly, once some countries were forced by judgments of the European Court of Justice to allow foreign competitors in their protected public-service branches, their governments tended to support Council directives requiring the general liberalization of these services (S. Schmidt 1998). By con-

Figure 6-1 National and European problem-solving capabilities



Source: Scharpf (1999: 117).

trast, in policy areas where national interests do in fact diverge, as was true for the European regulation of industrial relations (Streeck 1997), decisions at the lowest common denominator are indeed the best that can be expected.

It is possible to state with some precision the policy areas in which national problem-solving capabilities are most severely affected by the economic and legal constraints of European integration, and in which policy areas European problem-solving is most likely to be blocked by conflicts of interest among national governments (Scharpf 1997). In effect, both of these constraints tend to overlap in a limited range of policy areas which, however, includes precisely those instruments of market-correcting policy that have been of critical importance for the legitimization of democratic welfare states: social policy, industrial-relations policy, and the taxation of business profits and capital incomes. In these policy areas, located in the lower-left quadrant of Figure 6-1, European integration does create a problem-solving gap. Here the nation state is most

constrained by the economic pressures of international competition and capital mobility as well as by the legal prohibitions of negative integration. At the same time, however, it is also in these policy areas that agreement on the European level is most constrained by conflicts of interest and of ideological preferences among member governments.

The reasons are easy to see: EU Member States differ in their level of economic development, with the consequence that the level of social protection offered by, say, Denmark would be completely unaffordable in Greece or Portugal. Moreover, even countries at the same level of economic development differ greatly in the levels and the structures of social provision. For British citizens, who have made private arrangements to complement very lean public benefits, the Swedish "full-service" welfare state would be as unacceptable as British industrial-relations rules would be for workers and unions accustomed to German co-determination rights. In short, there is no chance that common, Europe-wide solutions can replace national welfare and employment regimes under institutional conditions where these would depend on the agreement of national governments.

The Institutional Preconditions of Effective European Action

Under these circumstances, it is tempting to think that the European problem-solving gap might be closed through constitutional changes that would simultaneously increase the capacity for, and the democratic legitimacy of, effective action at the European level. In order to realize this hope, so it is thought, Europe would need to transform its present constitution—which, essentially, is still that of a confederacy governed by negotiations among Member States—to that of a federal state whose decisions cannot be blocked by the opposition of a few member governments. In other words, the European Union would have to become more like the United States—or at least more like the German federal state (Scharpf 1988). Presumably, a (consolidated) Council of Ministers would have to be retained as a second legislative chamber, but what would matter are the transformation of the Commission into a European government that is politically accountable to the European Parliament, legislation by simple majorities in both chambers, and the authority of the Union to raise its own taxes—preferably the taxes on business profits and capital incomes that Member States have difficulty collecting.

Assuming that this constitutional revolution could be enacted, the institutional capacity of the European Union for effective action would be at a level that is roughly comparable to that of federal systems like Switzerland and Germany—still impeded by more veto positions than in unitary states, but with a

central government that is legitimized by a Europe-wide political majority, that is acting from a Europe-wide perspective, and that is able to employ considerable resources in trying to win the support of majorities in both chambers for its legislative initiatives.

The Non-institutional Preconditions of Majority Rule

As a practical matter, the record of past Intergovernmental Conferences and European Summits suggests that there is little or no chance that European constitutional reforms could go this far. What concerns me here, however, is the normative question of whether one could even wish that they should. Put more precisely, the question is whether parliamentary majorities could actually legitimize decisive action in those areas where European policy is presently blocked by major conflicts of interest or preferences among member governments.

That question presupposes that decisions by majority, which allow dissenting minorities to be overruled, may not be normatively acceptable under all conditions, and that their capacity to create a moral duty of voluntary compliance depends on non-institutional preconditions that legitimize the majority rule itself. In Lincoln's Gettysburg triad, these precondition are addressed in the reference to "government *of the people*." I interpret this to mean that majoritarian democracy presupposes the "we-identity" of a *demos*—a collectivity in which the identification of members with the group is sufficiently strong to override the divisive interests of subgroups in cases of conflict. If that were not true, secession or civil war would be an ever-present danger; and in polities where that sense of a collective identity is in fact weak or lacking—think of Northern Ireland, Bosnia, the former Czechoslovakia, or even Belgium and Canada—the mere counting of votes was never considered sufficient to create a moral duty to comply among outvoted minorities. Instead, it would set off disintegrative and even explosive dynamics of resistance and repression.

As of now, nobody seems ready to claim that the multi-ethnic, multilingual, multi-cultural and multi-institutional peoples of the European Union have yet achieved a robust we-identity that is more salient than existing cleavages and conflicts of interest. This is of course not meant to say that a common *ethnic* identity should be considered an indispensable prerequisite of democratic majority rule: the United States and Switzerland show that this is not so. But in its place, these multi-ethnic polities have developed a fierce national patriotism, based on a strong historical sense of common fate and common destiny: conditions which surely are also not yet realized among the 15 nations of the present Union, and that will take even longer to develop after eastern enlargement. And even if common identity were considered less essential, it must matter for the

input-oriented legitimization of European policy choices that the peoples of Europe do not yet constitute a common European public: that there are as yet no Europe-wide media of communications, no Europe-wide political parties, no Europe-wide candidates for political office, and no Europe-wide political debates and controversies.

Under these conditions, the most that one could hope for in a revised European constitution are institutions, decision rules, and practices of mutual accommodation that surely must be even more protective of minority interests than is true in "consociational democracies" in those nation states like Canada or Belgium, which must also deal with deep cleavages through accommodation rather than through straightforward majority rule. But if that is so, the potential gain, in terms of majoritarian capacity for decisive action, of any normatively defensible constitutional reform will be quite limited. That is not meant to suggest that such reforms are undesirable or could not help to facilitate the slow progress toward greater public attention to and participation in election campaigns for the European Parliament, debates about European issues, and the selection of European office holders. But these are hopes for the longer term.

3 National Democracy: Coping with the Loss of Boundary Control

These, however, are hopes for the longer term. In the immediate future, Europe will have to make do with its present constitution, and thus with its dependence on broad agreement among national governments for any major policy initiatives. As a consequence, it is also unrealistic to hope that control over the economy that was lost at the national level could soon be regained through market-correcting European policies. But does that mean that the erosion of democratic legitimacy at the national level is inevitable, as governments must either accept the continuing decline of their economies or accept retrenchments of the welfare state, of worker rights, and of social equality, which neither they nor their constituents would have freely chosen? I think not.

In order to support this conclusion, I must once more turn to the normative foundations of democratic legitimacy discussed above. In public debates, and under fair-weather conditions, governments as well as opposition parties often tend to equate input-oriented responsiveness with wish fulfillment, and output-oriented effectiveness with omnipotence. But these are populist misunderstandings (Riker 1982). Instead, democratic legitimacy is about good reasons that should persuade me to comply with policies that do not conform to my

own wishes. Its true test comes when the going gets tough. What matters then are the institutional conditions that allow citizens to trust that governments will choose among *feasible* options in such a way that the policies adopted will, *under the circumstances,* be responsive to expressed citizen preferences and effective in pursuing the common interest.

If circumstances no longer allow the state to control its economic boundaries, and if regulatory competition increases, that is not the end of politically salient and legitimacy-enhancing choices in national economic, employment, and social policy, even though the overall set of feasible choices may be narrower and less attractive than before. There is no question that the adjustment may be painful, especially for those countries—Sweden, for instance—where the state had in the past been very effective in steering the national economy by exercising control over interest rates and the allocation of credit, over wages and working conditions, or over the direction of industrial research and development. In a thoroughly Europeanized economy, most of these opportunities for political steering and control are gone. They have been replaced by international capital markets and by the dominant orientation of managers to the benchmarks of shareholder value. Moreover, the welfare-state policy legacies in some states are considerably more vulnerable to international competition and capital mobility than is true of others (Scharpf 2000).

But to say that there are tighter legal constraints and stronger competitive pressures is not the same as denying the existence of politically salient policy choices that do make a difference in the economic fate of the country and in the incomes, employment opportunities, or material inequality of their citizens. Thus, small open economies have long learned to pursue very ambitious social policy goals while coping successfully with international product markets they could never hope to control. In the crisis period of the late 1970s and early 1980s, moreover, Britain and the Netherlands had competed for the title of being "the sickest man in Europe." By the 1990s, however, both of these countries were held out as models of successful adjustment. Yet they have achieved their turnaround by pursuing very different strategies—neo-liberal versus neo-corporatist—and they have succeeded in reducing unemployment through very different methods and with different distributional consequences. Even more important for present purposes is the fact that although Dutch and British reform strategies had initially been extremely controversial in national discourses, these controversies and their outcomes have strengthened rather than weakened democratic legitimacy in both countries (V. Schmidt 2000). The same could be said of Denmark, Switzerland, Australia, or even Italy. By contrast, countries like Belgium, France, Germany, or Sweden, that had not yet found strategies in which political aspirations are matched to the economic options and con-

straints of the 1990s, seemed to be more affected by political uncertainty, self-doubt, discontent, alienation, or radicalization: in short, by a sense of malaise that threatened to erode public confidence in the responsiveness and problem-solving effectiveness of democratic government (Scharpf/Schmidt 2000).

4 European Regime for Regulatory Competition

The implication is that if economic internationalization creates a challenge to democratic legitimacy, that challenge must primarily be met by responses at the national and subnational levels of European polities. But since, as I have argued, Europe is part of the problem, European policies can also help to alleviate it—provided that measures can be identified that will not be blocked by massive conflicts of interest among the member governments. Essentially these would need to moderate the intensity of regulatory competition among Member States. This could be achieved, first, by allowing national policy makers greater freedom to pursue policies serving non-economic goals even if these have some limiting effect of market competition; second, by adopting a form of "proportional minimum standards" for total welfare spending; third, by providing institutional support for coordinated reforms among subsets of Member States; and fourth, by allowing the Commission and the Court to develop a European case law of "unfair regulatory and tax competition."

Softening the Constraints of Negative Integration

Most important would be a selective softening of the legal constraints of negative integration. Since these have been created and extended primarily by legal actions of the Commission, reinforced by judicial activism during the period when Council decisions were still blocked by the unanimity rule, they have been guided by a single-minded commitment to achieve economic integration and to maximize free competition against the protectionist machinations of recalcitrant Member States. In many areas, negative integration in the European Union has gone much further than the legal constraints imposed on the American States by Congressional legislation or by the decisions of the US Supreme Court under the "negative commerce clause" doctrine.

Yet now, when the single European market has become a reality that no Member State would want to dismantle, the perfectionist application of the syllogisms of undistorted competition should give way to a more balanced approach that weighs the seriousness of an alleged infringement of market free-

doms against the importance and normative validity of the purposes served by a given instance of market-correcting national regulations. In fact, recent decisions of the European Court of Justice are already moving in that direction. Moreover, it is also appropriate that in the application of this balancing test, the political judgment of the Council of Ministers or the European Council should have a legitimate role, examples of which can be found in several resolutions adopted at the Amsterdam Summit.[1]

Proportional Minimum Standards

Since the Member States of the Union are locked in a constellation of regulatory competition with each other, reforms in one country are likely to be read as beggar-my-neighbor stratagems by others, inducing them to respond in kind, which in turn will persuade others to do likewise in order to avoid capital outflows and job losses. This is how Sweden and other Scandinavian countries ended up with a "dual income tax," greatly favoring capital incomes in comparison with income from work, even though Denmark, which had first tried out the idea, soon had second thoughts about it. Tax harmonization, which would avoid such "races to the bottom" is, however, among the EU policy areas in which agreement has so far been notoriously difficult to achieve (Dehejia/Genschel 1999), and the same is even more true for the Europe-wide harmonization of highly diverse social-welfare systems.

As pointed above, there are two reasons for this: differences among Member States in levels of economic development, and differences in welfare-state structures. The first would allow at best the adoption of very low minimum standards that would not strain the ability to pay of the less advanced Member States—which, however, would in no way reduce the much more important pressures of regulatory competition among the richer welfare states. Neither would it help to adopt two levels of regulations, since the enormous institutional and structural diversity among the more advanced welfare states would prevent these from agreeing on common and more demanding solutions, even if these applied only among the group of rich countries.

Empirically, however, it is also true that the Member States of the European Union are remarkably similar with regard to *total social expenditures relative to their wealth*.[2] While countries differ greatly in the structure of social expenditures—that is, in the shares that are spent on pensions, health care, unemployment

1 Examples are discussed in Scharpf (1999: 160–169).

2 Data are presented in Scharpf (1999: 175–180).

benefits, or social services[3]—their total social expenditures happen to be almost directly proportional to their per capita GDP expressed in a common currency. Thus there seems to be a *de facto* consensus that richer countries should spend proportionately more on social welfare than less well-to-do countries. It seems not impossible, therefore, that this latent consensus might be translated into an explicit EU agreement on a lower proportional threshold of total social spending, defined for each Country relative to its wealth position. If such an agreement were in place, all countries could engage in structural and institutional reforms of their welfare systems without setting loose a chain reaction of competitive welfare retrenchment. Since all countries, including the United Kingdom and Luxembourg, are presently close to the regression line on social spending, an agreement to maintain that relative position should be more easily reached than any attempt at harmonizing institutionally incompatible national welfare systems. Conceivable, a similar quantitative agreement might also be achieved with regard to the share of GDP collected from all types of taxes on business and capital incomes.

Coordinated Reforms

Coordination could become an even more effective way of taking the pressures of regulatory competition out of the reform processes which are necessary to adjust existing national policy legacies to the new economic environment. Given the differences among these legacies, however, no useful purpose would be served by attempts at Europe-wide coordination. But there are subgroups of countries belonging to the same welfare-state "family"—Scandinavian, Anglo-Saxon, Continental, Southern (Esping-Andersen 1990)—that have similar institutions and similar structures of financing and benefits and that are facing basically similar problems (Esping-Andersen 1999; Scharpf 2000). Given these similarities, policy changes in one country are most closely monitored, and most likely to trigger a chain reaction of competitive responses, in countries belonging to the same group.

At the same time, however, these countries could benefit most from analyzing each others' experiences and from developing common reform strategies on that basis. Doing so could create complete-information conditions that would not only improve the quality of policy design but would also offer the best protection against suspicions that might trigger beggar-my-neighbor strat-

3 For more comprehensive comparative statistics, see OECD (1999).

egies.[4] Such coordination would be greatly facilitated if it could make use of the organizational resources and good services of the European Commission in providing trustworthy comparative information and analyses and in monitoring the reform efforts of all parties involved. Unfortunately, however, the very restrictive rules for "closer cooperation and flexibility" adopted at the Amsterdam Summit seem designed to foreclose this option. It is to be hoped that the next Intergovernmental Conference will enlarge the opportunities for closer cooperation among subgroups of EU Member States.

Toward a European Law of "Unfair Regulatory Competition"

Finally, it seems also possible to instrumentalize the legal instruments of negative integration and competition policy to create a European regime for controlling excesses of regulatory competition.

With the support of the Court, the Commission has made extensive use of the tools provided by the Treaty (Articles 90, 92 and 93) for scrutinizing state aids and other national measures that could be construed as a distortion of competition within the common market. At the same time, the Court has developed a body of case law that distinguishes subsidies serving legitimate purposes from illegitimate ones. Admittedly, it is not always easy to discern the dividing line between subsidies to Volkswagen in Saxony and subsidies to Rover in England, but there is no question that the monitoring and policing functions of the Commission and the Court have a considerable effect in disciplining the otherwise massive incentives for competitive subsidization.

If that is accepted, there is no logical reason why Commission and Court could not also be empowered to monitor and police deregulation and tax concessions when these are employed in improper competitive strategies. Again, there will be legitimate reasons for both, but as in the field of subsidies there are also important instances where tax concessions and deregulation are precisely targeted to attract foreign businesses, company headquarters, or financial operations to the disadvantage of other countries or domestic competitors. That the dividing line is unlikely to be a simple, hard-and-fast rule is not a major objection. The same is true in the private sector, where the dividing line between the anti-trust law of free competition and the law of unfair competition must also

4 Somewhat similar monitoring and trust-building functions may be performed by the national representatives in the hundreds of EU committees that are involved in the preparation and implementation of Council directives (Joerges/Vos 1999). Similarly, unions in Germany and some neighboring countries are now exchanging observers who are allowed to attend each others' collective bargaining negotiations.

be worked out on a case-by-case basis by the courts. If an abstract guideline seems necessary, it could well be a variant of the Kantian "categorical imperative": competitive strategies involving deregulation and tax concessions are improper if, even in the eyes of their initiators, they would be self-defeating if they were applied by all other countries as well.

From newspaper reports it appears, moreover, that during the Finnish presidency the ECOFIN ministers had come close to an agreement on some code of conduct governing discriminatory tax concessions before negotiations failed altogether after the British veto against common rules on interest taxation. I take this incident, first, as demonstrating that it is indeed possible to formulate plausible and practicable rules distinguishing proper and improper practices of tax competition; and second, I take it, as providing strong support for an active role of the Commission and the Court in a field where competitive incentives are preventing political agreement in the Council. If there are good reasons to use legal rather than political processes for the control of state aids, these would also support the use of the same kinds of procedures for controlling the temptations of unfair regulatory and tax competition.

5 Conclusions

What does all this imply for the European democratic deficit? My first conclusion is that there is no lack of legitimacy for what the Union has actually been able to do. This legitimacy is based on the norm-based authority of the Court and on intergovernmental agreement, and the area of effective European action may still continue to expand as agreement is reached on additional purposes and means of European action. However, the democratic deficit would surely become a major and potentially explosive issue if the European constitution were now changed in ways that would allow the Union to act more effectively by simple majority vote in the face of strong objections from more than a very few member governments. That also implies, unfortunately, that Europe still will be unable to deal with the wide range of social problems—among them mass unemployment and the crisis of the welfare state—that are caused by economic integration but for which European solutions are blocked by major conflicts of interest or ideology among member governments. By necessity, therefore, dealing with these problems will be left to the Member States, where the failure of governments to come up with normatively defensible and pragmatically effective solutions may indeed erode input-oriented as well as output-oriented democratic legitimacy.

In principle solutions must be found and implemented at the national level. Nevertheless, Europe should and could have a role in enabling, facilitating, and protecting national coping strategies, instead of single-mindedly maximizing the one goal—market integration and free competition—which the Union is able to pursue without the political agreement of member governments. This role would depend on the acknowledgment that regulatory competition is not the unmitigated good that neo-liberal economists claim it to be, and that there may be social values and political purposes that are more important than weeding out the last remaining national regulation that competition lawyers could construe to be a distortion of free competition. In this regard, the Commission and the European Court of Justice could learn much from the United States, where anti-trust law is applied much more vigorously against private monopolies than is true in Europe, but where, after the post-1937 decline of the "negative commerce clause" doctrine, State legislation is generally not challenged by the anti-trust division or the federal courts unless it is in direct conflict with federal legislation.

In most other regards, however, the American situation is too different to allow direct lessons to be drawn for the European predicament. On the one hand, welfare-state functions have a much lower political salience in the American States than in European nation states, and the structural and institutional diversity in existing state functions is considerably lower than is true in Europe. On the other hand, the democratic legitimacy of decisions at the federal level is clear and strong, and the most important welfare-state functions—social security, Medicaid, or the earned income tax credit—are shaped by federal law rather than by the States. And even in those areas where the States have a role—unemployment insurance, social assistance, and active labor market policies—their choices are strongly conditioned by federal subsidies. Hence the incentives as well as the opportunities to engage in regulatory competition are relatively unimportant for the American States. The same is true for tax competition, which is dampened by the partial offset of State taxes against the federal income tax. None of these devices is available in Europe. In this regard, in short, transatlantic comparison serves primarily to highlight differences rather than to provide lessons that could be put into practice on the other shore.

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7 Notes Toward a Theory of Multilevel Governing in Europe (2001)

Multilevel Europe—the Case for Multiple Concepts

The European Union (EU) and its member states have become a multilevel polity whose characteristics are poorly understood in political discourses as well as in academic controversies that are shaped by our conventional understanding of national politics and international relations. In public debates, we typically find unrealistic expectations—fears or hopes—of what European policy might achieve, combined with ignorance of what is in fact achieved, and polemics against the "democratic deficit" of the institutions and processes through which European policy outcomes are being achieved. There is, in other words, no realistic understanding of the extent and the limitations of either the institutional capacity or the institutional legitimacy of the European polity.

That is no reason for condescension, however, since the state of affairs in academic political science is not much better. There are, it is true, many highly knowledgeable and perceptive empirical accounts of European institutions and policy processes, but when it comes to theoretical explanations and normative assessments, we still find unresolved controversies between "neo-functionalist" and "realist," or "supranational" and "intergovernmental" approaches in the opening chapters of every dissertation. One reason is that the conceptual tools with which the political science subdisciplines of international relations and comparative politics are approaching the study of European institutions are ill suited to deal with multilevel interactions.

From the intergovernmental perspective of international relations theory, which presumes that nation states are the only theoretically relevant actors, the EU appears as a—more highly institutionalized—specimen of the genus "international organization." Such organizations are created to serve the purposes of their member states; and to the extent that they do so, their actions are legitimated by the agreement of member governments. At the same time, these actions

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are fully explained by the interests, relative bargaining powers, and bargaining strategies of those governments (Hoffmann 1966, 1982; Garrett 1992, 1995; Moravcsik 1998). In other words, the multilevel polity of the European Union is conceptualized in a single-level model of intergovernmental interactions.[1]

By contrast, students of comparative politics are led by their own disciplinary bias to emphasize the "supranational" characteristics of the EU, and to analyze its governing institutions as if it were, or ought to be, a polity resembling the models of democratic nation states. To be sure, these models differ greatly in their normative and descriptive characteristics, emphasizing either accountability through competitive or consensual party systems (Lijphart 1999), or the responsiveness of pluralist, corporatist or clientelist systems of interest intermediation (Truman 1951; LaPalombara 1964; Schmitter/Lehmbruch 1979). In any case, however, the focus is on the interactions between a single, autonomous and potentially omnipotent government and its constituents. Hence normative studies will focus on the relationship between European-level ("supranational") actors and constituents—emphasizing either the lack of democratic accountability (Greven 2000) or the existence (or feasibility) of institutional mechanisms facilitating responsiveness to constituency interests (Abromeit 1998; Eichener 2000; Grande 2000), whereas empirical research will focus either on the salience of European elections and the influence of the European Parliament, or on the channels of successful lobbying at the European level, the representation of "diffuse" interests, the role of deliberative problem solving in European "comitology," and the inclusiveness of European "policy networks" involving business associations, large firms, environmental and consumer groups and other NGOs involved in processes of interest intermediation (Mazey/Richardson 1993; Joerges/Neyer 1997; Pollack 1997; Joerges/Vos 1999; Kohler-Koch/Eising 1999).

Admittedly, our knowledge of the structures, processes and outcomes of European integration was often advanced by good research designed from either one of these competing perspectives. But the continuing controversies between intergovernmental and supranational perspectives suggest that these insights had to be achieved in spite of the poor fit of their paradigmatic assumptions. Thus the intergovernmental international-relations perspective must be pushed to the limits of its plausibility when it is asked to explain constellations where supranational actors are empowered to act against the manifest preferences of

1 Moravcsik's (1993, 1998) "liberal intergovernmentalism," it is true, also has a domestic module attached in which the preferences of national governments are shaped by the interests of major national producer groups, which, however, are not assumed to be actors in their own right on the European level.

member governments; where member states are subject to increasingly tight European constraints in the exercise of their own governing powers; where interactions among their citizens and corporations are increasingly governed by European law; and where the range of problems for which solutions are being sought at the European level seems to increase continuously (Burley/Mattli 1993; Jachtenfuchs/Kohler-Koch 1996; Sandholtz/Stone Sweet 1998; Schmidt 1998; Eichener 2000; Pollack 2000).

Similarly, however, the supranational perspective of comparative-politics theories cannot easily represent a European polity in which member states continue to be endowed with a full range of governing powers; in which the limited competencies of supranational actors are derived from agreement among member states; in which European legislation depends primarily on the agreement of member governments; and in which member states are in control of the actual administration of European regulations (Moravcsik 1998). Nor are these difficulties eliminated in studies approaching the EU from a comparative-federalism perspective (Scharpf 1988; Wessels 1990; Sbragia 1992, 1993; Schmidt 1999; Nicolaïdis/Howse 2001). While this perspective does suggest models that are able to represent the coexistence of, and the interaction between, distinct levels of government, their fit is still quite poor if it should be assumed that European-level government could be equated with the institutional capacity and legitimacy of central governments in federal nation states[2]—and if that equation cannot be made, federal models also lose much of their explanatory and predictive power. For opposite reasons, that is also true of perspectives equating the EU with models of "confederal governance" (Wallace 1982; Lister 1996).[3]

In the face of these paradigmatic difficulties, some of the best work on Europe is either self-consciously atheoretical or it attempts to structure research through a variety of innovative concepts and metaphors characterizing the European polity as a "condominio," a "consortio," a "fusion" of governing func-

2 The distortion is most pronounced if the federalist perspective is defined by reference to the "separation" model of the US constitution. But even if it is realized that European institutions are structurally similar to the German model of "joint-decision" federalism (Scharpf 1988; Sbragia 1992, 1993), parallels are misleading. Though European legislation—like most important national legislation in Germany—depends on the agreement of member governments, the political characteristics of vertical interactions differ fundamentally, since the democratic legitimacy and the bargaining resources of the national government and parliament in Germany are so much greater than those of the European Commission and the European Parliament.

3 Lister acknowledges as much: "At the same time, the European Union, while clearly falling within the broad class of confederations, differs in fundamental ways from earlier confederal models. It has legislative, executive, judicial and financial capabilities that they did not have and that allow its institutions to operate much more effectively" (Lister 1996: 107).

tions, a structure of "network governance," and the like (Marks/Hooghe/Blank 1996; Schmitter 1996; Wessels 1997; Kohler-Koch/Eising 1999). In general, such concepts do indeed take account of the multilevel nature of European institutions and governing processes, but they also emphasize their uniqueness and thus have the effect of carving out a separate and theoretically distinct domain of "European Community Studies." Even within this domain, however, it seems fair to say that many of these novel conceptualizations seem to fit the cases at hand but have not yet found broad acceptance among fellow Europeanists (Branch/Øhrgaard 1999; Sandholtz/Stone Sweet 1999), let alone among political scientists who are interested in theoretical propositions of more general applicability.

That seems an unfortunate and unnecessary state of affairs. It is unfortunate because it tends to immunize European studies against theoretical criticism from other quarters while depriving more general political-science theories of the empirical challenges arising from the growing body of research focused on Europe. It also seems unnecessary, since, even if the European polity is *sui generis* in the sense that there is no other institutional constellation quite like it, it should still be possible to analyze its institutions and policy processes with the use of theory-based concepts and propositions that are also useful in comparative politics and international relations. From what I have said so far, however, it also would follow that the reintegration of European studies into the mainstream of political science cannot be achieved through holistic concepts attempting to equate the EU to any of the reasonably well understood but internally complex macro-models or ideal types that political scientists use as a first cut in distinguishing among political systems.

Certainly, the EU is not a majoritarian or a consociational democracy, but neither are its structures and processes of interest intermediation generally congruent with ideal types like pluralism, corporatism or even network governance, nor do its intergovernmental structures and processes generally conform to the legal models of federation, confederacy or international organization. Instead, I suggest, we should work with a plurality of lower-level and simpler concepts describing distinct governing modes in the European polity—which, however, should also be useful as theoretical modules in studies of national government or international relations. The ones I will discuss here focus on the vertical relationship between European and national levels of government. It is clear that they could and should eventually be complemented by other lower-level concepts focusing on structures and processes of interest intermediation and on the political interactions between governmental actors at both levels and their constituencies. In the present article, however, my focus will be on vertical interactions among governments, which I will describe—in order of increasing

supranationalism—as the modes of "mutual adjustment," "intergovernmental negotiations," "joint decision making" and "hierarchical direction."[4]

Moreover, I suggest that we should explain the progressive Europeanization of governing functions by reference to theoretical propositions that are useful for describing and explaining similar upward shifts of governing functions in federal national states or, for that matter, similar processes of political unification involving nation states.[5] By the same token, I find it important that the institutional capacity and legitimacy of Europeanized governing should be evaluated by reference to the same normative criteria that we generally use for the evaluation of governing institutions.

What Drives Europeanization?

I begin with a brief discussion of the policy goals and pressures that account for the progressive Europeanization of governing functions from the mid-1950s to the present. Since NATO was by the 1950s taking care of European security interests[6]—"keeping the Russians out and the Germans down"—the explicit motive driving European integration was economic—or, more precisely, the anticipated benefits for consumers and producers that were thought to be associated with the creation of larger European markets for goods and services, and capital (Moravcsik 1998).[7]

This quest for economies of scale has not only driven the geographic enlargement from the Economic Community of the Six to the present Union of the Fifteen and beyond. It also explains the progress from a free-trade area to a customs union and to a common market eliminating national non-tariff barriers to trade (Armstrong/Bulmer 1998). Moreover, being the only manifest Euro-

4 These concepts correspond to the "modes of interaction" discussed in Scharpf (1997). The list is not complete, however, since the mode of "majority voting" does not—and cannot (Lord 1998; Scharpf 1999)—play the same central legitimating role in the European polity which we have come to associate with majority rule in democratic nation states.

5 For an early and still convincing attempt to explain European integration through concepts and propositions claiming general applicability to processes of "political unification," see Etzioni (1965).

6 These would otherwise have provided very powerful motives for federation (Riker 1964).

7 This is not meant to deny the crucial role that European integration has played in creating conditions where, for the first time in history, war among European countries has become unthinkable. As economic boundaries have been removed, moving political boundaries between member states has ceased to be a salient national goal.

pean mission, economic goals became progressively radicalized—moving from the mere integration of national markets as they existed in the mixed economies of member states to an active extension and perfection of market competition. It thus became a European governing function to eliminate national subsidies, public procurement practices and the "privileges" of public enterprises, public utilities and public services which could be construed as distortions of free market competition. By the same logic, finally, it was thought that the transaction costs imposed by the existence of multiple currencies and variable exchange rates ought to be eliminated by the creation of a monetary union and a common currency (Verdun 1996, 2000; Moravcsik 1998: Chapter 6).

Here I will not examine the theoretical validity of these propositions or the empirical magnitude of the economic benefits that can in fact be attributed to the achievements of market integration in Europe (Kamppeter 2000).[8] What matter much more, from a political science perspective, are the secondary effects of this process. As the primary goals of market integration are being realized, member states find themselves exposed to political pressures of a kind that in federal nation states (which had integrated national markets to begin with) have everywhere resulted in the progressive centralization of "market-correcting" governing functions that affected profits and production costs and hence the competitive position of subnational economic regions. Thus practically all federal states have come to regulate the economically salient aspects of work safety, environmental protection, labor law, industrial relations and the welfare state at the national level.

In Europe, the same pressures are reflected in current debates about the erosion of national governing capabilities in integrated European markets where firms may offer their products throughout the EU; where consumers will select goods and services without regard to their origin within the EU; and where capital owners are free to invest, and firms are free to locate their production, anywhere within the territory of the EU. Among the member states of the European Monetary Union (EMU), moreover, these locational choices are not even constrained by the risks of exchange-rate adjustments.

As a consequence, the impacts of national policies affecting aggregate or sectoral demand, average or sectoral production costs, and post-tax profits are no longer limited to the national economy. There may be positive externalities,

8 These economic benefits of integration may exist, but they are not easy to demonstrate empirically. In the macro-economic crises of the 1970s, small European countries outside of the Common Market (e.g., Sweden, Austria, Switzerland) were doing better than Denmark, The Netherlands and Belgium; and just as the Single Market program was being completed in 1992, the member states of the EU were hit by the deepest postwar recession (Scharpf/Schmidt 2000b).

as when the additional demand generated by a cut of income taxes will spill out to neighboring countries, or when an increase of taxes on capital interest or profits will trigger capital outflows into low-tax jurisdictions. By the same token, negative externalities occur when a major reduction of employers' social security contributions will increase the price competitiveness of national products at the expense of competitors in European product markets, or when similar effects are achieved by union wage restraint or a deregulation of labor markets. It is likely, moreover, that these economic externalities will have political repercussions—as when German truck operators were blocking the streets of Berlin in response to tax reductions on diesel fuel in France and The Netherlands. To the extent that governments are aware of and respond to this European interdependence among their policy choices, it is meaningful to say that the governing functions affected are in fact becoming Europeanized.

Modes of Europeanization

It makes a great difference, however, whether Europeanization is merely the outcome of strategic actions among governments that are aware of their mutual interdependence—which I describe as the mode of "mutual adjustment"—or whether Europeanized governing functions are exercised in one of the modes of institutionalized interaction—where I distinguish between the modes of "intergovernmental negotiations," "joint decisions" and "supranational centralization." In what follows, I will discuss the characteristics and consequences of these modes by reference to two evaluative criteria, institutional capacity and institutional legitimacy, both of which need to be understood in a relational sense. The first is used to evaluate the decision rules and incentive structures of Europeanized governing modes in relation to the specific range of problems that are supposed to be resolved through Europeanization. Similarly, the second criterion should be used to evaluate those Europeanized governing functions that are in fact effectively performed in the light of legitimating arguments that are generally considered pertinent for the evaluation of governing institutions at the national level (Lord 1998). Both of these criteria should and could be elaborated further (Scharpf 1999, 2000), but I trust that their intended meaning will become sufficiently clear in the following discussion.

Mutual Adjustment

The default mode of Europeanized policy responses to increasing economic interdependence is "mutual adjustment." Here, national governments continue to adopt their own policies nationally, but they do so in response to, or anticipation of, the policy choices of other governments. Hence these strategic interactions among governments can be analyzed as a non-cooperative game.[9] In theory and in the real world, there is of course a great variety of possible game constellations. In some of them, the expected outcomes (or equilibria) of strategic interaction are mutually beneficial (Genschel 1997), in others they will benefit some parties at the expense of others, and in still others all parties may be worse off (Rapoport/Guyer 1966; Rapoport/Guyer/Gordon 1976; Scharpf 1997). By the same token, there also cannot be a general verdict on the problem-solving effectiveness of mutual adjustment in Europe.

Economists who are impressed with the benefits of market competition, it is true, would generally ascribe beneficial efficiency effects not only to the competition among political parties, but also to constellations in which mutual adjustment forces national governments to engage in forms of "systems competition" (i.e., tax competition and regulatory competition) against each other (Sinn 1993; Vanberg/Kerber 1994). Nevertheless, one should not ignore the important differences between the competition among firms (which presumably benefits all consumers), the competition among political parties (benefiting all voters) and the locational competition between territorial governments—which tends to benefit mobile firms, investors and taxpayers at the expense of the less mobile members of national constituencies, and which reduces the capacity of national governments to perform those market-correcting functions that, in economic theory, justify the establishment of governments in the first place (Sinn 1994; Scharpf 1998).

Moreover, economic theory tends to discount the effect on democratic self-determination if systems competition should prevent all governments from adopting policies that would reflect the preferences of their constituencies. For example, think of the situation in which the American states found themselves in the early decades of the twentieth century, when even "progressive" state governments could not adopt legislation limiting the employment of children for fear of losing market shares in interstate commerce.[10] As the European in-

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9 As I have pointed out elsewhere, even constellations where governments merely adjust their own policies to economic conditions affected by the interdependent policy choices of other governments can usefully be analyzed as a non-cooperative game (Scharpf 1997: 107–112).

10 In fact, child labor legislation in the United Sates (along with other regulations of employment conditions, social security and other welfare-state policies) had to wait until the 1937 New Deal

ternal market has approached completion, these same competitive pressures are now constraining member states in taxation, in the regulation of employment relations, in social policy, in the environmental regulation of production processes and in other market-correcting policy choices (Scharpf 1999). These constraints may not only reduce the problem-solving effectiveness of national polities; they also affect their institutional legitimacy by preventing the adoption of (otherwise feasible) policies responding to the manifest demands of national electorates (Scharpf 2000).

In response to these tightening constraints, member states have been trying to move away from the mode of mutual adjustment, and to control systems competition through the coordination or centralization of governing functions at the European level. Within the democratic nation state, however, politics at the national level tends to have the greatest political salience and the clearest procedures assuring democratic accountability. Hence a shift of market-correcting governing functions from the sub-national to the national level is generally associated not only with a gain in problem-solving capacity but also with a gain in democratic legitimacy. By contrast, neither of these effects is assured when competencies are shifted from the national to the European level. In both regards, moreover, there are significant differences between the three modes of institutionalized European governing functions that I am considering here.

Intergovernmental Negotiations

At the lowest level of institutionalization, Europeanized governing is realized in the mode of "intergovernmental negotiations." Here, national policies are coordinated or standardized by agreements at the European level, but national governments remain in full control of the decision process, none of them can be bound without its own consent, and the transformation of agreements into national law and their implementation remains fully under their control. This is emphatically true of policies requiring Treaty revisions that must be ratified in all member states. Beyond that, the mode applies in the second and third pillars of "common foreign and security policy" and "police and judicial cooperation in criminal matters," and it is also approximated in those policy areas in the first pillar where the Council of Ministers must still decide by unanimity.

Since all participating governments have a veto, the legitimacy of policies so adopted can be indirectly derived from the legitimacy of democratically ac-

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revolution in American constitutional law, which then allowed the federal government to adopt uniform national regulations (Skocpol 1987).

countable national governments (Lord 1998).[11] By the same token, however, the problem-solving capacity of negotiated policy is strictly limited to solutions that are preferable to the *status quo* from the perspective of all participating governments. If such solutions are not available, side payments and package deals may still facilitate agreement under favorable circumstances (Scharpf 1997: Chapter 6). More generally, however, solutions will be blocked by major conflicts of interest—which is exactly what governments seem to want in the second and third pillars, where sovereignty issues are extremely salient.

For the resolution of problems generated by regulatory and tax competition in the integrated European economies, however, the mode of intergovernmental negotiations seems to offer little promise in all constellations where existing national solutions differ significantly from one another, or where some countries are actually benefiting from competition. If evidence were required, the unending history of efforts to harmonize the taxation of capital interest or of corporate profits through unanimous agreement should suffice. But how, then, did these same governments manage to achieve the degree of market integration that is generating these competitive pressures?

Hierarchical Direction

In discussing this question, I now turn to "hierarchical direction," the mode in which competencies are completely centralized at the European level and exercised by supranational actors without the participation of member-state governments. Within federal nation states, such centralized competencies are generally exercised by majorities in national parliaments, cabinet ministers and prime ministers whose legitimacy is directly derived from electoral accountability. In the European Union, by contrast, functions that are performed without the participation of member governments are also removed from the influence of democratically accountable political actors. They are exercised by the European Central Bank (ECB), by the European Court of Justice (ECJ) and by the European Commission when it is acting as a guardian of the Treaty in infringement procedures against national governments.

Since these functions are exercised without the participation of either the European Parliament or member-state governments, their legitimacy must depend entirely on shared beliefs in the authority of the law and in the capacity of

11 Strictly speaking, that is only true for the initial agreement. Once a common policy has been adopted, it can be changed only by unanimous intergovernmental agreement. Hence individual governments are no longer able to respond to new circumstances or changing constituency preferences (Scharpf 1988).

professional authorities to realize shared norms, values or goals (Majone 1989, 1996). For the ECB, these goals were explicitly and quite narrowly defined as a commitment to price stability in the Maastricht Treaty (now Article 105 of the EC Treaty), whereas the independent governing powers of the Court and the Commission are derived from their implicit responsibility for interpreting the law of the Treaty in the process of applying it in specific legal proceedings.

Non-democratic legitimacy also plays a role in democratic nation states where constitutional courts, independent central banks or independent regulatory agencies are performing governing functions for which they are thought to be better suited than politically accountable governments. At the national level, however, this form of legitimacy is inherently precarious and would collapse if non-accountable actors should exceed the limits of the "permissive consensus" on which their governing powers depend (Bickel 1962)—in which case the policy choices of independent actors, or even their institutional independence, would become vulnerable to correction by legislative action or constitutional amendment.[12] In the European Union, by contrast, such reversals would be much more difficult to achieve. The independence of the European Central Bank is protected by the Maastricht Treaty to a degree that exceeds the institutional autonomy of any national central bank (Elgie 1998; Haan/Eijffinger 2000), while Treaty-based decisions of the European Court of Justice (ECJ) can be reversed only by Treaty revisions that must be ratified by all member states. Moreover, the ECJ has been able to establish the doctrines of "direct effect" and "supremacy" by which its interpretations of European law will override not only acts of government, but also parliamentary legislation and even the constitutions of all member states (Weiler 1982).

In terms of substantive policy, the supranational governing functions exercised by the Court and the Commission have been most effective in policy areas where economic integration could be advanced by applying fairly explicit prohibitions in the treaties against national policies constituting barriers to the free mobility of goods, services, capital and persons or distortions of free competition. In interpreting these rules of "negative integration," the Commission and the Court have certainly gone beyond the original intent of negotiating parties at the conferences of Messina and Rome (Scharpf 1999: 54–62). Nevertheless, governments have by and large continued to support the moving goal of ever increasing economic integration (Moravcsik 1998), even though the Amsterdam

12 The historical *cause célèbre* is President Roosevelt's "court packing plan" of 1937, which caused the US Supreme Court to reverse its line of anti-New-Deal decisions. It should also be noted that the much celebrated independence of the German Bundesbank was never protected against ordinary legislation.

Summit attempted to impose some limits on the reach of European competition law, which, however, have not been very effective.

So how should we judge the problem-solving effectiveness and legitimacy of those governing functions that have been effectively centralized? As for effectiveness in achieving their assigned or self-chosen goals, the record of hierarchical policy choices adopted by the Commission and the Court is indeed impressive. National courts have generally accepted the authority of the European Court of Justice as the ultimate interpreter of European law (Burley/Mattli 1993), and even the German constitutional court has finally abjured its claim to act as a court of last resort when individual liberties are in issue.[13] As a consequence, European law is routinely enforced in ordinary cases and controversies by the judicial systems of member states. Moreover, this law goes further in eliminating non-tariff barriers to free trade and free movement than is true in long-established federal states like the United States, Australia or Switzerland. Even more significant is the fact that European competition law is effective in imposing much narrower restrictions on public subsidies granted by member states than federal states are imposing on subnational governments (Wolf 2000; Zürn 2000), and that it also is enforcing competition in public services and public utilities that, within nation states, had everywhere been exempted from anti-trust and competition law (Scharpf 1999: Chapters 2 and 3).

In short, if there should be reason for concern, it is not about the lack of effectiveness of negative integration, but rather about the single-minded perfectionism with which the ideal of perfectly competitive markets is pursued by the Commission and the Court.[14] Much the same could be said for the effectiveness of the European Central Bank in assuring price stability among EMU member states. In spite of the recent decline of the euro exchange rate (whose maintenance is not an explicit goal assigned to the ECB), the euro's internal value has remained remarkably stable in comparison with earlier decades, and even in Germany the near-hysterical fears of trading the stable mark against an inflationary euro seem to have abated. If the problem-solving effectiveness of European monetary policy is at all questioned, doubts are primarily voiced in quarters where (contrary to the explicit language of the Treaty) price stability is not considered the only criterion of success.

But what of the legitimacy of centralized European governing functions? Here it is remarkable that concerns about a European democratic deficit have

13 Bundesverfassungsgericht 2 BvL 1/97, 6 June 2000.

14 That is certainly the view of the German *Länder* which, in the run-up to the Nice Summit, even threatened to block eastern enlargement in the absence of Treaty amendments protecting their infrastructure functions against European competition policy.

rarely been addressed to those policy areas where Commission and Court were advancing negative integration without the participation of either national governments or the European Parliament. Since these policies are carried out in the form of legal actions, they are by and large accepted with the affirmative support or grumbling respect[15] with which winners and losers tend to respond to court decisions at the national level. In other words, market-making supranational policies benefited not only from the ascendancy of neoliberal and free-trade doctrines in academe and the media, but also from the customary respect for "the law" and from the legitimacy credit granted to judicial interpretations in the constitutional democracies of member states.

That is not, or perhaps not yet, generally true of monetary policy and the European Central Bank—mainly because member states differed greatly in the extent to which monetary and currency-policy choices had been depoliticized before the creation of the EMU. In countries like Germany, where central bank independence has a long tradition, the worry was that the ECB would be less independent than the Bundesbank, whereas in Britain, Sweden, Denmark and some other member states, the critical issue was precisely the lack of political accountability (Elgie 1998). It seems, however, that the accountability issue is also raised as a proxy for serious concerns about the problem-solving effectiveness of the EMU (Gustavsson 2000). These must be particularly salient in countries that used to rely on devaluation for solving major economic and employment problems. By contrast, the present member states had been part of the European Monetary System before joining the European Monetary Union, and they had learned to live with the constraints of a non-accommodating monetary policy and nearly fixed exchange rates. For them, therefore, the change from a tight money policy defined by the Bundesbank with a view to conditions in the German economy to a tight money policy defined by the ECB with a view to average conditions in Euroland must seem more a promise than a threat.[16]

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15 That may be about to change as the discretionary character of extensive interpretations of European competition law and their lack of political legitimation are publicly asserted by (sub) national political actors in cases where interventions by the Commission are clashing with politically salient (sub)national industrial, infrastructure and cultural policies. In Germany, these clashes give rise to double-pronged demands for institutional reforms increasing the democratic accountability of the Commission and limiting the scope of its competencies.

16 A potentially more serious challenge to the problem-solving effectiveness of ECB monetary policy arises from the fact that the EMU is not an "optimal currency area," and that economic conditions, and phases of the business cycle, may significantly differ among member states. Since the ECB can respond only to average conditions, its actual policy may turn out to be either too tight or too loose for the economies of particular member states. The latter problem is currently faced by Ireland, where inflation runs twice as high as the Euro average—with the consequence that uniform nominal Euro interest rates will translate into negative real interest

The implication is that for the most centralized and supranational governing mode of the multilevel European polity neither problem-solving effectiveness nor legitimacy is seriously in question. But in comparison with the full range of public policies that are in place at the national level in advanced capitalist democracies, the reach of the supranational mode is essentially restricted to the market-making enforcement of "negative integration" by the Commission and the Court and to control over the currency by the European Central Bank. It was not and could not be used to achieve market-correcting "positive integration" by non-political hierarchical fiat.[17] Instead, policies that might be effective in dealing with the negative consequences of regulatory and tax competition depend on political regulations, directives and decisions that can be adopted only with the participation of member governments.

Joint Decisions

The "joint-decision mode" combines aspects of intergovernmental negotiations and supranational centralization. It applies in most policy areas of the first pillar, which includes the market-making as well as the market-correcting competencies of the European Community. Here, European legislation generally depends on initiatives of the Commission which must be adopted (unanimously or by qualified majority) by the Council of Ministers and, increasingly, by the European Parliament. Assessments of the institutional capacity and legitimacy of this mode vary considerably in the academic literature and in political debates—which reflects the fact that policy choices depend, at the same time, on the institutional resources and strategies of supranational actors, and on the convergence of preferences among national governments—both of which are likely to vary from one policy area to another.

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rates for consumers and investors in Ireland. Under these conditions, it is at least uncertain whether union wage restraint can be relied upon to dampen the inflationary pressures that are exacerbated by the misfit of European monetary policy (Hardiman 2000).

Since the economic consequences of a lack of fit between uniform ECB policy and diverse conditions of national economies must be dealt with by national policy responses, the tightness of the budgetary constraints laid down by the Maastricht Treaty and the subsequent Stability Pact may also interfere with effective problem solving. However, as the Scandinavian countries seem to have been quickest to grasp, there is a functionally equivalent solution to deficit spending: Finland, Sweden and Denmark have built up substantial budget surpluses, which should allow them to respond with vigorous fiscal expansion to future economic downturns without violating any of the EMU constraints.

17 Exceptions are policies promoting gender equality in employment and preventing discrimination against migrant workers, both of which can be directly derived from the Treaty.

If member governments are united in their opposition to Commission initiatives, or if highly salient national interests are strongly divergent, European solutions will be blocked, regardless of the involvement of Commission and Parliament. The role of supranational actors will be significant, however, in constellations where national interests diverge but are not highly salient or—more important in theory and practice—in constellations where member governments disagree over the substance of a European solution but still would prefer a common solution over the *status quo*.

Under these conditions—which can be analytically represented by a battle-of-the-sexes game—common solutions could still be blocked by intergovernmental haggling over the precise content of European rules. It is here, therefore, that qualified majority voting should be most acceptable to governments. By the same token, it is here that the capacity for European action will benefit most from the Commission's agenda-setting monopoly, from the expanding co-decision rights of the Parliament (Tsebelis 1994), from the good services of national representatives in COREPER (Hayes-Renshaw/Wallace 1997; Lewis 2000) and from the work of Europeanized national experts in the hundreds of committees preparing, or specifying the details of, Council directives (Joerges/Neyer 1997; Joerges/Vos 1999).

By the same token, however, the institutional legitimacy of joint-decision procedures loses its intergovernmental foundation. By the logic of the original treaties, European legislation was primarily legitimated by the agreement of democratically accountable national governments. Yet these legitimating arguments are undermined the more the role of non-accountable supranational actors and procedures is emphasized in the literature and perceived by political actors and their publics. If it is true that infringement proceedings initiated by the Commission can compel national governments to change their positions on politically salient issues (Schmidt 1998), that national representatives in COREPER will conspire to block domestic opposition to European compromises (Lewis 2000), and that comitology favors agreements among national experts that are decoupled from the positions of their governments (Joerges/Neyer 1997), then the formal agreement of governments in the Council will no longer have much legitimating force.

As a consequence, the focus of legitimating arguments in the literature has shifted. What is now emphasized is the openness of European decision processes to the demands and the expertise of plural interests, the flexibility of European "networks" of interest intermediation, and the "deliberative" qualities of interactions in comitology (Jachtenfuchs/Kohler-Koch 1996; Marks/McAdam 1996; Marks/Hooghe/Blank 1996; Joerges/Vos 1999; Kohler-Koch/Eising 1999; Schmalz-Bruns 1999). Regardless of the descriptive accuracy of

these accounts, however, their normative persuasiveness must rest on the proposition that the accommodation of special interests and the substantive quality of European standards could be a legitimating substitute for democratic accountability based on general and equal elections and public debates. But since effectiveness of European policy must frequently be achieved by "subterfuge" in processes that are completely opaque to the public (Héritier 1999), there is no assurance that all affected interests will even be aware of what is going on at the European level.[18] For politically salient issues, at any rate, it is thus hard to see how informal networks of interest intermediation and anonymous expert committees could be considered satisfactory substitutes for the democratic accountability of representatives whose mandate is derived, directly or indirectly, from general elections based on the formal equality of all citizens (Weiler 1999; Greven 2000).

In light of these legitimacy problems, it is perhaps good news that the success stories celebrating the effectiveness of supranational mechanisms and the problem-solving capacity of European policy (Eichener 1997, 2000; Pollack 1997) are considerably exaggerated or at least overgeneralized. They are true as far as they go, but their empirical domain is limited to a range of policy areas in which conflict over divergent national interests is overshadowed by a common interest, or where decisions tend to have low political salience for the general public. This is true for market-making directives harmonizing national product regulations[19] and for a few other policy areas where common interests are stronger than divergent interests (Scharpf 1997, 1999). But where it is not true, national governments remain fully capable of blocking European decisions even if the decision rule is qualified-majority voting in the Council (Golub 1996a, 1996b).

From a legitimacy point of view, therefore, all seems to be well. In the joint-decision mode, the EU can deal only with problems where European action is supported by a broad consensus involving democratically accountable national governments, a directly elected European Parliament and those affected (and organized) interests that are able to influence the agenda-setting functions of the Commission. Where this consensus exists, the legitimacy of policies so ad-

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18 Similar claims to legitimacy were advanced by theorists of American pluralism (Truman 1951; Latham 1952), but it is fair to say that they were ultimately rejected on empirical as well as normative grounds (Mills 1956; Dahl 1961, 1967; Bachrach/Baratz 1963; Olson 1965; McConnell 1966; Lindblom 1977).

19 When that is not true—as in the BSE case or for genetically modified foodstuffs—national governments tend to take control again, since it is they, rather than the anonymous experts on the Commission's Veterinary Committee, who must face the brunt of political protest at home.

opted is not seriously in question, even though the procedures do not conform to standard models of democratic accountability in the nation state. Where it does not exist, European action is blocked, and problems are left to be resolved by national governments in institutions and procedures with presumably impeccable democratic credentials. But all is not well from a problem-solving perspective if the market-making policies on which Europe can agree will damage the capacity of national governments to adopt those market-correcting policies on which the EU cannot agree. Unfortunately, this European problem-solving gap tends to exist in precisely those policy areas where national governing functions are most vulnerable to systems competition.

One reason is that constellations of tax competition and regulatory competition do not generally resemble either a battle-of-the-sexes game or a symmetrical prisoner's dilemma—in which case agreement on common rules regulating competition should be possible. In tax competition, for instance, small countries may actually increase their revenue through tax cuts that bigger countries could not reciprocate without incurring massive revenue losses (Dehejia/Genschel 1999). Similar asymmetries may favor competitive deregulation in other policy areas. In such constellations, the winners are clearly not interested in having their competitive advantages harmonized away by common European rules. But even in the absence of winner-loser asymmetries, harmonization may be blocked by conflicts arising from politically salient differences among member states in economic development, policy legacies, institutional structures or ideological preferences.

Thus, environmental regulations considered necessary in Denmark, Germany or The Netherlands may simply not be affordable in less wealthy member states like Greece, Spain or Portugal, let alone countries on the threshold of eastern enlargement. The same would be true if the EU attempted to standardize the provision of social transfers and public social services at the level that is considered appropriate in the Scandinavian countries. If that were all, it might perhaps be possible to agree on relative standards reflecting these differences in the ability-to-pay of member states at different stages of economic development. Yet even though Britain and Sweden may be similarly wealthy, they could still not agree on common European welfare-state solutions.

The reason is that European welfare states have come to define widely differing dividing lines between the functions the state is expected to perform and those that are left to private provision, either in the family or by the market. They all provide social assistance to the needy, but in Scandinavia and on the European continent, the state also provides earnings-related social insurance that is meant to secure the standard of living of average-income families in the case of unemployment, sickness and disability, and in old age. In Britain and

other Anglo-Saxon welfare states, by contrast, workers with average or higher incomes have learned to rely on private provisions for these eventualities. Moreover, only the Scandinavian welfare states are providing universal and high-quality social services freeing wives and mothers from family duties while at the same time providing the public-sector jobs that have raised female participation in the labor market to record levels. In Continental and Anglo-Saxon countries, by contrast, these services are left to be provided in the family or by the market (Scharpf/Schmidt 2000a). Differences of similar significance are also characteristic of the industrial relations institutions of EU member states (Crouch 1993; Ebbinghaus/Visser 2000).

These structural differences are not merely of a technical nature but have high political salience. They correspond to fundamentally differing welfare-state aspirations which can be roughly equated with the historical dominance of "liberal," "Christian democratic" and "social democratic" political parties and social theories (Esping-Andersen 1990). Moreover, and perhaps more important, citizens in all countries have come to base their life plans on the continuation of existing models, and any attempts to replace these with qualitatively different European solutions would mobilize fierce opposition. Scandinavian voters would resist the dismantling of their full-service welfare state just as much as British voters would refuse to accept the higher taxes that would be needed to finance the Scandinavian model, and both would reject the German model of tightly regulated industrial relations and co-determination. There is, in short, no single "European social model" on which harmonization could converge (Ferrera/Hemerijck/Rhodes 2000).

In the joint-decision mode, therefore, national governments, accountable to their national constituencies, could not possibly agree on common European solutions for the core functions of the welfare state. That need not prevent the adoption of minimum European standards on social and workers" rights either through Council directives or through agreements reached in the "social dialogue" of the peak-level organizations of capital and labor (Leibfried/Pierson 1995; Falkner 1998). But since such standards must be acceptable to all member states, they must not only be economically viable in the least wealthy member states, but also compatible with all existing industrial relations and welfare-state institutions. It is no surprise, therefore, that only very undemanding regulations have been able to pass this dual test (Streeck 1995, 1997)—which also implies that while they may be useful in raising minimal levels of social protection in Anglo-Saxon and southern countries, they will not do much to relieve the competitive pressures on more advanced Continental and Scandinavian welfare states.

Other Options?

Under present conditions, therefore, European social policy is able to intervene (in the mode of hierarchical direction) against discriminatory national rules and practices affecting migrant workers and gender equality, and to adopt legislation (in the joint-decision mode) assuring minimal standards of social protection that do not challenge either the ability to pay or the core institutions of member states. Nor could institutional reforms change much in this regard. Given the high political salience of national welfare-state institutions, governments must resist all proposals by which differences could be harmonized away through majority decisions in the Council and the European Parliament. The point can be made more generally: the European Union is not, and cannot soon become, a majoritarian democracy (Lord 1998; Scharpf 1999; Greven 2000), and its institutional legitimacy cannot support policies that violate the permissive consensus of constituencies in its member states.

By the same token, however, the problem-solving capacity of the European Union must also remain limited. It was and is sufficient to create and regulate the larger European market, but it is insufficient for Europeanizing those market-correcting governing functions that, at the level of member states, are most vulnerable to the pressures of economic competition. Hence member states must continue to cope with these pressures in the mode of mutual adjustment. What that entails for the survival of advanced European welfare states is the subject of ongoing controversies in public debates and in academic analyses, which I cannot review here (Scharpf/Schmidt 2000a, 2000b). There is no question that economic globalization and, above all, European economic integration and the EMU have deprived national policy makers of many of the policy options they could and did employ in earlier decades to achieve and defend full employment and high levels of social protection. Moreover, intense competition in international product markets and increased capital mobility are exerting downward pressures on wages as well as on taxes and regulations that would increase the unit costs of production or reduce post-tax profits. Governments and unions that ignore these international pressures will pay for it in terms of lower economic growth and job losses. At the same time, national governments have lost control over interest rates and exchange rates in the EMU, public-sector deficits are constrained by the rules of the Stability Pact and by the anticipated response of international capital markets, and state subsidies are policed under European competition law.

Constraints, however, are just that. They do not rule out strategic choices, and they do not determine outcomes. There are at least some European countries—e.g., Denmark among the Scandinavian welfare states, The Netherlands

among the Continental group, and Portugal in the south—that have found ways to achieve or maintain high international economic viability without abandoning their employment and welfare-state aspirations or resorting to beggar-my-neighbor strategies policies that—like devaluation—could only work if others did not follow suit (Ferrera/Hemerijck/Rhodes 2000; Scharpf/Schmidt 2000a). But not all national welfare states have remained economically viable, and many of them are struggling with disruptive political conflicts over tax cuts, welfare retrenchment and employment deregulation.

Under these conditions, there is reason to ask whether the European Union—which generated these problems for member states without being able to deal with them directly—might nevertheless play a positive role in facilitating successful coping strategies at the national level. In my earlier work (Scharpf 1999: Chapter 5), I have discussed two such solutions—the formulation and enforcement of standards of "unfair regulatory and tax competition" by the Commission and the Court, and what I have called "sub-European coordination." In the meantime, the first of these suggestions seems to have become a realistic prospect with the recent announcement by Commissioner Monti that he would henceforth examine selective tax concessions under the rules applying to distortions of competition through state subsidies.

The second suggestion might have a chance if the current Intergovernmental Conference should in fact liberalize the provisions on "closer cooperation" in Title VII of the Treaty of European Union. In that case, it might become possible that groups of countries that have similar welfare-state institutions and are facing similar problems could use the machinery of the European Union and the services of the Commission to harmonize their social policies. Unfortunately, however, the recent discussion has again raised the specter of an avant-garde of member states moving ahead toward political integration and relegating all others to second-class status. Given the decades of misunderstandings and apprehensions associated with proposals for "differentiated integration" in a "Europe with variable geometry," a "multi-speed Europe," a "two-tier Europe," a "Europe à la carte," a "Europe of concentric circles" or a "core Europe" (Ehlermann 1984; Giering 1997; Ehlermann 1998; Walker 1998; Burca/Scott 2000), there is little hope at the time of this writing (October 2000) that the extremely restrictive rules adopted at the Amsterdam Summit will be significantly liberalized at the upcoming Nice Summit.

But even if selective harmonization should be beyond reach, opportunities for coordinating reform efforts could also be provided by the procedures of "open coordination" which were introduced in the new "Employment" title of the EC Treaty at Amsterdam, and which the Lisbon Summit (23–24 March 2000) decided to apply also in the field of social policy. In terms of the concepts

used here, open coordination could be located somewhere between the mode of "intergovernmental negotiations" and the mode of "mutual adjustment." It resembles mutual adjustment insofar as governing competencies remain entirely at the national level and continue to be exercised by national governments that remain fully accountable for their policy choices to their national electorates. There are, in other words, no problems of a democratic deficit here. At the same time, however, national policy choices are not to be exercised in isolation. Acknowledging that promoting employment is "a matter of common concern," governments have accepted a commitment to "coordinate their action in this respect within the Council" (Article 126, II). For this purpose, the Council acting on a proposal of the Commission will adopt annual guidelines for national action, member states will submit annual reports on actions taken to implement these guidelines, and these will be evaluated by a permanent high-level committee of national civil servants and by the Commission, which may then propose specific recommendations to the Council.

These rules provide for multilevel and recursive processes of joint problem analyses and goal setting, self-commitment and self-evaluation, combined with common monitoring and central benchmarking capacities. Such arrangements appear plausible if it is assumed that member states see themselves pursuing parallel, rather than conflicting goals, but also prefer to remain free in defining and adopting their own measures for reaching these goals—presumably because national conditions are so different or politically salient that uniform solutions could not be effective or politically acceptable. Given that Article 129 explicitly excludes the "harmonization of the laws and regulations of the Member States" from the range of measures that the Council may adopt, the considerable efforts required by the elaborate procedures of open coordination must then be justified by the hope that monitoring, benchmarking and peer review could increase the effectiveness of national employment and social policies (Ferrera/Hemerijck/Rhodes 2000: Chapter 4).

At a theoretical level, that is not implausible (Sabel 1995). The question is, however, whether these promises of "policy learning" can be fully realized under the heterogeneous conditions shaping the employment and social policy-problems as well as the policy options of EU member states.[20] From what was

20 It seems significant that the employment guidelines proposed by the Commission and adopted by the Luxembourg Council for 1998 and the following years seem carefully designed to avoid all issues in which existing differences among the policy legacies and institutional structures of member states would be highly salient, focusing instead on such institution-neutral goals as "improving employability," "developing entrepreneurship," "encouraging adaptability" and "strengthening policies for equal opportunities" (Council 21-11-97). In Lisbon, the employment goals were amended to include "lifelong learning" and "increasing employment in ser-

said above, it would follow that "open coordination" will be most effective if aspirations for Europe-wide standards of performance are moderated by the recognition that member states may legitimately differ not only in the policy instruments they employ, but also in the goals they strive to attain and in the problems they need to deal with. In that case, the potential gains from coordination and policy learning will be the greater, the more countries with similar institutions and policy legacies are encouraged to cooperate in focusing on their specific problems and potential solutions to them.

At this time, it is too early to tell whether these efforts will remain at the level of symbolic politics and public relations or will have real effects on national policies.[21] Nevertheless, "open coordination" does appear to be a potentially valuable addition to the set of institutionalized governing modes that are available in the European polity. It is more flexible than either joint decisions or intergovernmental negotiations. In comparison with mutual adjustment, it could nevertheless provide useful safeguards against unintended races to the bottom under conditions of systems competition. If taken seriously by national governments, it could become an important European response to the pressures on national welfare states that were brought about by European economic integration.

To conclude: the European polity is a complex multilevel institutional configuration that cannot be adequately represented by theoretical models that are generally used in international relations or comparative politics. Worse yet, its complexity also seems to defy all theoretical efforts based on holistic concepts. The present article suggests that these difficulties could be overcome by a modular approach using a plurality of simpler concepts representing different modes of multilevel interaction which are characteristic of subsets of European policy processes. I have tried to show that these modes exist and that they have specific implications for the institutional capacity and legitimacy of European governing functions. My further claim (which was not developed here) is that the same conceptual tools should also be useful for the analysis of subnational, national, transnational and other supranational policy-making institutions.

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vices," and open coordination was extended to cover also the goals of "modernizing social protection" and "promoting social inclusion."

21 Since no binding directives are to be adopted at the European level, actors who are in fact in charge of national policy choices may fail to get actively involved in the coordination exercises. In that case, the danger is that "National Action Plans" will merely restate what governments are doing anyway, and that the learning effect of deliberations at the European level may only benefit international liaison officials who lack effective power at home.

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8 The European Social Model: Coping with the Challenges of Diversity (2002)

I Social Europe: The Road not Taken

Why is it that concern about the "European social model" has risen so dramatically in the last decade? Or why is it that efforts to promote employment and social policy at the level of the European Community have come so late and seem so feeble in comparison to the success stories of the single market and the monetary union? In approaching an answer, I find it useful to begin with another, historically counterfactual question: where would we now be if, in the 1956 negotiations leading to the Treaties of Rome and the creation of the European Economic Community, French (Socialist) Prime Minister Guy Mollet had had his way? Mollet, supported by French industry, had tried to make the harmonization of social regulations and fiscal burdens a precondition for the integration of industrial markets. But since he had even more pressing concerns to fend for—opening European markets for French agriculture, support for former French colonies—what he got in the final package deal was merely the political commitment of other governments to increase social protection nationally (Moravcsik 1998: 108–150; Küsters 1980; Loth 2002).

So what if Mollet had won on all counts? Could attempts to harmonize social policies have succeeded or would they have blocked European integration altogether? We cannot know, of course, but we do know that in the mid-1950s European welfare states were still rudimentary in quantitative terms, and structurally much more similar than they became during the following decades. Moreover, the original six included only Member States whose welfare states had been shaped by the Bismarck model of work-based social insurance.[1] Thus, harmonization would not have been hopeless—much less difficult, at any rate, than it would now be in the face of much greater quantitative and structural

1 In 1960 and among the original six, the GDP share of total public expenditures on social protection had varied by a ratio of 1.54–18.1 percent of GDP in Germany and 11.7 percent in the Netherlands. By 1965, further convergence had reduced that ratio to 1.17. By 1990 and for the fifteen, however, the ratio had risen to 2.15–33.1 percent of GDP in Sweden and 15.4 percent in Portugal (OECD 1994: Tables 1a–1c).

heterogeneity among the present fifteen, let alone in the EU after eastern enlargement.

If a commitment to harmonization in 1956 could be assumed, it seems plausible that the process of European integration would have been driven by the same political demands which, under conditions of increasing affluence, pushed the rapid expansion of national welfare states in the following high-growth decades. It would have been a highly political process, in which normative disputes and class conflict would have played a significant role and in which it would also have been necessary to define the line of demarcation between the spheres of market competition and protected social and cultural concerns at the European level. If these conflicts could be resolved, the outcome would have boosted political legitimacy and facilitated European political integration among the original six—but it would also have made subsequent rounds of enlargement considerably more difficult.

In any case, what could *not* have happened was the political decoupling of economic integration and social-protection issues which has characterized the real process of European integration from Rome to Maastricht (Scharpf 1999: Chapter 2).[2] It allowed economic-policy discourses to frame the European agenda exclusively in terms of market integration and liberalization, and it ensured the privileged access of economic interests to European policy processes. Even more important, however, was the constitutional asymmetry following from the selective Europeanization of policy functions. At the national level, economic policy and social-protection policy had and still have the same constitutional status—with the consequence that any conflict between these two types of interests could only be resolved politically, by majority vote or by compromise. The same would have been true in the European Community if Guy Mollet had had his way. As it was, however, once the European Court of Justice (ECJ) had established the doctrines of "direct effect" and "supremacy," any rules of primary and secondary European law, as interpreted by the Commission and the Court, would take precedence over all rules and practices based on national law, whether earlier or later, statutory or constitutional. When that was ensured, all employment and welfare-state policies at the national level had to be designed in the shadow of "constitutionalized" European law.

Initially, it is true, the shadow was so light that it was hardly noticed. In the 1960s, the integration of industrial markets did not exceed the level of a customs union, whereas in agriculture, where integration went further, the de-

2 The exception are rules against the discrimination of women in the labor market (one of Mollet's concerns that had made it into the EEC Treaty) and rules ensuring non-discrimination and the portability of social benefits for migrant workers (Leibfried/Pierson 1995).

coupling of economic and social concerns was avoided and the common agricultural policy (CAP) dealt directly in some way[3] with the social problems it induced. In general, however, national systems of social protection could and did expand rapidly, just as France had been assured by its partners in Rome. In doing so, however, they also diverged structurally—and heterogeneity increased dramatically in the 1970s with the accession of Denmark, Britain and Ireland, three definitely non-Bismarckian welfare states.

The shadow of European law began to matter very much in the 1980s, however, when, in response to widespread apprehension about "Eurosclerosis," economic integration was greatly deepened and widened by the internal market program and the Single European Act, and it came to matter even more when the Maastricht Treaty committed Member States to create European monetary union in the 1990s. The Single Act had introduced qualified majority voting, minimal harmonization and mutual recognition to remove the non-tariff barriers of nationally differing product standards; it required the liberalization of hitherto protected, highly regulated and often state-owned *service-public* industries and infrastructure functions, including financial services, air, road and rail transport, telecommunications and energy; and it extended the reach of European competition law to all national policies that could be regarded as distortions of free competition. Going even further, monetary union eliminated all national control over exchange rates and monetary policy, while the stability and growth pact imposed rigid constraints on the public sector deficits of its Member States.

II European Constraints on Welfare States

In their own terms, the efforts to complete the internal market and monetary union have succeeded beyond expectations. At the same time, however, the advance of economic integration has greatly reduced the capacity of Member States to influence the course of their own economies and to realize self-defined socio-political goals. In order to appreciate the magnitude of the change, it is useful to remind oneself of the policy instruments which, in various combinations, were routinely used by many Member States only a decade or two ago, and

3 I am not of course suggesting that the Franco–German compromise that shaped the CAP—price support justified by the plight of small peasants but benefiting large producers—was efficient in either economic or social-policy terms (Scharpf 1988). But in that regard it was hardly worse than the compromise solutions that had prevailed nationally in Europe and elsewhere.

which are now ruled out by European law. Thus monetary union has not only deprived Member States of the ability to adjust exchange rates in response to economic problems, but it has also replaced national monetary policy by ECB interest rates which—since they must necessarily respond to average conditions in the euro area at large—will be too high for economies with below-average rates of economic growth and inflation and too low for countries above the average. Hence they will further impede the recovery of sluggish economies and add to inflationary pressures in countries with high growth rates (Enderlein 2002). Yet while the inevitable misfit of European monetary policy increases the need for compensatory strategies at the national level, Member States find themselves constrained in their fiscal policy by the conditions of the stability and growth pact—which will punish countries suffering from slow growth, but can do nothing to discipline the governments of overheating and highly inflationary economies. At the same time, the internal market removed legal barriers to the free mobility of goods and services, and it eliminated controls of capital movements which had persisted well into the 1980s. European liberalization and deregulation policies have eliminated the possibility of using public-sector industries as an employment buffer; they no longer allow public utilities and the regulation of financial services to be used as tools of regional and sectoral industrial policy; and European competition policy has largely disabled the use of state aids and public procurement for such purposes.

In short, compared to the repertoire of policy choices that was available two or three decades ago, European *legal* constraints have greatly reduced the capacity of national governments to influence growth and employment in the economies for whose performance they are politically accountable. In principle, the only national options which remain freely available under European law are supply-side strategies involving lower tax burdens, further deregulation and flexibilization of employment conditions, increasing wage differentiation and welfare cutbacks to reduce reservation wages. At the same time, governments face strong *economic* incentives to resort to just such strategies of competitive deregulation and tax cuts in order to attract or retain mobile firms and investments that might otherwise seek locations with lower production costs and higher post-tax incomes from capital. By the same token, unions find themselves compelled to accept lower wages or less attractive employment conditions in order to save existing jobs. Conversely, welfare states are tempted to reduce the generosity or tighten the eligibility rules of tax-financed social transfers and social services in order to discourage the immigration of potential welfare clients.

III The Dilemma of Social Europe

It is no wonder, therefore, that countries and interest groups that had come to rely on social regulation of the economy and generous welfare state transfers and services are now expecting the European Union to protect the "European social model" and thus to re-establish the constitutional parallelism of economic ("market-making") and social-protection ("market-correcting") interests and policy purposes that had existed at the national level before the take-off of economic integration—and which would have existed at the European level if France had had its way in the Treaty of Rome. So why not return to the agenda of 1956 by trying to combine the policies creating and liberalizing European markets for goods, services and capital with the European harmonization of market-correcting social regulations and taxes?

In purely economic terms, that would still be feasible, and the much maligned CAP demonstrates that it is possible in practice as well. While there is presently much public commotion about the destabilizing consequences of "globalization," that would not prevent the creation and protection of social Europe. The world economy is still much less integrated, and WTO rules are much less constraining, than is true of the internal market, and there is of course no global monetary union that would rule out currency adjustments and independent monetary policy at national or European levels. At the same time, the European Union is much less dependent on imports and exports than its individual Member States, and with the creation of monetary union it has become much less vulnerable to the vicissitudes of international capital speculation. Hence macroeconomic management, industrial policy and the social regulation and taxation of business activities, which have become economically constrained at the national level, would still be feasible policy options for the European Union. So would be the harmonization of national welfare state policies on the basis of treaty amendments with the same constitutional status as the provisions creating the internal market and monetary union. This was indeed the promise of the "social dimension" which Jacques Delors had promoted along with the deepening of economic integration. In reality, however, the road not taken by the original six in 1956 was no longer open for the fifteen in the 1990s.

It was foreclosed not by external economic constraints but by the diversity of European welfare states. There are, first, differences in economic development which increased greatly after southern enlargement. At the end of the 1990s, per-capita GNP in purchasing power parities was about twice as high in Denmark as it was in Greece and, excepting Slovenia, it was three to six times higher than in the central and eastern European accession states (Kittel 2002: Table 1). Thus, social transfers and public social services at a level that is

considered appropriate in the Scandinavian countries could simply not be afforded by Greece, Spain or Portugal—let alone by the candidate countries on the threshold of eastern enlargement. If that were all, however, it might still be possible to define harmonization by reference to relative standards reflecting differences in Member States' ability to pay at different stages of economic development (Scharpf 1999: 175–180). Yet even though Britain and Sweden may be similarly wealthy, they still could not agree on common European policies regarding the welfare state or industrial relations.

What matters here is the divergent development of welfare state institutions and policies that began in the 1950s and reached its high point in the early 1970s (Esping-Andersen 1990; Scharpf/Schmidt 2000a, 2000b; Huber/Stephens 2001). Following its first enlargement in the 1970s, the European Community included countries belonging to each of Esping-Andersen's (1990) "three worlds of welfare capitalism," with Denmark representing the "Scandinavian" model, Britain and Ireland the "Anglo-Saxon" type, while the original six conformed to the "Continental" pattern. Southern enlargement in the 1980s and northern enlargement in the 1990s increased and solidified this heterogeneity (Ferrera/Hemerijck/Rhodes 2001; Begg et al. 2001). These groups of countries differ not only in their average levels of total taxation and social spending, but also in the relative weights of various taxes and social security contributions on the revenue side, and of social transfers and social services on the expenditure side (Scharpf/Schmidt 2000a: Tables A 23–A 28). Of even greater importance than these operational differences, however, are differences in taken-for-granted normative assumptions regarding the demarcation line separating the functions the welfare state is expected to perform from those that ought to be left to private provision, either within the family or by the market (Esping-Andersen 1999; Scharpf 2000; Huber/Stephens 2001; Ferrera/Hemerijck/Rhodes 2001).

- All three groups of countries provide means-tested social assistance to the needy, publicly financed primary and secondary education, and some form of collectively financed health care.
- In Scandinavia and on the European continent, however, the state also provides work-based and earnings-related social insurance that is meant to secure the standard of living of average income families in case of unemployment, sickness, disability and in old age, whereas in Anglo-Saxon welfare states, workers with average and higher incomes are expected to rely primarily on private provisions for these eventualities.
- Finally, only the Scandinavian welfare states provide universal and high-quality social services for all families and needy individuals, freeing wives and mothers from family duties while at the same time providing the public-

sector jobs that have raised female participation in the labor market to record levels. In Anglo-Saxon, Continental and southern European countries, by contrast, these caring services are mainly left to be provided by the family or the market.

– Differences of similar significance are also characteristic of the industrial-relations institutions of EU Member States (Crouch 1993; Ebbinghaus/Visser 2000).

These structural differences have high political salience. They correspond to fundamentally differing social philosophies which can be roughly equated with the social philosophies and the post-war dominance of "liberal," "Christian democratic" and "social democratic" political parties (Esping-Andersen 1990; Huber/Stephens 2001). In any case, however, citizens in all countries have come to base their life plans on the continuation of existing systems of social protection and taxation and would, for that reason alone, resist major structural changes. Voters in Britain simply could not accept the high levels of taxation that sustain the generous Swedish welfare state; Swedish families could not live with the low level of social and educational services provided in Germany; and German doctors and patients would unite in protest against any moves toward a British-style National Health Service. Thus uniform European solutions would mobilize fierce opposition in countries where they would require major changes in the structures and core functions of existing welfare state institutions, and member governments, accountable to their national constituencies, could not possibly agree on European legislation imposing such solutions.[4]

Political parties and unions promoting "social Europe" are thus confronted by a dilemma: to ensure effectiveness, they need to assert the constitutional equality of social-protection and economic-integration functions at the European level—which could be achieved either through European social programs or through the harmonization of national social-protection systems. At the same time, however, the present diversity of national social-protection systems and the political salience of these differences make it practically impossible for them to agree on common European solutions. Faced by this dilemma, the Union has opted for a new governing mode, the open method of co-ordination (OMC), in order to protect and promote social Europe.

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4 That did not prevent the adoption of *minimum* European standards on social and workers' rights either through Council directives or through agreements reached in the "social dialogue" of the peak-level organizations of capital and labor (Leibfried/Pierson 1995; Falkner 1998). But since such standards must be acceptable to all Member States, they must not only be economically viable in the less wealthy countries, but also compatible with existing industrial relations and welfare state institutions—and hence relatively permissive (Streeck 1995, 1997).

IV Can the Open Method of Co-ordination Overcome the Dilemma?

The new governing mode was established—*avant la lettre*—by the Maastricht Treaty (Articles 98–104 TEC) for the purpose of co-ordinating national economic policies through "broad economic policy guidelines" and recommendations of the Council (Hodson/Maher 2001) and it was again used by the Amsterdam Treaty to develop a co-ordinated strategy for employment (Articles 125–128 TEC). Without creating a new treaty base,[5] the Lisbon summit then introduced the generic label of OMC and resolved to apply it not only to issues of education, training, R&D and enterprise policy, but also to "social protection" and "social inclusion."[6] While procedures differ among these policy areas, all of them share two essential characteristics:

– Policy choices remain at the national level and European legislation is explicitly excluded.
– At the same time, however, national policy choices are defined as matters of common concern, and efforts concentrate on reaching agreement on common objectives and common indicators of achievement.
– Moreover, governments are willing to present their plans for comparative discussion and to expose their performance to peer review.
– Nevertheless, co-ordination depends on voluntary co-operation, and there are no formal sanctions against Member States whose performance does not match agreed standards.

The open method was most fully specified for the European employment strategy (EES) which came to be known as the "Luxembourg process." Its core is an iterative procedure, beginning with an annual joint report to the European Council which is followed by guidelines of the Council based on proposals from the Commission. In response to these guidelines, member governments present annual "national action plans," whose effects will then be evaluated in the light of comparative benchmarks by the Commission and a permanent committee of senior civil servants. These evaluations will feed into the next iteration of joint annual reports and guidelines, but they may also lead to the adoption of specific recommendations of the Council addressed to individual Member States. In any case, however, "the harmonization of the laws and regulations of Member

5 The importance of a treaty base is emphasized by Vandenbroucke (2002).

6 A very useful overview of all applications of OMC was provided in the context of preparatory work for the Commission's White Paper on European Governance by Working Group 4a (2001).

States" is explicitly excluded from the measures the Council could adopt (Article 129 TEC). In other policy areas, procedures may be less formalized and less demanding, but the essential characteristics are the same.

The open method has already become the focus of much attention in the literature (see, e.g., Goetschy 1999, 2000; Hodson/Maher 2001; Begg et al. 2001; de la Porte/Pochet 2002a), but most academic[7] assessments are still speculative and preliminary. An official evaluation by the Commission (which, however, will be based on national studies commissioned by each member government) is presently under way. It will be interesting to see if the closer look will change the rather skeptical view expressed in the White Paper on European Governance (Commission 2001; Scharpf 2001), but for the time being there is no sense in trying to anticipate the findings of this investigation. Instead, I will use what is presently known about the objectives and design of the open method in the areas of employment and social policy to discuss the question of whether these could, assuming optimal implementation, overcome the basic dilemma of social Europe as I have defined it above. In other words, could the method of open co-ordination generate solutions that are less vulnerable to the legal and economic challenges of European economic and monetary integration, while still maintaining the legitimate diversity of existing welfare-state institutions and policy legacies at the national level?

What OMC Can Do

While respect for national diversity seems to be ensured by the essential voluntarism of the open method which leaves effective policy choices to the Member States, the first question raises issues which are generally ignored in a growing literature that seems to focus exclusively on the beneficial effects of the method. There the emphasis is on policy learning through information exchange, benchmarking, peer review, deliberation, and blaming and shaming (see, e.g., Trubek/Mosher 2001; Begg et al. 2001; Esping-Andersen et al. 2001; Hemerijck/Visser 2001). All this may be true as far as it goes. While national governments remain responsible for the adoption of specific policy solutions, they are required to focus on jointly defined problems and policy objectives, and to consider their own policy choices in relation to these "common concerns." Moreover, by exposing their actual performance to comparative benchmarking on the basis of agreed indicators, to peer review and to public scrutiny, the process does in fact

7 But see the very positive view of Vandenbroucke (2002), whose role during the Belgian Presidency was essential in reaching agreement on common indicators for "social exclusion" (Atkinson et al. 2002).

provide favorable conditions for "learning by monitoring" (Sabel 1994), and it may also contribute to shaming governments out of "beggar-my-neighbor" strategies that would be self-defeating if everybody adopted them.

It is also true, however, that the expected benefits of OMC depend crucially on the willingness of those national actors who are in fact in control of policy choices to get themselves involved in processes of European co-ordination (Coron/Palier 2002; Jacobsson/Schmid 2002). If that is the case, European recommendations may be used as powerful arguments in national policy discourses; if not, national action plans may simply reflect the status quo of national policy routines, while the innumerable rounds of meetings in Brussels will merely educate national liaison officers who have no influence at home. But these are not the main reservations. Even if the willingness to learn could be generally assumed, it is still necessary to ask what type of policy choices could optimally be made under OMC conditions.

What OMC Cannot Do

In this regard, a look at the four pillars of the employment guidelines adopted in the Luxembourg process is quite instructive. Apart from "equal opportunities," which has a base in the commitment of the original EEC Treaty to gender equality, the other three pillars all refer to the type of supply-side policies which are favored by neo-liberal economists and which are fully compatible with maximal economic integration. Thus "employability" is about improving the skills and increasing the work incentives of the unemployed, "entrepreneurship" is about removing red tape and other barriers to entry affecting startup businesses; and "adaptability" is primarily about the deregulation of employment protection. Similarly, when the Lisbon summit adopted a commitment to "modernizing the European social model,"[8] its primary focus was, again, on education and training, skills and life-long learning—which is also the main approach toward its goal of "social inclusion."[9] The one exception to this supply-side emphasis appears to be the commitment to "modernizing social protection" which, apart from admonishing Member States "to ensure that work pays," appears to be mainly concerned about the fiscal "sustainability of pension systems (COM [2000] 622 final).[10] Recent research confirms the impression that a major motive for creat-

8 Lisbon European Council, 23–24 March 2000, Presidency Conclusions.

9 Begg et al. (2001) suggest that the primary focus of policies for social inclusion should be on the "participatibility" of target groups—a term coined to parallel the "employability" pillar of the Luxembourg process.

10 Similarly, Article 126 TEC stipulates that the employment strategy must be consistent with the "broad economic policy guidelines" adopted by Ecofin under Article 99, 2 TEC.

ing an open method process for pension reform was the concern that, otherwise, the Economic Policy Committee and Ecofin might unilaterally impose their own views on how to constrain the run-away deficits of public pension systems (de la Porte/Pochet 2002b). It seems fair to say, therefore, that pension reform came on to the European agenda at least in part as a spillover from monetary union and the stability pact and their concern with the soundness of national fiscal commitments.[11]

In short, the selection of policy goals confirms the expectation that, under the constitutional priority of European law, policies promoted through the open method of co-ordination must avoid all challenges to the *acquis* of the internal market and monetary union. Even when responding to OMC guidelines, therefore, Member States continue to operate under exactly the same legal and economic constraints of economic integration which limit their policy choices when they are acting individually. In order to appreciate the severity of these constraints, it is useful to think of policy options that are not, and could not be, on the agenda of OMC deliberations. Thus, if unemployment rises in the euro area generally, Luxembourg EES guidelines could not recommend lower ECB interest rates; if unemployment rises nationally, EES recommendations could neither relax the deficit rules of the stability and growth pact nor the competition rules on state aids to depressed regions or industries. Similarly if expenditure on health care is rising, OMC could not recommend price controls or "positive lists" for pharmaceuticals; and if social services are being eroded by fiscal constraints, there is no chance of guidelines promoting either a concerted increase of taxes on capital incomes or, failing that, the re-introduction of effective capital exchange controls.

The long and the short of it is that optimistic or pessimistic assessments of the maximum potential for policy learning that could be achieved through the open method depend very much on the authors' estimates of the range of options that are still available at the national level under the constraints of an internationalized economy. In the literature on the comparative political economy of welfare states, this question has become the subject of a large and controversial theoretical and empirical body of work (Sinn 1993; Tanzi 1995; Garrett 1998; Swank 1998; Alber/Standing 2000; Scharpf/Schmidt 2000a; Pierson 2001; Huber/Stephen 2001). It is fair to conclude that these studies by and large

11 This is not meant to deny that most Member States had their own demographic and fiscal reasons for attempting to reform their pension systems. It is merely suggested that pensions issues appeared on the European agenda when the Economic and Financial Committee threatened to treat them in the broad economic policy guidelines from a purely fiscal perspective (Vandenbroucke 2000).

do not provide empirical support for expectations of a general "race to the bottom," but emphasize the path-dependent resistance of welfare state regimes to the downward pressures of economic competition. Moreover, comparative research did identify several instances of successful policy learning and creative adjustment through which some countries were able to maintain or achieve international competitiveness and high levels of employment without sacrificing their social-policy aspirations (Hemerijck/Schludi 2000; Scharpf 2000; Huber/Stephens 2001).[12]

The Vulnerability of Best-practice Models

It should be noted, however, that particularly successful countries usually had the benefit of favorable economic and/or institutional preconditions (Schwartz 2001), and that there are in fact more countries that are stuck in economic difficulties or that had to impose significant cutbacks on welfare state transfers and services and accept a considerable increase in social inequality and insecurity. Moreover, most of the studies cited look at the longer-term effects of "globalization," rather than at the more recent impact of the completion of the internal market and monetary union in Europe. It is important to point out, therefore, that some of the most successful solutions are potentially quite vulnerable to the seemingly inexorable deepening and widening of the reach of European competition law.

Thus, the Scandinavian system of universal social services and egalitarian social protection was generally treated as a best-practice model by Esping-Andersen and his collaborators in their report to the Belgian Presidency on the "new welfare architecture for Europe" (Esping-Andersen et al. 2001). Moreover, in our own comparative study of work and welfare in the open economy (Scharpf/Schmidt 2000a), we concluded that, in terms of economic competitiveness and fiscal viability, Scandinavian welfare states were quite secure. If there should be cause for concern, their potential vulnerability would be political, hinging on the continuing willingness of citizens to pay comparatively high rates of personal income tax. In a different line of research, finally, it was shown that the broad political support presently enjoyed by the Scandinavian welfare state depends critically on the universalism of high-quality and publicly provided social services from which middle-class families benefit directly, as well as indirectly, through high levels of public-sector employment for married women (Svallfors 1997, 1999; Rothstein 1998).

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12 Similar differences have been observed with regard to the impact of European liberalization policies on national regulation of *service-public* sectors (Héritier 2001; Héritier et al. 2001).

But now let us assume that European competition law should be invoked to liberalize these "markets" by opening them to commercial service providers—as it has been used to crack the monopoly of public placement services, and to expose national health insurance systems to reimbursement claims for unauthorized dental services or spectacles obtained abroad,[13] and as it may next be used to allow private financial services to compete with public pension systems (Leibfried/Pierson 2000). Let us further assume that in order to ensure a "level playing field," the opening of social-service markets would be accompanied by the requirement that private providers must receive public subsidies per client that match the budget allocations received by their public-sector counterparts, but would still be free to charge additional user fees.

If that should happen, the Scandinavian welfare state might evolve into a very "American" future through a vicious cycle: once well-to-do clients gravitated toward private, but publicly subsidized, "premium" services, financial constraints would reduce the comparative attractiveness of public providers that would still need to serve poorer neighborhoods and "unprofitable" rural areas—with the consequence that the political support of middle-class voters would rapidly erode. Just as is true of education and health care in the United States, the result might then be a two-class system where tax-financed public institutions could provide no more than minimal services for those who cannot afford to pay for private day care, schools, health insurance, or long-term care for the elderly.

This has not happened yet, and it may not happen soon. But, as was true of dental care abroad, retail price maintenance for books, public transport, or publicly owned banks, the only thing that stands between the Scandinavian welfare state and the market is not a vote in the Council of Ministers or in the European Parliament, but merely the initiation of treaty infringement proceedings by the Commission or legal action by potential private competitors before a national court that is then referred to the European Court of Justice for a preliminary opinion. In other words, it may happen any day. Once the issue reaches the ECJ, the outcome is at best uncertain. In principle, at any rate, the Commission and the ECJ have been treating such conflicts by the logic of a lexicographic ordering: in consequence of the doctrines of "supremacy" and "direct effect," any requirement deduced from primary or secondary European law will override any national policy purposes, no matter how substantively important or politically salient in the national context.

If these legal constraints cannot be challenged, OMC may still help Member States to discover more intelligent and effective ways of adjusting to the

13 ECJ, *Kohll*, C-158/96 (1998); ECJ, *Decker,* C-120/95 (1998).

economic pressures of integrated product and capital markets. Within these limits, I would certainly not deny the usefulness of policy learning. Under the circumstances, it is indeed the one best hope for employment and social policy in Europe (Vandenbroucke 2002). But even if all this is granted, it remains true that the European social model that could best emerge from these learning processes can only be a model of "competitive solidarity" (Streeck 2000). Whereas the welfare state was once about limiting the reach of market forces and about the partial "decommodification" of labor (Esping-Andersen 1990), the agenda of "Social Europe" as it must be defined through the open method, is about optimizing the adjustment of social-protection systems to market forces and fiscal constraints, and about facilitating the "recommodification" of the labor potential of persons who are threatened by "social exclusion"—which is understood to mean primarily exclusion from the labor market. If this is considered insufficient, open co-ordination by itself will not be enough.

A Positive Example

There is of course no sense in considering the deconstruction of the internal market and monetary union. But what one might and should demand is a balancing of market-enhancing and market-correcting concerns at the European level, instead of the lexicographic ordering that presently prevails. This is not impossible, and there have indeed been cases where the Commission and the Court did strain the market logic in order to allow nationally salient solutions to stand—the compromise reached over book-price maintenance in Germany or the cautious treatment of the Swedish alcohol monopoly (Kurzer 2001) are cases in point. But in the absence of a countervailing logic derived from values or goals institutionalized at the European level, such exceptions cannot be relied upon. What would be needed instead is illustrated by a recent ECJ decision in the field of environmental policy that upheld a German statute requiring electricity networks to buy, at prices considerably above the market level, electricity that is generated (in Germany!) from renewable sources.[14]

When the EU started to liberalize energy markets, it was widely feared that exactly these types of "green" policies would now be ruled out as protectionist distortions of competition, and the Court did in fact assume that the legislation in question constituted a potential barrier to trade under Article 28 (ex 30) TEC. It also noted that environmental protection is not specifically listed among the allowable exceptions in Article 30 (ex 36) TEC. In other words, from the one-sided perspective of European internal-market and competition law, the

14 ECJ, *PreussenElektra/Schleswag*, C-379/98 (2001).

German statute is about as bad as it could be: it amounts to a restraint on trade, it discriminates against foreign suppliers, and it does not serve any of the recognized purposes that could justify barriers to trade. Nevertheless, in a surprising reversal of past decisions (Gebauer/Wollenteit/Hack 2001), the Court let the statute stand. In reaching this outcome, the decision treated the environmental purpose of the statute as a justification supported by European law, pointing: (1) to international agreements on climate change to which the EU had become a party; (2) to treaty provisions defining high levels of environmental protection as a policy goal of the EU (Articles 6 and 174 TEC); and (3) to the fact that the liberalizing directive itself had made some allowances for environmental protection (Directive 96/92, Article 8, 3), and that the Commission had already drafted a directive promoting the use of renewable energy (200/C 311 E/22).

In other words, since the national statute was seen to be serving *European* policy purposes, the issue could be framed as a conflict between two equally legitimate European goals, rather than between European legal requirements, on the one hand, and the idiosyncratic (and legally irrelevant) policy purposes of a Member State, on the other. Having framed the issue in this fashion, the Court then had to strike a balance, in view of the specific circumstances of the case at hand, between the relative importance of a merely "potential" restraining effect on trade,[15] and the real environmental benefits of the program. There is no question that "social Europe" would stand on safer legal ground if the Court and the Commission could be required to apply a similar balancing test to potential conflicts between European internal market and competition law, and national policies promoting employment and social protection.

V Can Social Europe Be Europeanized?

It is tempting to think that the "Europeanization" of social-protection purposes could be achieved simply by adopting a treaty amendment which, in parallel to the formula protecting environmental purposes in Article 6 TEC,[16] might perhaps read as follows:

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15 Plaintiffs, after all, had been German firms, rather than foreign suppliers of electricity.

16 Vandenbroucke (2002: 20) proposes a similar amendment that would add social protection to the clause on gender equality (Article 3, 2 TEC) which would then read as follows: "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities and to promote equality between men and women *and shall take into account social protection requirements, in particular with a view to promoting accessible and financially sustainable social protection of high quality*

Employment and social-protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting social inclusion.

However, the differences between the environmental and social-policy fields should not be underestimated. Environmental protection has become a fully developed domain of European policy whose coverage is by now nearly as inclusive as the environmental regimes of the most active Member States. It is true that the German form of subsidizing the use of renewable energy was still breaking new ground but, as the Court pointed out, even this sub-field was about to be cultivated by EU directives. By contrast, European "hard law" in the fields of employment and social-protection policy remains limited to minimum standards and, for the reasons discussed before, the open method of co-ordination could not be used to create European legislation. The question is, therefore, whether other governing modes could be employed or designed to achieve this purpose while still respecting the diversity of politically salient national solutions.

Closer Co-operation?

At first sight, a plausible candidate might be the option of "closer co-operation" (Title VII TEU) through which groups of Member States could avail themselves of EC procedures to adopt and implement legislation that pertains only to members of the group (Article 44 TEU). If this route were open, European social policy could take advantage of the fact that, in spite of increasing differentiation, it is still possible to identify groups of EU Member States with roughly similar welfare-state institutions and policy legacies which face similar challenges, suffer from similar vulnerabilities, and tend to share similar political preferences (Scharpf/Schmidt 2000a, 2000b). As a consequence, resistance to the harmonization of welfare-state reforms ought to be considerably lower among the more homogeneous members of each group than it is within the European Union as a whole.

Unfortunately, however, the conditions specified in the Amsterdam Treaty were so restrictive that closer co-operation has not yet been used at all.[17] If the Treaty of Nice should ultimately be ratified in spite of its initial rejection

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organised on the basis of solidarity" (emphasis added). However, the parallelism to Article 6 is also recognized here. It would be inserted as Article 3, 3 TEC.

17 It would be more correct to say that examples which do in fact exist did not come about under the rules governing "closer co-operation." Monetary union has become the most important of these examples, but also the "Schengen area," even after it was brought under the Treaty, does not include all EU Member States, and the same is true of the European security and defense policy (ESDP).

in Ireland, some of the present constraints will be relaxed. Nevertheless, the requirement that there must be a minimum of eight Member States forming a group (Article 43 g TEU) would still rule out the use of closer co-operation for the Scandinavian or the Continental or the southern groups of welfare states. Moreover, the Nice Treaty also tightened precisely those substantive constraints which the harmonization of social-protection rules would have to challenge: co-operation must respect the *acquis* and may neither affect the internal market nor impede trade or distort competition among Member States (Article 43 c, e and f TEU). Thus, if these conditions are taken literally, the state monopoly of social services in Scandinavian welfare states still could not be defended through legislation based on closer co-operation.

But why this seeming hostility towards closer co-operation? One reason, surely, is the fierce defense of the *acquis* by the Commission—and the dominance of economic integration and liberalization discourses within the Commission. But why should governments—which could overrule the Commission in the process of treaty reform—share that aversion? One of the reasons, I suggest, is a case of unfortunate "framing." Regardless of the variety of terms that have been used since the early 1970s—"variable speed," "variable geometry," "concentric circles," "two tiers," "core" or most recently, "pioneer group"—the notion of differentiated integration has always been associated with the image of greater or lesser progress along a single dimension from less to more integration, and with the formation of solid blocs within the Community (Ehlermann 1984, 1998; Giering 1997; Walker 1998; de Búrca/Scott 2000). The idea was that an "avant-garde" of Member States that were willing and able to move ahead of the others toward tighter integration should be allowed to do so—which immediately mobilized the opposition of all others who resented being assigned to the rear guard and relegated to second-class citizenship in Europe. Alternatively, objections to closer co-operation may be based on the suspicion that rich Member States might form a club of their own in order to escape from the obligations of solidarity and from the side-payments exacted by the beneficiaries of "cohesion" programs whenever advances of European integration were on the agenda.

In a rational debate, these suspicions would of course not apply to the solutions proposed here. In social and employment policy, closer co-operation would be issue-specific. Rather than creating solid blocs of countries, it would result in overlapping clusters. Thus Britain, the Netherlands, Italy and the Scandinavian countries could join forces in trying to reform their tax-financed national health services in ways that are compatible with the increasing mobility of patients and the potential competition of service providers. Another group consisting of France, Belgium, Luxembourg, Germany and Austria would seek their own

solutions to similar challenges facing countries with compulsory health insurance systems. In seeking to protect the provision of universal social services, the Scandinavian countries might form a group that is also joined by France, whereas, in reforming Bismarckian pension systems, Sweden could join a group of Continental welfare states that probably would not include the Netherlands, and so on.

These solutions, clearly, would not imply either a two-class Europe or a renunciation of solidarity. If they are nevertheless rejected, the reason appears to be a more abstract but deeply held conviction that European integration would, or at any rate should, lead to greater uniformity—of political preferences, legal rules and administrative practices—among formerly diverse Member States. From this perspective, closer co-operation appears as a regression from the ideal, a backward move toward disintegration and "Balkanization," that all good Europeans must resist.[18] What would be needed instead is a recognition of legitimate diversity within the European Union even in policy areas where strictly national solutions are no longer sufficient. Uniform European solutions could not be agreed upon—and would not be legitimate if they were imposed by majority vote (Scharpf 2002).

Combining Framework Directives with OMC?

In the current debate on a European constitution, assertions of legitimate diversity are likely to be misunderstood as demands for limiting European competencies or as references to the principle of "subsidiarity." It needs to be emphasized, therefore, that in the present state of economic integration, the aspirations of "social Europe" can no longer be realized through purely national solutions. In the *horizontal* relationship among policy areas, European social law is necessary in order to provide a legal counterweight to the supremacy of internal market and European competition law. At the same time, moreover, European social law also has an important role to play in the *vertical* dimension in order to control the beggar-my-neighbor incentives which will tempt individual Member States once they seriously begin to adjust their social-policy regimes to the constraints and competitive pressures of the internal market and monetary union.[19]

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18 In its recent communication to the Constitutional Convention, the Commission (2002: 17–18) goes so far as to invoke the "equality between the citizens of Europe" to support its campaign not only against existing "derogations" but also against "provisions of the treaties concerning reinforced co-operation."

19 Even if "races to the bottom" have not yet been reported in the literature, this should provide little comfort. With the completion of monetary union, the high non-wage labor costs of Bismarckian social-insurance countries have become major factors affecting international

Under present conditions, there is no question that such legislation could not be uniform. But even in a longer-term perspective it makes no sense to consider either the Scandinavian or Anglo-Saxon welfare states as an *avant-garde* with which others ought to catch up. Their divergent shapes reflect legitimate differences of social philosophies and normative aspirations. Hence, instead of striving for uniformity, European social law should allow different types of welfare states to maintain and develop their specific institutions in response to different understandings of social solidarity; it should allow the Bismarckian welfare states on the European continent to seek common solutions to their common problems; and it should support southern countries as well as the accession states of central and eastern Europe in developing economically and politically viable institutions of social protection without being required to conform to a uniform European blueprint (Müller 1999; Müller/Ryll/Wagener 1999). So if the mode of closer co-operation should remain unavailable, it seems important to investigate other potential courses leading towards the goal of differentiated Europeanization.

Politically least difficult would seem to be an amendment to Article 137, 2 b TEC that would extend the authorization of directives setting *minimum standards* from the list of employment-rated rules in Article 137, 1 a–i TEC to include "social inclusion" and also the "modernization of systems of social protection" (Article 137, 1 j and k TEC). But even though it can be shown that, contrary to expectations, the minimum standards set by social directives on employment conditions also require policy changes in high-protection countries,[20] that solution would not be sufficient here. Since such minimum requirements would have to be met by all Member States, they could not provide much legal protection for the social services of Scandinavian welfare states or, for that matter, for systems of compulsory health insurance and pay-as-you-go pension insurance in Bismarckian welfare states. But what if the authorization in the Treaty were formulated more broadly, allowing directives to set differentiated standards for the stabilization and improvement of national social-protection systems that take account of differences in countries' ability to pay at different stages of

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competitiveness in the exposed sectors. If a country did succeed in achieving major reductions, others would now find themselves forced to follow suit—with haphazard overall outcomes that might be much less desirable than what could be achieved through co-ordinated reform.

20 Under the direction of Gerda Falkner, a series of projects is presently examining the implementation and the effects of five social directives in all 15 Member States. [Author's note 2010: Cf. Gerda Falkner et al. (2005), Complying with Europe: EU Harmonisation and Soft Law in the Member States, Cambridge University Press.]

economic development[21] and of the existing institutions and policy legacies of Member States?

Since a directive, unlike regulations, is binding *"upon each Member State to which it is addressed"* (Article 249, para. 3 TEC), it would indeed be legally possible to adopt substantively differing directives for different groups of Member States.[22] However, since in contrast to closer co-operation such directives would always have to be adopted by all Member States, rather than just the members of the respective groups, transaction costs could be quite high. In any case, moreover, while conditions within each group are still similar, they are by no means uniform. The organization of the Danish labor market differs considerably from that in Sweden (Benner/Bundgaard 2000); the Dutch pension system has departed considerably from the pay-as-you-go Bismarck model that still prevails more or less intact in other countries of the Continental group (Hemerijck/Unger/Visser 2000), and similar differences exist between the southern countries (Ferrera/Hemerijck/Rhodes 2001). Hence, to obtain even the agreement of all members in each group, legal commitments would need to be formulated at a fairly high level of generality, in the nature of "framework directives," rather than at the level of excessive detail that has become characteristic of EC legislation.

Without more than this, however, this solution could give rise to one or the other of two basic objections: in order to accommodate existing diversity, framework directives could be so vague as to be without legal effect and thus incapable of directing national policy choices and of disciplining competitive beggar-my-neighbor strategies. Alternatively, if such directives were nevertheless treated as legally binding, they would delegate exceedingly wide powers of implementation to the Commission[23] which—if supported by the Court—could practically dictate the substance of welfare-state reforms in individual Member States through treaty infringement procedures. There is no reason to think that either the Council or the European Parliament would find such solutions acceptable. Conceivably, however, both of these dangers could be avoided if differentiated framework directives were combined with the open method of co-ordination.

In that case, the vagueness of the underlying directives would matter less, since progress toward their realization would be directed by Council guidelines, while Member States would have to present action plans and reports on their

21 This was suggested in Scharpf (1999: 175–180).

22 I owe this suggestion to a discussion with Gerda Falkner who, however, should not be held responsible for the way it is used here.

23 The solution would approximate the problematic ideal of a revitalized "Community method" which was explicated in the White Paper on European Governance (Commission 2001; Scharpf 2001).

effects which would be periodically assessed by peer review. If evaluation should reveal general problems, the framework legislation could be amended and tightened. With regard to specific implementation deficits in individual countries, moreover, the Council could not merely issue recommendations but adopt legally binding decisions or authorize[24] the Commission to initiate the usual infringement proceedings. In other words, Member States would retain considerable discretion in shaping the substantive and procedural content of framework directives to suit specific local conditions and preferences. Yet if they should abuse this discretion in the political judgment of their peers in the Council, more centralized sanctions and enforcement procedures would still be available as a latent threat.

Compared to the open method of co-ordination practiced by itself, this combination of governing modes would increase the effectiveness of the European employment strategy and of social Europe in the *vertical* dimension. Given the legally binding character of framework directives and their potential enforcement, national policy-makers could no longer afford to ignore the policy discourses of open co-ordination at the European level. At the same time, however, the benefits of the method would be maintained: Member States could design solutions to fit their specific conditions and preferences, and any recommendations addressed to them would be "contextualized" by reference to these conditions, rather than being of the one-size-fits-all variety that often characterizes OECD and IMF recommendations (Hemerijck/Visser 2001; Esping-Andersen et al. 2001). Moreover, as open co-ordination would be organized within subgroups of Member States with roughly similar welfare-state institutions and policy legacies, one should also expect that the effectiveness of policy learning would be greatly enhanced.[25]

Even more important, however, is the fact that, in the *horizontal* dimension between policy areas, the national social-protection measures so adopted would come under the umbrella of primary European law (through an amendment paralleling either Article 3, 2 TEC or Article 6 TEC, as suggested above) and would be implementing secondary European law (authorized in the context of Article 137 TEC). In that respect, therefore, they would have equal constitu-

24 The flexibility of open co-ordination might be lost if the Commission could automatically resort to infringement proceedings whenever it saw the unity of European law threatened by differentiated national solutions. Thus it seems desirable to require authorization by a majority in the Council.

25 Even in the absence of framework directives, it would thus be useful to introduce a form of "differentiated open co-ordination" among groups of countries facing similar problems of social-policy reform. If successful, this might then become a "foot-in-the door" strategy leading to the adoption of framework directives or even towards closer co-operation.

tional status with measures implementing the European law of the internal market and monetary union. As a consequence, conflicts between social-protection purposes and market-liberalizing purposes would finally have to be resolved through a balancing test, rather than through lexicographic ordering.

Conclusion

To summarize: the course of European integration from the 1950s onward has created a fundamental asymmetry between policies promoting market efficiencies and those promoting social protection and equality. In the nation-state, both types of policy had been in political competition at the same constitutional level. In the process of European integration, however, the relationship has become asymmetric as economic policies have been progressively Europeanized, while social-protection policies remained at the national level. As a consequence, national welfare states are constitutionally constrained by the "supremacy" of all European rules of economic integration, liberalization and competition law. At the same time they must operate under the fiscal rules of monetary union while their revenue base is eroding as a consequence of tax competition and the need to reduce non-wage labor costs.

In response, there have been demands to recreate a "level playing-field" by Europeanizing social policies as well. In practice, however, such attempts are politically constrained by the diversity of national welfare states, differing not only in levels of economic development and hence in their ability to pay for social transfers and services but, even more significantly, in their normative aspirations and institutional structures. As a consequence, uniform European legislation in the social-policy field has not, and could not, progress beyond the level of relatively low minimal standards that are acceptable to all Member States. Instead, the Lisbon European Council decided to apply the open method of coordination in the social-policy field. The method leaves effective policy choices at the national level, but it tries to improve these through promoting common objectives and common indicators and through comparative evaluations of national policy performance.

These efforts are useful as far as they go. But since effective welfare-state policies will remain located at the national level, they cannot overcome the constitutional asymmetry that constrains national solutions. Since uniform European social policy is not politically feasible or even desirable, there is reason to search for solutions which must have the character of European law in order to establish constitutional parity with the rules of European economic integration,

but which also must be sufficiently differentiated to accommodate the existing diversity of national welfare regimes. Since the rules of closer co-operation are presently too inflexible to serve these purposes, the article suggests that a similar effect could be achieved through a combination of differentiated "framework directives"—which, though addressed to subsets of Member States, would still have the status of European law—and of the open method of co-ordination, practiced within groups of countries facing similar economic and institutional challenges of welfare-state reform.

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9 Legitimate Diversity: The New Challenge of European Integration (2003)

I The Challenge of Present Constitutional Debates

In contrast to earlier periods of institutional reform, the present debate over a European Constitution, fueled by frustration over the meager outcomes of the Nice Summit, appears to be at the same time more systematic and less connected to substantive policy problems or goals. Whereas the Single European Act had introduced limited institutional reforms that were considered essential for reaching the goals of the Internal-Market program, and whereas Maastricht was about the specific institutional requirements of a common currency, the present Convention and discussions accompanying its work seem to be mainly concerned with competing visions of the Union's *finalité* and its ultimate institutional architecture. Compared to the piecemeal institutional engineering, or even tinkering, that characterized the work of earlier Intergovernmental Conferences (IGCs), the more general discussions of Europe's future shape have the advantage of being more easily communicated and understood in public discourses, and of generating wider media attention.

At the same time, however, proposals for institutional reform that are not plausibly linked to agreed-upon substantive goals or urgent policy problems are less likely to gain support among political actors who are not already committed to European political unification for its own sake, let alone among "Euroskeptics" whose agreement will still be necessary in subsequent IGCs and Treaty ratification procedures. Moreover, since the constitutional debates seem primarily concerned with a perceived "European democratic deficit" (which tends to be defined by reference to parliamentary practices at the national level) while the Convention is dominated by national and European members of parliament, the proposals that will emerge from these discourses are more likely to improve the institutional position of the European Parliament than to address the increasing "performance deficits" of the European Union. If that should

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Written during a period of research and teaching which, at the invitation of Professor Renaud Dehousse, I enjoyed at the Centre Européen des SciencesPo, Paris.

happen, and if such proposals should in fact be adopted, the Union may find itself confronted with rising democratic expectations and subsequently, as its performance is unlikely to improve, with even deeper disappointment and a wider legitimacy gap than before.

If this outcome is to be avoided, proposals for institutional reform should be evaluated not only from the perspective of "input-oriented" democratic legitimacy (whose glib equation with the institutional self-interest of the European Parliament needs to be challenged in any case) but also from the "output-oriented" perspective of problem-solving effectiveness. Since present European institutions have allowed and legitimated the creation of the Single Market and Monetary Union, proposals for change ought to be justified as being necessary for dealing with manifest new policy challenges which cannot be met within the present institutional framework. The most important among these seem to be

– the challenges of a Common Foreign and Security Policy that have become manifest in the Balkans and after 11 September 2001;
– the challenges arising from Eastern enlargement; and
– the challenges to the viability of national welfare states that arise from the successful completion of the Internal Market and the Monetary Union.

In order to appreciate the institutional implications of these challenges, however, it is also necessary to understand the functioning of present EU institutions and the limits of their problem-solving capacity. I will begin, therefore, with a brief overview of the principal "modes" of EU policy making—defined by participation rights and decision rules—for which I will use the labels of "intergovernmental negotiations," "joint-decision making" and "supranational centralization" (Scharpf 2001) and I will then proceed to discuss the new policy challenges with regard to the strengths and limitations of these present modes of policy making.

II The Plurality of European Governing Modes

Like the political systems of nation states,[1] the European Union resorts to differing governing modes in different policy areas. Nevertheless, since European governing institutions are being created by the member states, the initial mode in

1 In Germany, for instance, the characteristic governing mode for many policy areas is a form of joint-decision system involving the federal government and its parliamentary majority in negotiations with the *Länder;* in other policy areas, however, the *Länder* have no policy making role and the government is instead involved in "neo-corporatist" negotiations with peak associations; in still other policy areas, the mode of governing is straightforwardly majoritarian;

all policy areas must be *intergovernmental agreement*. It is the governments of member states who must decide that certain policy choices, which otherwise would be exercised autonomously at national or subnational levels, should be transferred to the European level. In the same process, moreover, governments must also decide on the institutional mode in which these European policy choices should be reached. They may maximize their own roles by choosing the mode of "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 adopt policy choices in the "supranational-centralized" mode.[2] These modes differ in their capacity to achieve effective policy choices in the face of conflicts of interest among member states, and by empowering different actors, they will affect the policy outcomes that are likely to be achieved (Héritier 2001).[3] They also differ with regard to the range of choices that could be legitimately taken.[4]

1 Supranational Centralization

In the supranational-centralized mode, policy choices are taken by the Commission, the European Court of Justice or the European Central Bank without depending on the agreement of individual member governments, of the Council or of the European Parliament. To the extent that these European-level institu-

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and given the large roles of the Constitutional Court and of the *Bundesbank*, important policy choices are also made in a centralized mode.

2 A (rational-choice) theory explaining these choices of governing modes would have to simultaneously consider the pressure of problems that could not be resolved by purely national action and the anticipated problems that national governments would have to cope with if European policy choices should violate important national interests or politically salient constituency preferences. These anticipated problems could be represented by three basic game constellations—the Prisoner's Dilemma (justifying resort to supranational solutions), the Battle of the Sexes (suggesting the joint-decision mode), and constellations where common interests are dominated by conflict over the choice of a solution (where governments are most likely to insist on the mode of intergovernmental agreement). But of course, path-dependent institutional evolution and the strategies of corporate actors created by intergovernmental agreement, may cause subsequent departures from the original "equilibrium" solution.

3 Even though Adrienne Héritier (2001) explicitly refers only to decision rules, her distinction between "Treaty revision," "internal market" and "competition paths" is parallel to the three modes of policy making discussed here. Focusing on the field of utilities regulation, she shows how the choice among the three paths affects the relative weight given to market-liberalizing and social-cohesion concerns in European regulations of public services.

4 Héritier (2001) also shows that specific policy initiatives may be plausibly introduced within one or another of these governing modes—which implies that the choice of mode may itself become the object of a strategic game.

tions can be considered as single (corporate) actors with a capacity for strategic action, this mode has the characteristics of "hierarchical direction" (Scharpf 1997: Chapters 3 and 8) or of a (constitutional) "dictatorship" (Holzinger 2002[5]). In the European polity, the establishment of this mode is a two-step or three-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 which is allowed to exercise its discretion without the further participation of national governments. The clearest example of a two-step establishment of the supranational-centralized mode is provided by the authority of the European Central Bank over European monetary policy. Its mandate to "maintain price stability" (Article 105 TEC) was defined through Treaty negotiations, and in carrying out this mandate the Bank is more insulated against the influence of EMU member governments than is or was true of any national central bank, including the German *Bundesbank*.

The same two-step structure is in place in all other policy areas where the Treaties include directly applicable prohibitions and obligations addressed to member states or corresponding rights of individuals and firms. In this case, the power of the Commission to initiate treaty infringement proceedings against individual member states and the power of the European Court of Justice (ECJ) to issue formally binding and enforceable interpretations of these Treaty obligations could only be reversed through unanimously adopted and ratified amendments of the text of the Treaties. In practice, therefore, the power of Treaty interpretation has created a capacity for supranational-centralized policy making in all areas where Treaty provisions are directly applicable.

With few exceptions (one of which is the injunction against gender discrimination in employment relations), these conditions apply in policy areas promoting economic integration and market liberalization. Here, once the basic commitment was agreed-upon, the interest constellation could be construed as a symmetrical Prisoner's Dilemma: All member states would be better off if the commitment were carried out in good faith, but all would also be exposed to the free-riding temptations of protectionist practices. If that was anticipated, delegating the power of enforcement to supranational actors, the Commission and the Court, would indeed be justified as serving the enlightened self-interest of

5 In Holzinger's use, the term retains its pejorative implications which, in my view, prevent a full and fair exploration of the problem-solving potential of the hierarchical mode and of institutional arrangements that could ensure the "benevolent" use of dictatorial powers. On the other hand, the unqualified enthusiasm with which "independent" constitutional courts and central banks are celebrated in much of the legal and economic literature appears to be equally blind to the policy risks of dictatorship and its costs in terms of democratic legitimacy.

all member states (Moravcsik 1998). If this conceptual frame was accepted, one could still expect that individual decisions would conflict with the short-term interests of national governments (Burley/Mattli 1993)—but their opposition would undermine neither the explanation nor the legitimacy of the delegation of regulatory powers to supranational authorities. It also implied, however, that the politically uncontrolled evolution of European competition law could lead to extensive interpretations of Treaty commitments that might, and often did, go beyond the original intent of the treaty-making governments (Scharpf 1999).

To a lesser extent, supranational policy-making powers also arise from a three-step process—where intergovernmental agreement on the Treaties has created a European competence, but left the definition of substantive policy choices to directives and regulations adopted in joint-decision processes involving the Commission, the Council and, increasingly, the Parliament. In the enforcement of these more specific rules of "secondary" European law, opportunities for discretionary interpretation by the Commission and the Court are 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, the capacity for supranational-centralized policy making deviating from the preferences of the Council and the Parliament exists here as well.

These centralized powers of interpretation and enforcement exercised by the Commission and the Court did account for the progress of economic integration in the periods of political stagnation in the 1970s and early 1980s, and they also account for the rapid advancement and radicalization of market-liberalizing policies once the basic political commitments had been agreed upon in the Single European Act of 1986. Moreover, these powers could also be employed strategically by the Commission to induce reluctant governments to agree on additional legislation that would again advance economic liberalization (Schmidt 1998). It is true that some governments have repeatedly tried to promote Treaty revisions or protocols protecting existing public services and infrastructure functions against the impact of European competition law. As of now, however, these efforts have not succeeded in imposing legally effective limitations on market liberalization, and it remains to be seen if such proposals will fare better in the present Convention.

2 Joint-decision Making

The normal mode of policy-making in the "first pillar" of the European Community (which the Commission describes as "the Community Method") has the characteristics of joint-decision making involving supranational actors as well as

national governments. It takes the form either of "directives" that need to be transposed into national law by the legislative processes of member states, or of "regulations" that take direct effect. Both need to be adopted, on the initiative of the Commission, by the Council of Ministers acting increasingly under rules of qualified-majority voting (QMV), and by the European Parliament (EP) whose role was strengthened through the increasing use of co-decision procedures.[6] In preparing its initiatives, the Commission consults (generally at its own discretion) a wide range of interest associations, firms, non-governmental organizations and expert committees. Similarly in preparing its common position, the Council relies on the Committee of Permanent Representatives (COREPER) and the preparatory work of specialized committees representing the governments of member states. As the role of the European Parliament has been strengthened, specialized EP committees and negotiations between these and Council committees have also increased in importance. Moreover, if directives need to be "implemented" through more detailed regulations, this is generally delegated to the Commission, acting in "Comitology" procedures involving, again, civil servants and experts nominated by member governments (Joerges/Vos 1999).

Taken together, these institutional arrangements provide so many veto positions, and so many access points for interest groups, that the actual policies produced by joint-decision processes are unlikely to violate status-quo interests that have high political salience in member states or that are represented by well-organized interest groups. At the same time, however, the central role of the Commission, and the commitment of "Europeanized" national representatives in COREPER and in Comitology committees generally ensure that conflicting initial positions are not taken at face value, and that opportunities for creative "win-win" solutions or mutually acceptable compromises are actively explored. As a consequence, agreement is reached more frequently than one would expect on the basis of a static analysis of postulated national interests, and it may also be assumed that these outcomes are generally legitimated by a broad consensus among the parties involved (Eichener 2000).

By the same token, however, the multi-actor negotiations required here tend to be not only complex but quite intransparent—which is easily criticized as violating norms of democratic accountability. A more relevant line of criticism points out that the joint-decision mode, like all multiple-veto systems (Tsebelis 1995), has a systematic bias favoring status-quo interests over political preferences that could only be satisfied by substantial changes of the status quo (Scharpf 1988). Moreover, consensus-seeking processes are slow, and if

6 Héritier (2001) has shown how the empowerment of the EP has strengthened social-cohesion concerns in the regulation of liberalized public utilities.

they are successful the resulting legislation is likely to be either at the lowest common denominator or encumbered by excessive detail.[7] In other words, the problem-solving effectiveness of the joint-decision mode is limited in policy areas where conflicts of interest have high political salience in the constituencies of member governments, and in general the efficiency of policies that can be adopted under these constraints leaves much to be desired.

3 Intergovernmental Agreement

The mode of intergovernmental agreement is not limited to the foundational functions of allowing the Europeanization of public policy in areas that were hitherto under autonomous national control—either through explicit Treaty revisions or through unanimous agreement in the Council under the "necessary-and-proper" clause of Article 308 (ex 235) TEC. It also applies in policy areas where governments have recognized a need for European action but where, in the view of at least some of them, the likelihood or the potential (economic or political) costs of decisions going against their own preferences is thought to be so high that they cannot accept QMV in the Council. Thus, the unanimity rule has so far been maintained in the fields of tax harmonization, budget decisions, and a range of social-policy areas. If reservations 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 over compromises with the European Parliament, and they will seek to disable the supranational interpretative and enforcement powers of the Commission and the Court. These have been the conditions characterizing intergovernmental policy making in the second and third "pillars" of the Treaty of European Union dealing with "Common Foreign and Security Policy" and "Justice and Home Affairs," even though some of the latter competencies on visas, asylums and immigration are in the process of coming under first-pillar rules (Articles 61–69 TEC). In recent years, finally, the European Council has increasingly come to circumvent the Commission's monopoly of legislative initiatives by defining items on the European policy agenda in its Summit meetings which then have to be worked out through legislation or ad-hoc intergovernmental arrangements.

In all these instances, individual national governments have a veto—which they may employ in the "bloody-minded" defense of narrowly-defined and

7 Both possibilities are entirely plausible in multi-veto systems: Low-regulation countries having no interest in common European solutions may veto all rules providing higher levels of protection. By contrast, high-regulation countries with an interest in a common solution may still use the veto threat to ensure that their own particular set of rules is included in it.

short-term national (political or economic) self-interest or with a view to either common European interests or to the longer-term benefits expected from closer cooperation and policy coordination. In any case, however, the outcomes of negotiations in the intergovernmental mode tend to have higher political visibility than is generally true of European policies adopted in the supranational or joint-decision modes—which also means that they are more likely to be scrutinized by national opposition parties and the media, and that governments must generally be able and willing to publicly defend their support in terms of the (enlightened) self-interest of national constituencies. As a consequence, intergovernmental agreements are supported by the legitimacy of the governments that conclude them, but their problem-solving effectiveness is more narrowly restricted to solutions that do not violate the intense preferences of national constituencies.

III New Policy Challenges

Present European institutions, it is fair to say, have allowed member states to achieve a degree of market integration, economic interaction and transnational mobility that has gone far beyond the original aspirations of the governments that had concluded the Treaty of Rome. In doing so, they have also contributed to the unprecedented period of peace that Western Europe has enjoyed over the last half-century. As European integration has succeeded in removing economic boundaries among member states, it has also reduced the political salience of national boundaries to such a degree that territorial disputes have become a non-issue and war among member states has become unthinkable. In achieving these outcomes, European integration has relied on modes of governing which, though not always very efficient, have been adequate to their specific tasks, and whose legitimacy, though not "democratic" in the sense prevailing in constitutional democracies at the national level, is supported by normative arguments that are sufficiently persuasive for the functions that are in fact performed.

It should also have become clear, however, that both the effectiveness and the legitimacy of these governing modes are limited, and that one could not and should not expect that in their present shape they could cope with an unspecified range of new challenges. Thus, if the present constitutional debate is to be pragmatically meaningful, it ought to focus on these limitations—and thus on the question whether the foreseeable challenges to the Union and its member states could or could not be met within the present institutional framework of the Union.

1 Common Security Capabilities (CFSP and ESDP)

The most serious challenge is also the one about whose possible resolution I know the least.[8] In the postwar decades, the twin problems of European security—"keeping the Russians out and the Germans down"—were resolved by the NATO alliance under the hegemonic leadership of the United States. With the end of the Cold War, the Soviet threat evaporated while the German threat, if it existed, had dissolved in the process of European integration. However, as Communist rule disintegrated, suppressed ethnic and religious conflicts re-emerged not only in the successor states of the Soviet Union but also closer to the EU, in the former Yugoslavia and its Balkan neighbors—and while they did not constitute an immediate military threat to Western Europe, it was clear that EU member states would be morally and practically affected by escalating violence and genocide in their own "back yard," by waves of refugees, and by conflicts among their immigrant populations. There was no question that maintaining or re-establishing peace and order in the Balkans was in the immediate and urgent self-interest of EU member states.

While NATO eventually did get involved in Bosnia and the Kosovo, it also became clear that America had turned into a reluctant hegemon in areas of the world where its own security and economic interests are not directly at stake. At the same time, however, the Balkan interventions revealed that European countries, in spite of long-standing attempts to coordinate their foreign policies, were still working at cross purposes and could not agree on common strategies that would have allowed them to intervene jointly at a time when this could still have staved off the escalation of conflict. Even more important was the recognition that, individually and jointly, they lacked the reconnaissance and logistic capabilities as well as the trained intervention forces and the specialized weaponry that would allow them to engage on their own in peace-making missions if the United States were not willing to assume the leading role and to carry the major burden of actual operations (Zielonka 1998).

In the meantime, EU governments have strengthened the intergovernmental institutions for coordinating their Common Foreign and Security Policy (Hoffmann 2000) and they have at last responded to Henry Kissinger's request of a European phone number by appointing Javier Solana as their High Representative (HR-CFSP). In addition, they are in the process of building common military capabilities that would allow either autonomous action or more co-equal cooperation with the United States. Thus, at Helsinki they agreed to create the

8 Much of what I know about the field is owed to the work of, and discussions with Jolyon M. Howorth who, however, is in no way responsible for my use or misuse of this knowledge.

institutional infrastructure of a European Security and Defense Policy (ESDP) which also includes the commitment of all EU member states (with an opt-out for Denmark) to contribute national contingents to a European Rapid Reaction Force (ERRF). In die process, governments also seemed to have achieved a remarkable convergence of cognitive and normative orientations—apparently assisted through intense and frequent "transgovernmental" interactions of the military and foreign-policy staffs and elites of the participating governments (Howorth 2000, 2001).

Nevertheless, as the aftermath of 11 September and the war in Afghanistan has shown, the United States continues to act by its own insights; the military and diplomatic responses of its European allies are still determined nationally and in bilateral coordination with the US government; and common European forces are not yet a factor that matters internationally. Moreover, the creation of ERRF has been delayed by financial squeezes and by the difficulties of combining the diverse offers of national contributions into an effective military capability. At the same time, political agreement on common strategies is impeded by the extremely high salience of military commitments in national politics—particularly in countries with a neutralist tradition or with significant segments of public opinion or governing parties committed to pacifism. In any case, however, the deployment of national contingents in military action is so closely associated with core notions of national sovereignty and democratic accountability that all attempts at coordinated action are likely to remain contingent on the outcome of time-consuming national deliberations.

In short, while coordination has been improved, CFSP and ESDP are still stuck in die intergovernmental mode which, in the absence of vigorous (and accepted) American leadership, will continue to prevent those rapid European responses which, in the crises of the past decade, might have averted the escalation of conflict and the later need for more massive interventions. At the same time, however, given the diversity of the international and military positions of its members, it seems unlikely that the EU as a whole could move CFSP/ESDP into the joint-decision mode, where national decisions might be replaced by Commission initiatives and qualified-majority votes in a (still to be created) Council of Defense Ministers. Under these conditions, needless to say, an effectively supranational-centralized solution, which would eliminate the control of national governments and national parliaments over the deployment of national contingents in common European missions, seems completely beyond reach.

2 Eastern Enlargement

The prospect of moving from the present fifteen to perhaps twenty-seven EU member states during the present decade is confronting the European polity with severe challenges. The most obvious problems of voting rules in the Council and of the size of the Commission were addressed at the Nice Summit in a not very convincing fashion. In fact, it has been shown that, compared to present QMV rules, the Nice Treaty will even increase the threshold of reaching majority decisions in the enlarged Council (Tsebelis/Yataganas 2002). However, what matters more in this regard is the dramatic increase in the economic, social, political-cultural and political-institutional heterogeneity among EU member states that Eastern enlargement will bring about. This will obviously affect the capacity of the EU to adopt new policies in the intergovernmental and joint-decision modes—a problem to which I will return in the next section. But it will also affect existing policies.

As I pointed out above, the application and enforcement of existing EU law is carried out, in the supranational-centralized mode, by the Commission and the European Court of Justice (and by the courts of member states when they follow the preliminary rulings of the ECJ in ordinary legal proceedings). Even though the power to interpret the law will often shade over into policy making, the Commission and the Court will normally remain within the frame of understandings that were shared among the governments that participated in the adoption of European rules—which also suggests that EU law and its interpretation will by and large reflect the generalized interests of the countries that were members at the time of its adoption. Since the massive expansion of the *acquis communautaire* through the Single European Act did occur only after Southern enlargement, and since the later accessions of Austria, Finland and Sweden involved countries that were, by and large, similar to the original member states, the enforcement of the *acquis* has so far not been considered particularly problematic. But that is changing with the accession of Central and Eastern European countries—whose governments had no voice in the accumulation of the existing body of European law, and whose economic, social and institutional conditions and interests differ fundamentally from those of the countries that had shaped its content over more than four decades (Müller 2000; Müller/Ryll/Wagener 1999; Holzinger/Knöpfel 2000; Ellison 2001).

The potential problems are illustrated by the experience of German unification, when the West German currency and the complete *acquis* of West German law and governing practices were imposed in one full sweep—with the consequence that East German industries were more or less wiped out by international competition and that mass unemployment, social disintegration

and political alienation still persist in Eastern Germany in spite of financial transfers amounting to five or six percent of West German GDP annually (Ragnitz 2001). It is of course true that Central and East European accession countries need not adopt the Euro immediately, and that, by the time of their entry into the EU, they will have had a longer period of capitalist and democratic transformation than was true of the GDR. But it is also true that the financial assistance they are likely to receive will not amount to anything like the West-East transfers in Germany. In any case, however, while the full application of some requirements may be postponed for limited transition periods, there is no question that the complete and uniform *acquis* will have to be accepted before accession is allowed, and that it will then be enforced through the usual supranational-centralized procedures.

The consequences could be destabilizing in one of two ways. The most likely outcome—under the counter pressures of political commitments to early enlargement and the formal rigidity of the Commission's negotiating stance—would be accession agreements containing unfeasible commitments to the uniform *acquis,* adopted with the tacit complicity of Commission representatives in the expectation that lax implementation will be tolerated. But since the gap between what is legally required and what is economically affordable and politically feasible will be so wide, implementation deficits could not go unnoticed. In the accession countries, the cynicism toward EU law would infect the nascent respect for the rule of law in general; and as firms and interest groups in present EU member states become aware of illegal competitive advantages that accession countries are gaining through the lax enforcement of EU rules, compliance may be undermined in EU-15 countries as well.

In the less likely scenario, the Commission would not tolerate lax implementation and would use its considerable sanctioning powers to force governments in the accession states to stick to the letter of the agreements they had to sign. In that case, rules designed for rich and highly competitive Western economies with stable democracies would be enforced in economically backward and politically fragile Central and Eastern European countries with outcomes that could be as destabilizing as those in some developing countries that were forced by the IMF and the World Bank to cut budget deficits and welfare spending at the height of an economic crisis in order to qualify for international loans. In contrast to East Germany, moreover, where the political repercussions of imposed "Westernization" were buffered not only by transfer payments from West Germany, but also by the integration of elites into the strong political institutions of the Federal Republic, the attempt to rigidly enforce the European *acquis* in Central and Eastern Europe could delegitimate not only European integration but the democratic regimes of new member states as well.

If these equally unpromising scenarios are to be avoided, the Union needs to find legitimate ways to differentiate the rules that are in fact applied in member states whose economic, social and institutional circumstances would render the uniform application of uniform European rules either impossible or fraught with unacceptable risks (Philippart/Sie Dhian Ho 2001). Under the circumstances, this differentiation cannot be left to the discretion of the Commission and to ECJ judgments in the individual case, where the absence of general standards and the lack of transparency would encourage special pleading and provoke suspicions of favoritism and corruption. At the same time, however, the formulation of general but differentiated standards in the legislative process could turn out to be extremely difficult—and might be counterproductive in policy areas where the salient differences among countries cannot be validly represented by quantifiable indicators, and where it would not be enough to respond to such differences by adopting legislation with quantitatively differing requirements for member states in different categories. At bottom, however, these difficulties differ only in degree from the problems that the EU must also face among its present member states when the seriousness of the challenges discussed immediately below is fully appreciated.

3 Safeguarding European Welfare States

European integration has succeeded beyond expectations in widening and deepening the Internal Market and in creating the Monetary Union. But as these economic goals are being realized, the capacity of national governments to influence the course of their national economies and to shape their social orders has also been greatly reduced. Thus Monetary Union has not only deprived member states of the ability to respond to economic problems with a devaluation of the currency, but it has also created conditions under which European monetary policy—which necessarily must respond to average conditions in the Euro Zone at large—will no longer fit economic conditions in individual countries, and hence must contribute to the destabilization of national economies with below-average or above-average rates of inflation and economic growth. Yet while the inevitable misfit of ECB monetary policy increases the need for compensatory strategies at the national level, national governments find themselves severely constrained in their choice of fiscal-policy by the conditions of the Stability and Growth Pact—which will punish countries suffering from slow growth, but can do nothing to discipline the fiscal policies of countries with overheating and highly inflationary economies (Enderlein 2001). There is little that attempts at macroeconomic coordination could do to alleviate this problem (Issing 2002).

Moreover, European liberalization and deregulation policies have eliminated the possibility of using public-sector industries as an employment buffer; they no longer allow public utilities and the regulation of financial services to be used as tools of regional and sectoral industrial policy; and European competition policy has largely disabled the use of state aids and public procurement for such purposes. At the same time, European integration has removed all legal barriers to the free mobility of goods, services, capital and workers. Firms may re-incorporate in locations with the most attractive tax regime without affecting their operations, and the Treaties impose very narrow limits on the ability of member states to discriminate in favor of local producers or of their own citizens and taxpayers.

In short, compared to their repertoire of policy choices two or three decades ago, national governments have lost most of their former capacity to influence growth and employment in their economies—most, that is, except for the supply-side options of further deregulation, privatization and tax cuts which are perfectly acceptable under EU law. At the same time, governments face strong economic incentives to resort to just these supply-side strategies in order to attract or retain mobile firms and investments that are threatening to seek locations with lower production costs and higher post-tax incomes from capital. By the same token, workers find themselves compelled to accept lower wages or less attractive employment conditions in order to save existing jobs. Conversely, generous welfare states are also tempted to reduce the availability of tax-financed social transfers and social services in order to avoid the immigration of potential welfare clients.

Taken together, these pressures and temptations are in conflict with the political aspirations and commitments of countries which, in the postwar decades, had adopted a wide range of market-correcting and redistributive policies, creating "social market economies" in which the effects of the capitalist mode of production were moderated through regulations of production and employment conditions, and in which the unequal distribution effects of capitalist economies were modified through public transfers and services financed through progressive taxation. As long as economic boundaries were under national control, such policies could be entirely compatible with vigorous economic development since capital owners could only choose among national investment opportunities, whereas firms were generally able to shift the costs of regulation and taxation onto captive national consumers (Scharpf 1999: Chapter 1). In the absence of tight economic constraints, therefore, politics mattered and governments and unions were within wide limits free to opt for large or small welfare states and for tightly regulated or flexible labor markets. With the removal of economic boundaries, however, these political choices have become comparative advan-

tages or disadvantages[9] in the Europe-wide competition for investments, production, and employment.

If these pressures and temptations are not yet fully manifest in the policies of European welfare states, that is largely due to political resistance against the adjustments that would be required by economic concerns in the face of international competitive pressures. But political resistance must often be paid for in terms of lower rates of economic growth and lower rates of employment (Scharpf/Schmidt 2000). It is no surprise, therefore, that countries and interest groups that have come to rely on extensive regulations of the economy and generous welfare state transfers and services are now turning to the European Union to demand the protection, or creation, of a "European Social Model" that would assume the functions that nation states can no longer perform in the way they had done before the completion of the Internal Market and the Monetary Union.

In the abstract, these are highly plausible demands. Before European economic integration had its way, both market-making and market-correcting policies had their place at the national level, where competition law had no higher constitutional status than the legislation governing postal services or subsidies to stagnant regions or sectors. If the respective policies were seen to be in conflict, their relative importance had to be determined by political processes, rather than by the constitutional precedence of market making over market correcting concerns (Scharpf 1999: Chapter 1). At the European level, moreover, the much maligned Common Agricultural Policy has demonstrated that it is possible to achieve a similar symmetry of free-trade and social-protection policies. Moreover, the successful harmonization of health and safety regulations of foodstuffs, consumer goods and machinery has shown that European institutions are also capable of re-regulating liberalized product markets (Eichener 2000). So why not also combine the policies creating and liberalizing European markets for goods, services and capital with the European harmonization of market-correcting social regulations and taxes?

Economically, that would indeed be feasible. While there is presently much public commotion about the destabilizing consequences of "globalization," the fact is that the world economy is much less integrated, and hence much less constraining, than is the Internal Market. At the same time, the European Union is much less dependent on imports and exports than its member states,

9 Even under the assumptions of the "varieties-of-capitalism" approach (Hall/Soskice 2001), which denies that competitive pressures must imply institutional convergence, not all existing institutions will convey comparative advantages. Hence the loss of boundary control should still induce countries to "reform" institutions constituting a competitive disadvantage.

and with the creation of the Monetary Union it has become much less vulnerable to the vicissitudes of international capital markets. In abstract economic theory, therefore, macroeconomic management, industrial policy and the social regulation and taxation of business activities, which have become constrained at the national level, would still be economically feasible policy options for the European Union. This, in fact, had been the promise of the "Social Dimension" which Jacques Delors had associated with the Internal-Market initiative and, again, with the creation of the Monetary Union. Unfortunately, however, this promise was not, and could not be fulfilled within the present institutional framework of the European polity.

IV The European Dilemma: Consensus and Uniformity

But why is it that the new challenges discussed here cannot be met effectively within the present institutional and policy framework of the European Union? The short answer is that effective solutions could not, at the same time, be uniform and consensual—and that both of these requirements are closely associated with the legitimacy of European policy making.

The notion that European integration ought to take the form of *uniform* rules applying equally throughout all member states has a high normative salience in Europhile discourses. It is associated with idealistic aspirations for a European collective identity and commitments to common citizenship and solidarity. At the same time, however, hard-nosed market liberalizers, if they cannot get deregulation and mutual recognition, will also insist on uniform product standards to eliminate non-tariff barriers, uniform process regulations to create a "level playing field," and uniform competition rules to prevent discrimination. And even where, in the absence of compelling economic pressures, differences among national legal systems are pragmatically tolerated for the time being, that tolerance does not extend to European law itself—whose very *raison d'être* is not only to overcome and remove national obstacles to free trade, but also to create a unified European legal order.

In practice, diversity is of course often accommodated by "stealth" and "subterfuge" in European policy processes (Héritier 2001), and there have also been explicit compromises. Accession countries had to be granted periods of grace before the uniform *acquis* would fully apply in all policy areas; not all member states have yet become part of the Monetary Union or of the "Schengen Area"; and political opt-outs had to be accepted in foreign policy and social policy as well. But these are considered exceptions that cannot invalidate the

principle that European policy, whether adopted in the supranational-hierarchical mode, in the joint-decision mode or in the intergovernmental mode, should be uniform throughout the territory of the Union's member states.

In a formal sense, the requirement of *consensus-based* policy making follows from present decision rules. It applies explicitly to decisions that have to be reached in the intergovernmental mode, and in practice broad consensus is also achieved in the joint-decision mode, even where the Council may decide by qualified majority. By contrast, consensus among member governments is not required in the supranational-centralized mode. But as I have pointed out above, the delegation of supranational powers is generally premised on a pre-existing intergovernmental agreement on the purposes that are to be achieved and on the rules under which they are to be exercised.

The twin requirements of *consensus cum uniformity* worked well for the basic commitment to economic integration, and they also worked, under the political and economic conditions of the mid-1980s, for the commitment to liberalization and for the harmonization of product standards which, at least in principle, had the support of consumers and producers in all member states. By comparison, consensus on uniform environmental regulations of production processes was more difficult to achieve (Scharpf 1999; Eichener 2000). In none of these areas, however, was the combination of uniformity and consensus as problematic as it is with regard to the new challenges discussed above.

In the field of *European security policy,* common and uniform policies would indeed be highly desirable from a problem-solving perspective. If the combined political and military potential of its member states were available for common strategies, the EU would be fully capable of dealing with its own security concerns and those in its neighborhood without having to wait for American leadership (Freedman 2001). The problem is consensus. For the reasons discussed above, it is most unlikely that agreement on common solutions ensuring effective and speedy diplomatic and military action could be reached in a field so closely associated with core ideas of national sovereignty and with issues of war and peace whose salience in national politics is shaped by divergent historical legacies and normative orientations.

For *Eastern enlargement,* by contrast, the problem is uniformity. Given the wide economic gap between even the most advanced candidate states and the least well-off among present member states, and the enormous differences in the social, political and institutional starting positions of the candidates, uniform European rules imposed on all accession states appear undesirable from a problem-solving perspective. What would be desirable are policies and accession requirements reflecting existing differences and allowing each country to find its own path toward economic viability and political legitimacy within the

framework of EU institutions and of a subset of EU standards defining a "core *acquis*" (Philippart/Sie Dhian Ho 2001). In fact, however, uniformity is likely to be imposed. The Commission is in charge of accession negotiations and it is conducting them bilaterally with each candidate government—which implies a supranational-centralized mode similar to the one in which the Commission is enforcing EU law against individual member states. Since the Commission's judgment of a candidate's "readiness" for accession is premised on acceptance of the full *acquis,* present member governments and the Council are not even presented with the option of agreeing to a subset of "core" standards or to differentiated requirements for individual candidate countries. The danger is, therefore, that uniform standards will be imposed without regard to the severity of the problems which they will entail.

In the fields of *tax and social policy,* finally, uniformity might be desirable from a problem-solving perspective, but it could not be obtained under institutional conditions requiring high levels of consensus because member states will disagree on the choice of a common solution. One reason is that some countries may have no interest in common solutions. Unregulated tax competition, for instance, may actually benefit small countries whose revenue from capital inflows may outweigh revenue losses from tax cuts—which larger countries could not reciprocate (Dehejia/Genschel 1999). Similar conflicts follow from differences in economic development. Thus, the provision of social transfers and of public social services at the level that is considered appropriate in the Scandinavian countries could simply not be afforded by less rich member states like Greece, Spain or Portugal, let alone in the candidate countries on the threshold of Eastern enlargement. Of even greater importance, however, is the fact that European welfare states have come to define widely differing dividing lines between the functions the state is expected to perform and those that are left to private provision, either in the family or by the market (Scharpf/Schmidt 2000). Differences of similar significance are also characteristic of the industrial-relations institutions of EU member states (Crouch 1993; Ebbinghaus/Visser 2000).

These structural differences are not merely of a technical nature but have high political salience. They correspond to fundamentally differing welfare-state aspirations which can be roughly equated with the historical dominance of "liberal," "christian democratic" and "social democratic" political parties, and social philosophies (Esping-Andersen 1990). Moreover, and perhaps more important: Citizens in all countries have come to base their life plans on the continuation of existing systems of social protection and taxation, and any attempts to replace these with qualitatively different European solutions would mobilize fierce opposition. Voters in Britain simply could not accept the high levels of taxation that sustain the generous Swedish welfare state; Swedish families could not live

with the low level of social and educational services provided in Germany; and German doctors and patients would unite in protest against any moves toward a British-style National Health System. There is, in short, no single "European social model" on which harmonization could converge (Ferrera/Hemerijck/Rhodes 2000). National governments, accountable to their national constituencies, thus could not possibly agree on common European solutions for the core functions of the welfare state (Scharpf 2002).

V Two Non-solutions: Subsidiarity and Majority Rule

If *uniformity cum consensus* cannot be attained at the European level, two conventional solutions, subsidiarity or majority rule, are most likely to be proposed. The first one would avoid the Europeanization of policy choices and leave member states to cope with the problems; the second one would call for institutional reforms allowing uniform policies to be imposed by majority vote in the Council. For the problems discussed here, however, neither of these solutions is likely to be appropriate.

"Subsidiarity" as defined in Article 5 II TEC allows the Europeanization of policy only if "the objectives of the proposed action cannot be sufficiently achieved by the Member States," and if it is also true that these objectives can "be better achieved by the Community." The principle provides no guidance, however, if the first condition should be true and the second one false—which is precisely the situation encountered by the new challenges discussed here. On the basis of what was said above, common (and uniform) European solutions would be either undesirable or politically unfeasible under present voting rules in all three instances. But that would not imply a superiority of national alternatives.

As for a Common Foreign and Security Policy, there is no question that its objectives could not be achieved by autonomous national action. Similarly, if there is a need for adjusting the *acquis* in the process of Eastern enlargement, the Union could not simply leave the definition of such rules to individual accession states. It is thus only with regard to challenges affecting European welfare states that subsidiarity might be considered a serious option. For libertarian authors, it would ensure the constitutional superiority of economic liberties guaranteed by the Treaties over all market-restraining policies adopted at national level (Mestmäcker 1994). By a different line of normative reasoning, Giandomenico Majone (1996) would also assign welfare-state policies to national levels where redistributive policy choices could be legitimated by democratic procedures that are as yet unavailable in the European polity.

However, neither of these positions takes account of the legal and economic constraints that European integration has imposed on national policy choices in the fields of taxation, social protection and industrial relations. It is true that theoretical and empirical research on the viability of welfare states under conditions of globalization has, by and large, noted significant differences (and a good deal of path-dependent resistance) in the responses of national welfare state regimes to the downward pressures of economic competition (Garrett 1998; Swank 1998; Scharpf/Schmidt 2000; Pierson 2001; Huber/Stephens 2001). It should also be noted, however, that successful countries often had the benefit of favorable economic or institutional legacies, and that more countries are either stuck in economic difficulties or had to accept a considerable increase in social inequality and insecurity. In any case, purely national solutions will always be constrained by the "supremacy" and "direct effect" of European rules assuring market integration, free movement, and undistorted competition (Scharpf 1999).[10]

From a problem-solving perspective, therefore, the new challenges discussed here seem to require European solutions. If these are nevertheless blocked by lack of agreement among member states, it may then appear plausible to move from consensual policy making to *majority rule*—which would allow uniform European policies to be adopted even in the face of intergovernmental conflict. While that would not be directly useful for the problems of Eastern enlargement, it would certainly make a difference for the feasibility of a Common Foreign and Security Policy, a common European tax policy, and a European social policy—just as the introduction of qualified-majority voting in the Single European Act had ensured the success of the Internal-Market program. The same idea is implied in Joschka Fischer's vision of the EU as a democratic federation (Fischer 2000) in which, presumably, simple majorities in both chambers of the legislature would suffice for European policy choices—and proposals to extend majority voting also seem to be high on the agenda of the present Convention.

But quite apart from the question of whether governments would agree to the abolition of veto powers in the next Intergovernmental Conference, such proposals could undermine the legitimacy of EU policy processes. Voting by qualified majority has become a pragmatically useful device for speeding up Council decisions in constellations where the divergence of policy preferences does not have high political salience in national constituencies—or where divergent preferences are delegitimated by reference to clearly understood commit-

10 Such constraints would also apply to the *service public* and infrastructure functions and the industrial-policy options of national and subnational governments which the French and German governments have been trying to protect (Héritier 2001; Lyon-Caen/Champeil-Desplats 2001; Franßen-de la Cerda/Hammer 2001).

ments to an overriding common purpose. But if neither of these conditions is fulfilled, the use of majority votes to override politically salient national preferences could blow the Union apart. The EU is not (yet) itself a unified polity with general-purpose democratic legitimacy, and its voters do not (yet) constitute an integrated constituency with Europe-wide public debates, Europe-wide party competition, and effective political accountability (Scharpf 1999). Where divergent national preferences are not delegitimated by agreed-upon common goals, therefore, politically salient EU policies must still depend on the willingness of democratically accountable member governments to assume political responsibility (Lepsius 2000; Weiler 2000). In the face of legitimate diversity, therefore, intergovernmental disagreement cannot be overcome by majority rule. Instead, there is a need for governing modes that are able to accommodate diversity while dealing effectively with the problems that can only be resolved at the European level.[11]

VI European Action in the Face of Legitimate Diversity

If the legitimate diversity of national preferences has sufficiently high political salience at national levels to prevent agreement on uniform European policies, and if strictly national policies cannot provide effective responses to urgent problems, there is a need for differentiated European policies that are able to accommodate divergent national problems and preferences. In the present institutional structure of the EU, there are two options, "Closer Cooperation" and the "Open Method of Coordination" which could possibly be employed for this purpose.

The provisions on *"Enhanced Cooperation"* in Title VII of the Treaty of European Union are meant to allow groups of member governments to make use of EC institutions to adopt and implement European policies that will apply only to the participating members states (Article 44 TEU). In theory, these options might be usefully employed in the field of foreign and security policy and with regard to the challenges of Eastern enlargement. Their potentially most useful

11 Under certain conditions, European action might also be facilitated by devising solutions that have less political salience at national levels. In the context of ESDP, for instance, one might imagine a European Rapid Reaction Force that is not composed of national contingents, but created as an organizationally separate European volunteer army and financed entirely from the EU budget. If this genuinely European capacity for military action were in existence, national governments would still have to take political responsibility for specific mandates. But one should expect that agreement on these would have to overcome fewer national reservations, and that the implementation of such mandates could to a larger extent be delegated to a supranational command structure.

application, however, could be in policy areas where national problem-solving capacities are undermined by economic integration.

Thus, high-tax countries might harmonize profit taxes at least among themselves; highly industrialized countries could jointly adopt more stringent environmental regulations than would be acceptable for less developed member states; and Southern and Eastern member states could agree on common standards for systems of means-tested basic income support. By the same token, countries financing health care through compulsory health insurance could harmonize their regulations for the licensing and remuneration of service providers; countries considering the partial privatization of public pension systems could harmonize their regulations of investment options; countries wishing to maintain efficient and affordable local transport could jointly regulate the competition among public and private providers; and the same could be done by countries committed to the maintenance of public-service television.

What matters is that the rules so adopted would have the force of European law in the vertical as well as the horizontal dimension. *Vertically,* they would be binding on national and subnational policy makers—which implies that the temptations of tax and regulatory competition would be eliminated among members of the group. Even more important in many cases would be the *horizontal* effect: The regulations so adopted would have the same legal status as other provisions of European law—which implies that conflicts between market-liberalizing and social-protection goals would have to be resolved by a "balancing test" at the European level, rather than being automatically settled by the "supremacy" of European liberalizing rules over national social-protection rules (Scharpf 2002).

So why were the statements in the preceding paragraph all phrased in the conditional mode? The proximate reason are conditions defined in the Treaty of Amsterdam that are so restrictive that there are no present examples of closer cooperation.[12] Thus, enhanced cooperation was allowed only for groups whose membership includes "at least a majority of Member States" (Article 43 I d TEU). Moreover, permission had to be granted by the Council "acting by qualified majority on a proposal of the Commission" (Article 11 II para 1 TEC), and that decision could be prevented by the opposition of single member state invoking "important and stated reasons of national policy" (Article 11 II para 2 TEC). These extremely restrictive conditions were marginally liberalized by the

12 It would be more correct to say that examples which do in fact exist did not come about under the rules governing "Closer Cooperation." Monetary Union has become the most important one of these examples, but the "Schengen Area," even after it was brought under the Treaty, also does not include all EU member states, and the same is true of CESDP.

Treaty of Nice, but the requirement that a minimum of eight member states must participate would still exclude most of the potential examples suggested above. In addition, the Treaty of Amsterdam ruled out agreements that would "affect the *'acquis communautaire'* and the measures adopted under the other provisions of the […] Treaties" (Article 43 I e TEU) or that would "constitute a discrimination or a restriction of trade between Member States and […] distort the conditions of competition between the latter" (Article 11 I e TEC).

This apparent hostility against closer cooperation is in part explained by the fierce defense of the *acquis* by the Commission—and the dominance of economic integration and liberalization discourses within the Commission. But why should governments—which could overrule the Commission in the process of Treaty reform—share that aversion? The answer, I suggest, is a case of unfortunate "framing." Regardless of the variety of terms that have been used since the early 1970s—"variable speed," "variable geometry," "concentric circles," "two tiers," "core" or most recently, "pioneer group"—the notion of differentiated integration has typically been associated with the image of greater or lesser progress along a single dimension from less to more integration (see Ehlermann 1984; Giering 1997; Walker 1998; Búrca/Scott 2000). The idea was that an "avant-garde" of member states that were able and willing to move ahead should be allowed to do so—which immediately suggested that all others would find themselves in the rear guard and might be relegated to second-class citizenship in Europe. This framing of the discussion is unfortunate, but it seems too deeply entrenched to be overcome in the near future.

The same objections do not apply to the second option, the *"Open Method of Coordination"* which—*avant la lettre*—was established in the Maastricht Treaty for the coordination of economic policies of member states (Articles 98 and 99 TEC) and applied to employment policies in the Amsterdam Treaty (Articles 125–130 TEC). Without amending the Treaty, the Lisbon Summit then introduced the generic label and proceeded to apply it to a few industrial and social-policy goals. The method implies that member governments should agree to define certain policy purposes or problems as matters of "common concern," whereas the actual choice of effective policies should remain a national responsibility. Its core is an iterative procedure, beginning with a report from the Commission to the European Council which is followed by guidelines of the Council based on a proposal from the Commission. In response to these guidelines, member governments will present annual "national action plans" and reports on measures taken—which will then be evaluated in the light of comparative "benchmarks" by the Commission and a permanent committee of senior civil servants. These evaluations will feed into the next iteration of annual reports and guidelines, but they may also lead to the adoption of specific recommenda-

tions of the Council addressed to individual member states. However, "the harmonization of the laws and regulations of Member States" is explicitly excluded from the measures the Council could adopt (Article 129 TEC).

It is too early for a definitive evaluation of the problem-solving effectiveness of the open method of coordination,[13] but its potential and its limitations seem to be quite clear. Since member states remain in control of their own policy choices, they also remain capable of responding to the diversity of national economic and institutional conditions and of national preferences. Nevertheless, by exposing their actual performance to comparative benchmarking, peer review and public scrutiny, open coordination could provide favorable conditions for "learning by monitoring" (Sabel 1995; Visser/Hemerijck 2001), and it may also contribute to shaming governments out of "beggar-my-neighbor" strategies that would be self-defeating if everybody did adopt them. At the same time, however, it is also clear that the policies so adopted will have the status of national law and thus will remain vulnerable to all the legal constraints imposed by the "supremacy" of European rules of market integration, liberalization and competition law. As a consequence, they will do little to alleviate the impact of the *acquis* on accession states or to protect European welfare states against the pressures of regulatory and tax competition (Scharpf 2002).

In its "White Paper on European Governance" (COM 2001/428), the Commission itself appears to be quite unenthusiastic about the open method of coordination and it also insists that it "should not be used when legislative action under the Community method is possible" (COM 2001/428: 22). Instead, it suggests that Council and Parliament should more often adopt "framework directives" that leave more room for the discretion of national policy makers (COM 2001/428: 20). If that suggestion is rarely acted upon, one reason could be mutual distrust among member governments who might doubt each other's good faith in carrying out burdensome legislative mandates or in resisting the temptations of protectionist beggar-my-neighbor practices.

But these suspicions could be alleviated if *framework directives* were *coupled with* the *open method of coordination*. Then member states would have to describe their chosen methods of implementation and report on their effects, while their performance would be monitored and compared by the Commission and evaluated by peer review and by the Council. If evaluation should reveal general problems, the framework legislation could be amended and tightened. With regard to specific implementation deficits in individual countries, moreover, the Council could not merely issue recommendations but adopt legally binding decisions

13 But see Goetschy (1999); Hodson/Maher (2001); De la Porte/Pochet (2002).

or authorize[14] the Commission to initiate the usual infringement proceedings. In other words: Member states would retain considerable discretion in shaping the substantive and procedural content of framework directives to suit specific local conditions and preferences. Yet if they should abuse this discretion in the political judgment of their peers in the Council, more centralized sanctions and enforcement procedures would still be available as a "fleet in being."

At the same time, the effectiveness of open coordination would be increased if its procedures were embedded in the context of framework directives which, like all other directives, have the quality of European law. Thus, in the *vertical* dimension, their implementation is not left to the discretion of national governments, and actors in charge of national policy choices in the respective sectors could not simply ignore agreements at the European level. By the same token, the existence of a legal obligation could help to overcome domestic opposition against the policy choices required by good-faith implementation. In the *horizontal* dimension, moreover, the policies so adopted would have the status of European law and hence would not be asymmetrically constrained by market-making policies adopted at the same European level.

Differentiation could be taken one step further if framework directives and open coordination were applied to achieve the purposes of enhanced cooperation discussed above. Technically, that would be easy to achieve since a directive, unlike regulations, is only "binding upon each member state to which it is addressed" (Article 249 para 3 TEC). It would thus be possible to adopt framework directives dealing specifically with the common problems of a group of member states. In contrast to the rules for enhanced cooperation, participation in the decision-making process could not be formally restricted to members of the group—which would increase transaction costs but might also help to avoid the distrust against attempts at differentiated integration.

VII Conclusions

Present debates on the European constitution would benefit from a focus on the substantive policy problems that cannot be effectively resolved through the existing governing modes of the European Union. While these modes differ

14 The flexibility of Open Coordination might be lost if the Commission could automatically resort to infringement proceedings whenever it saw the uniformity of European law threatened by differentiated national solutions. Thus it would seem desirable to require the special authorization by a majority in the Council.

from one another, they share two essential requirements: effective European policy depends on high levels of consensus among member governments, and it must, at least in principle, provide for uniform rules across all member states. By and large, these requirements could be simultaneously satisfied in the policy processes that brought about economic integration. That is no longer true of a set of new challenges that the Union must now deal with—among which I have discussed the need for rapid peace-keeping and peace-making interventions in conflicts affecting common European security, the need to facilitate the economic, social and political development of accession states in Central and Eastern Europe, and the need for protecting the plurality of "European social models" against the constraints and pressures of integrated markets. In each of these areas, the dual conditions of broad consensus and uniform policy cannot be satisfied at the same time.

In dealing with these challenges, the Union is confronted with a dilemma: Purely national solutions will not be effective, but common and uniform European solutions could not be adopted in consensus in the face of a "legitimate diversity" of national preferences. Under these conditions, neither resort to the principle of "subsidiarity" nor a move toward majoritarian decision rules could provide effective and legitimate solutions. The Union is not now, and will not soon be a unified democratic polity, and it would undermine the bases of its own legitimacy if highly salient political preferences of its member states could simply be overruled by majority votes in the Council and the European Parliament.

If the present constitutional debate is to be useful, therefore, it ought to be about new modes of European governing that will allow effectively Europeanized responses to the new challenges facing the Union which are also able to accommodate legitimate national diversity. Two such options, "Enhanced Cooperation" and the "Open Method of Coordination," already have a base in the present Treaties. However, the first of these is crippled by overly restrictive conditions which were not significantly relaxed in the Nice Treaty, whereas the second option may facilitate policy learning at national levels but cannot achieve the legal effectiveness of European policy solutions. It might be promising, therefore, to consider Open Coordination in combination with European "framework directives" that are legally binding but leave the specification of more detailed substantive and procedural rules to national governments.

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10 The Joint-decision Trap Revisited (2006)

Introduction: A Successfully Deficient Contribution

In re-reading the "Joint-decision Trap" (1988), I find it worth noting that the text is older than it seems. The original manuscript was written in 1983–1984 for a study group of the Western Europe Committee of the American Social Science Research Council. Headed by Philippe Schmitter, the group was supposed to reflect on some vague and ambitious theme like "Reconstituting the Boundaries of the Political." I had been co-opted to write something about recent changes in German federalism, but Schmitter suggested that I should also explore possible parallels in European integration—a subject which, until that time, had not been among my academic concerns. Since the edited volume which the group was to produce was not yet in sight, I published a German version of my essay in 1985 which was followed by an Italian translation in 1986. By 1988, when the edited volume had finally evaporated altogether, I agreed to have a slightly amended version of the original English text published by *Public Administration*.

This genesis suggests that the article should have suffered from three limitations. First, it was shaped by the excitement of a neophyte exploring a new field. Second, it was drafted well before the Single European Act and the success of the single market program, let alone monetary union, would have empirically disturbed the stark simplicity of the original sketch. Finally, it was written from a German perspective, highlighting the characteristics of European integration that I could see from that vantage point. As it turned out, however, some of these deficiencies actually contributed to the apparent success of the article on the citation index.

In itself, the fact that the European Community was approached from the study of German federalism implied a comparative perspective that avoided the *sui generis* premises that had tended to isolate the work on European integration from the mainstream of political science research and theory. Instead, the article suggested that the European polity might be usefully compared to the institutions and politics of federal nation-states—an idea which has since developed into an

important strain in the Europeanist literature (Sbragia 1992; Nicolaïdis/Howse 2001). In fact, however, my original research on Germany had focused more narrowly on the consequences of policy-making through intergovernmental negotiations—which we had originally discussed and explained in the framework of Coasian negotiation theory (Scharpf/Reissert/Schnabel 1976). Hence the comparison was also focused on intergovernmental negotiations at the European level, and the article tried to show that some of the manifest failures of German and European policy could be explained by the same negotiation-theoretic hypotheses. Compared to more holistic treatments of European integration, therefore, the narrow empirical focus of my contribution made it more amenable to the application of an explanatory model derived from general theory.[1]

Given the purposes of the article and the context in which it was drafted, the model was presented in a rudimentary and informal fashion. But the more precise specification of the "joint-decision trap" (or what I later called a "compulsory negotiation system") and its consequences proved to be quite straightforward (Scharpf 1997)—and very much in line with George Tsebelis' analyses of the policy implications of "veto players systems" (Tsebelis 1995, 2002).

Yet even though it was intended to focus on a particular aspect of policy-making, the article was sometimes read as if it were meant as a comprehensive representation of the workings of the German political system or of the European Community. For Germany, such over-extended interpretations were relatively rare and generally innocuous: most readers knew that not all policy areas were caught in the federal joint-decision trap—some were obviously governed in a mode of neo-corporatist concertation between the government and large interest organizations, others evolved in common-law fashion under the guidance of specialized labor or administrative courts, and some were indeed shaped by the politics of parliamentary majorities (Katzenstein 1987; Schmidt 2003; Hesse/Ellwein 2004).

With regard to Europe, however, the article's ranking on the citation index was significantly enhanced by interpretations that ignored its intended domain. For authors reporting empirical work, it became a must citation in the introductory discussion of theories which they would then proceed to "falsify" by their own findings. Worse yet, the article was conscripted in the ontological battle that "intergovernmentalists" and "supranationalists" were waging over the true nature of the European polity. On this front, I saw no reason to take sides. Since

1 That I was not primarily interested in explaining European integration as such is also demonstrated by the concluding section which tries to specify the abstract conditions of a "joint-decision trap" and suggests some possible applications of the model in constellations as diverse as self-governing university faculties, joint ventures, or political coalitions (Scharpf 1988: 271–273).

my later work focused on the political economy and legitimacy of European policy, my view of the institutional framework of European policy-making had become too complex for simple dichotomies.

If pushed to present a greatly simplified model of the overall conditions shaping policy processes in the European Union, I would now insist on the co-existence of at least three distinct modes of European governance—which I have recently described as the "intergovernmental" mode, the "joint-decision" mode, and the "supranational-hierarchical" mode (Scharpf 2001). Of these, only the first and, arguably, the second were treated in the "Joint-decision Trap" in an analysis which still appears to me as an empirically valid application of Coasian negotiation theory under institutional conditions constituting an extreme variant of a multiple-veto player system. I will begin with a brief restatement of what I consider the still valid arguments and then proceed to a discussion of what is missing.

I The Intergovernmental Mode: An Exercise in Applied Negotiation Theory

In Germany as in the European Community/Union, important policy choices at the center, and also all institutional changes, depend on the support of constituent governments (of the *Länder* or Member States) either by unanimous agreement or by qualified majority votes. In contrast to the ideological or class-based factions of national parliaments, the *Bundesrat* and the Council of Ministers are supposed to represent territorially-based interests. But unlike the US Senate and the second chambers of all other parliamentary federal states, their members will not only represent the interests of citizens and firms in their respective territories, but are also able to defend directly the institutional self-interests of their governments. This makes it useful to distinguish between substantive policy choices and changes in the institutional architecture of these multilevel polities.

For substantive policy, the Coase theorem postulates that, in the absence of transaction costs, and with side-payments and package deals universally available, all potential welfare gains which a benevolent and omniscient dictator might provide could also be realized by negotiations between self-interested and fully informed individual actors (Coase 1960). But of course, transaction costs are far from zero; side-payments and package deals are often not feasible; and even if they were, complete information about the true preferences, constraints and alternative options of all other participants would be very hard to come by. If agreement depends on "all-channel negotiations," moreover, these dif-

ficulties would exponentially increase with the number of independent participants. Hence it was safe to conclude that, as an empirical matter, self-interested bargaining between the German *Länder*, or between the Member States of the European Community, was likely to generate sub-optimal policy outcomes—resulting either in blockages or in inefficient lowest-denominator compromises.

From the normative perspective of liberal political theorists, that may not seem so bad. Their strong preference for unanimous decisions (Buchanan/Tullock 1962) presupposes that agreements that are in fact reached are welfare-improving, since all participants must prefer the outcome to the status quo, whereas the liberty of individual action will continue to prevail if negotiations should fail. But that assumption holds only for "voluntary negotiation systems" and when negotiators are still writing on a clean slate. But Germany as well as the European Community are "compulsory negotiation systems" where certain purposes can be realized only through agreement (Scharpf 1997). In any case, moreover, once a binding rule is agreed upon, individual action is no longer permitted, and the veto of one or a few governments will prevent all others from correcting or abolishing the rule in response to changed circumstances or preferences. Hence, as negotiating systems with multiple veto players come to accumulate a growing *acquis communautaire*, they will progressively lose the capacity for policy innovation (Tsebelis 1995, 2002).

The obvious remedy would be a change from unanimous decisions to simple majority voting—the one decision rule that does not discriminate between the defenders of the status quo and the promoters of policy reform. In Germany, the constitution would in fact allow this in many cases.[2] But in the absence of strong party-political pressures, the *Länder* have always tried to achieve near unanimity in order to present a united front *vis-à-vis* the federal government (Scharpf/Reissert/Schnabel 1976). In Europe, simple majority voting on politically salient issues would in my view lack legitimacy (Scharpf 1999, 2003). In any case, the best that could so far be achieved has been qualified majority voting on many, but by no means all issues—and even after the reforms adopted at Nice, these would still require a very high quorum of two-thirds of the votes in the Council (Tsebelis/Yataganas 2002). Moreover, as in Germany, EU governments have generally been searching for consensus and avoiding decisions that would violate the vital interests of a Member State (Hayes-Renshaw/van Aken/Wallace 2006).

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2 For most legislation, absolute majorities in the *Bundesrat* are required. Abstentions count as no votes, and since coalition governments often abstain, blocking minorities may actually be quite small.

In the original article, I used the metaphor of the "joint-decision trap" to summarize the arguments explaining these practices. They start from the fact that, on issues of institutional reform, member governments represent not only the interests of their constituents but also their own institutional self-interest which, in the present context, can be interpreted as a concern for autonomy and influence. If problems within their territories can no longer be resolved through autonomous policy choices, these governments may reluctantly delegate competencies to higher-level institutions. But they will nevertheless try to maintain as much influence as possible over the exercise of these competencies. In order to prevent decisions violating their own preferences, they will insist on unanimity or qualified majority voting even though the outcomes are likely to be inefficient from a problem-solving perspective.

Assuming that a move to simple majority voting will not be feasible, the article then explores the possibility that the "style" of self-interested bargaining might be replaced by solidaristic "problem-solving." The underlying intuition, which anticipated the theoretical concept of the "negotiator's dilemma" (Lax/Sebenius 1986), is that many or most of the interest constellations involved in intergovernmental negotiations at the European level are in the nature of "mixed-motive games." Such constellations may be analytically disaggregated into a common interest in producing the welfare gains that can only be achieved through co-operation, and conflicting interests in the distribution of benefits and costs. If, under these conditions, both types of interest must be pursued simultaneously, *bona fide* co-operators are likely to be exploited by free riders maximizing distributive gains. In theory, this dilemma could be overcome either by a procedural separation of co-operative problem-solving from distributive bargaining or by a solidaristic transformation of preferences (Scharpf 1997)—a possibility which has subsequently come to fascinate the "constructivist" school of European studies (Christiansen/Jorgensen/Wiener 1999; Checkel 1999).[3]

3 Transaction costs may also be reduced by increasing empathy among negotiators. National officials located permanently in Coreper, the Council Secretariat and the Brussels staffs of national ministries may come to appreciate each others' positions, and to seek solutions that will not violate highly salient national concerns (Hayes-Renshaw/Wallace 1997; Lewis 2003).

II Transaction Costs Reduced in the Joint-decision Mode

With hindsight, however, I am embarrassed to have ignored the Commission's Potential role in reducing the transaction costs of consensual policy solutions through its monopoly of legislative initiative. This mechanism is central to what I now call the "joint-decision mode" and what the Commission likes to call the "Community method." In order to appreciate its consensus-facilitating power in comparison to pure intergovernmental bargaining, one needs to consider the exponential rise of complexity (and hence transaction costs) in all-channel negotiations that are trying to reach agreement on welfare-maximizing (or "problem-solving") policy solutions:

In all-channel negotiations between *(N)* veto players, each of whom is trying to protect *(a)* salient concerns, one would need $[N \cdot (N-1) \cdot a^2]$ bilateral examinations of policy impacts in order to identify potentially consensual policy choices (Friend/Jessop 1969; Scharpf 1972). However, if Solutions could be proposed by a single, central agent, that agent would need to explore only $(N \cdot a)$ policy impacts to develop a win-win solution which (if the solution space is not empty!) should be acceptable to all veto players.

In the real world, this possibility of "intelligent design" may allow the Commission to present creative proposals that go beyond the trivial exploitation of fixed policy preferences suggested by the role of the agenda-setter in spatial-voting theories.[4] Relying on extensive consultations with interest groups, national and sub-national officials and independent experts, the Commission may be able to assess the hardness or pliability of the interests and constraints defended by all member governments, and to develop innovative win-win solutions which—though departing from the initial policy preferences of some or all veto players—may still be preferred to the status quo by all

4 It is important to note the difference between the Coasian approach adopted here, and the role of the agenda-setter in spatial voting theory. Coasian theory is welfare theoretic, asking if self-interested bargaining between rational agents could lead to welfare-maximizing policy solutions. The positive answer assumes fixed preferences over outcomes (i.e., "interests"), but totally flexible preferences over strategies (i.e., "policies"). In other words, welfare gains in Coasian theory presuppose successful "policy learning" and the reduction of transaction costs helps to reduce obstacles to policy learning.

Spatial voting theory, in contrast, ignores the possibility of policy learning and takes fixed preferences over strategies ("policies") plus the default outcome in case of non-agreement (usually the status quo) as its point of departure. If the solution space among policy preferences is empty, that is the end of the matter. If not, the "agenda-setter" gains the power to select its own preferred policy from the feasible set. Obviously this power is the greater the more the decision rule departs from unanimity (Romer/Rosenthal 1978; Enelow/Hinich 1990; Tsebelis 1994). But it is not welfare increasing.

(or at least a qualified majority of) member governments and a majority in the European Parliament.

That is, of course, not the end of the story, given the unpredictable vagaries of national politics and intergovernmental and inter-institutional group dynamics. Nevertheless, as long as the Commission is accepted as an "honest broker" by the Member States, and as a politically neutral guardian of the European public interest, its agenda-setting role should ensure more successful negotiations than one should expect from strictly intergovernmental bargaining. At the theoretical level, I would thus have to soften the pessimistic implications of the joint-decision trap.

But not by much. Transaction costs still rise with the number of Member States and the diversity of their preferences and, in any case, the good services of the Commission will not help if the solution space is empty—i.e., if problem-solving solutions would require uncompensated sacrifices by at least some participants. In theory, it is true, compensation might be achieved through side payments or through package deals combining asymmetric solutions in different policy areas. But side-payments, which often facilitated European compromises in the past, are increasingly constrained by the EU budget, whereas package deals have always been difficult to achieve in the narrowly specialized councils of ministers. In any case, not all sacrifices can be compensated, and the difficulty of reaching negotiated agreement increases with the heterogeneity of Member State conditions, interests and preferences. Thus while the "original six" might perhaps have agreed on the European harmonization of their "Bismarckian" welfare states, the present hope for a common commitment to the "European social model" was already destroyed with the first enlargement that had brought Britain, Ireland and Denmark into the Community (Scharpf 2002). On politically salient issues, therefore, transaction cost-reducing mechanisms have been overwhelmed by the increase in numbers of Member States and in their heterogeneity, and the logic of the joint-decision trap must be stronger in the EU-25 today than it was when I wrote about the EC-12 in 1984.

III The Supranational-hierarchical Mode

If this were all, I could content myself with clarifying the original argument and relating it to theoretical advances in the more recent literature. But if the article is read as an overview of EU governance modes, there is a much more serious gap that has occupied much of my later work on European integration. The joint-decision trap applies to the intergovernmental and joint-decision

modes which I discussed. But it does not apply to the supranational-hierarchical mode in which the Commission, the European Court of Justice or the European Central Bank are able to exercise policy-making functions without any involvement of politically accountable actors in the Council or the European Parliament.

This mode of governing was completely ignored in the original article—even though, having previously worked on the policy-making functions of the judiciary myself (Scharpf 1966), I should have been alerted to it by Joe Weiler's path-breaking analysis of the "Dual Character of Supranationalism" (1982). Its origins go back to the 1960s, when the Court had succeeded, over the feeble opposition of some member governments, in establishing the twin doctrines of the "supremacy" and the "direct effect" of European law (Alter 2001). As a consequence, not only the "primary law" of the treaties, but also the "secondary law" of European regulations and directives came to take legal precedence over all national law, including parliamentary legislation, plebiscites, and the national constitution—and since they also had direct effect, European rules could be invoked as the supreme law of the land by any party in legal proceedings before national courts. To become effective, these doctrines depended on the willingness of national courts to accept the decisions and preliminary rulings of the European Court as the authoritative interpretation of European law. Once this condition was secured, however, the power to interpret became a power to legislate that was sanctioned by the respect for the rule of law engrained in the political cultures of Member States (Alter 1996; de Búrca 2003; Stone Sweet 2003).

By itself, of course, the Court's power can be exercised only in cases that happen to come before it, and on issues raised by the parties to these cases. Its strategic value as an instrument of European legislation can thus be appreciated only when it is seen in conjunction with the Commission's mandate to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied" (Article 211, ex. 155 TEC) and its power to bring violations of Treaty obligations by a Member State before the Court (Article 226, ex. 169 TEC) (Börzel 2003). Given the Court's power of judicial legislation and its own enforcement powers, the Commission is then able to avail itself of two distinct legislative options.

It may choose the joint-decision mode and propose European regulations or directives that needed to be approved by the Council (and now, the Parliament). But given some of the very sweeping commitments to European economic integration in the original treaties, it may also attempt to legislate in the supranational-hierarchical mode. To do so, it has to assert that a particular rule should have direct effect and that certain laws or practices in Member States are in violation of it. If these arguments are then upheld by the Court, the interpre-

tation will be the law of the land in all Member States without any further action by governments or parliaments at European or national levels.

Compared to the situation in national democracies, moreover, judicial legislation at the European level is also extremely well protected against political correction. If decisions are based on an interpretation of treaty provisions, they could be corrected only through amendments that must be ratified by national parliaments or referendums in all Member States. And it is hardly less difficult to change judicial interpretations of directives and regulations—which would require new legislation that the Commission itself would have to propose, and that must be adopted by at least a qualified majority in the Council and in most cases also a majority in the European Parliament. In short, all the obstacles to European political action in the intergovernmental or joint-decision modes will also immunize judicial legislation against political correction.

From my present perspective, therefore, the joint-decision trap appears as a basically valid—though simplified—account of the institutional conditions of *political* policy choices in the European Union and their consequences. It needs to be complemented, however, by a similar account of the conditions and consequences of *non-political* European policy-making in the supranational-hierarchical mode. That I did not see that at the time may be excused by the fact that the policy-making potential of this mode had not yet become a fully-fledged reality. The European Central Bank was not even on the horizon of realistic proposals, and while the institutional preconditions of judicial legislation were all in place by 1983–1984, the Commission and the Court were only just beginning to discover their strategic usefulness as an instrument of European policy-making that was not caught in the joint-decision trap.

As it happened, this discovery coincided with a neo-liberal window of opportunity in the intergovernmental politics of the EU. In the early 1980s, the recession caused by monetarist responses to the second oil-price crisis was widely interpreted as a symptom of "eurosclerosis" which the Commission proposed to combat by a widening and deepening of market integration. In order to facilitate the removal of non-tariff barriers and further liberalization, not only traditionally pro-European governments but also Margaret Thatcher's Britain agreed to the Single European Act of 1986 which introduced qualified majority voting in the Council for directives implementing the internal market program (Moravcsik 1998). Of course, even qualified majority was still a very high hurdle when existing regulations, public service monopolies and legally protected cartels in the Member States had to be challenged. But by then the Commission's second legislative option had also come into its own.

Starting with the *Cassis de Dijon* decision of 1979 (ECJ Case 120/78), the Court had signaled its willingness to intervene against national non-tariff barri-

ers even in the absence of harmonizing European legislation. Since the default outcome—the mutual recognition of incompatible national regulations—would often appear undesirable or even impracticable (Schmidt 2002), the mere threat of Court action would greatly increase the willingness of all governments to accept the minimum harmonization directives proposed by the Commission. In the field of competition policy, moreover, the Commission made strategic use of treaty violation proceedings against the public service monopolies of some Member States—whose governments would then support directives that would open the service and infrastructure functions of all other Member States to market competition (Schmidt 1998, 2000). And of course, each new directive extends the *acquis communautaire*, i.e., the body of secondary European law which the Commission is bound to enforce and whose interpretations by the Court cannot be reversed politically.

IV Policy Consequences

In other words, the combination of judicial legislation and the Commission's monopoly of legislative initiatives was able to increase the effectiveness of European policy-making far beyond the constraints discussed in the joint-decision trap. But it did not and could not do so in all policy areas. Thus when I came to appreciate the power of the supranational-hierarchical mode in the early 1990s, my attention also turned to the substantive policy consequences of the plural governing modes prevailing in the European Union.

My first cut was the distinction between "negative" and "positive integration" (Scharpf 1996). The supranational-hierarchical mode had its strongest base in the economic freedoms and competition rules postulated by the Treaty—which were perfectly suited to support the removal of national regulations considered as non-tariff barriers to trade or as distortions of competition. Quite apart, therefore, from the neo-liberal beliefs of members of the Commission and the Court (Gerber 1994a, 1994b, 2001), institutional conditions were most favorable to the widening and deepening of market-making, market-extending and market-enhancing European law. In contrast to negative integration, market-correcting positive integration depended on political legislation, either in the intergovernmental or the joint-decision mode where very high consensus requirements and the heterogeneity of Member State interests and preferences would make agreement difficult or impossible.

Recognizing, however, that there were some policy areas where the adoption of market-correcting rules was relatively more successful than in others, I at-

tempted to capture the difference by referring to the further distinction between "product" and "process regulations." Under the Treaty, Member States could not be prevented from applying national product standards that served legitimate safety or environmental purposes. Thus at least a minimal harmonization of product standards was essential if the benefits of the internal market were to be realized. By contrast, regulations of production processes, which might affect the cost of the product, but not its quality itself, could not be used to ban imports produced under another national regime. Hence Member States that enjoyed the competitive advantages of lower working and employment standards, or lower taxes on factors or production and business profits, would have no reason to agree to the "leveling of the playing field" which Member States with more demanding regulations and higher taxes might demand.

By and large, and with some fuzzy edges, this distinction seemed to work reasonably well. But not all policies can be classified as being either "product" or "process" related. From my present perspective, therefore, I would not place so much weight on trying to identify a substantively defined dividing line. Instead, I would once more refer to the underlying logic of general negotiation theory: given an institutional setting with high consensus requirements, positive integration is likely to succeed in policy areas where national interests converge and it will fail in policy areas where divergent national interests and preferences are politically salient. In my 1999 book *Governing in Europe* (Scharpf 1999), I tried to classify policy areas according to this criterion, and I think the ordering along the dimension of greater or lesser European capacity to act has held up fairly well.

V The European Problem-solving Gap

The question which has occupied me more in recent years was what would happen in policy areas where positive European integration seemed unlikely or impossible. The automatic answer is, of course, given by the "subsidiarity" rule: where Europe cannot act, the Member States remain in charge. But that answer ignores the constraints on national action that are created by the success of European economic and monetary integration. Some of these constraints are of a legal character: many of the policy instruments which Member States had routinely employed to manage their economies in earlier decades—from import controls, export subsidies and the devaluation of national currencies to regional and sectoral subsidies and the strategic use of public procurement and the employment buffers of public-service industries—are no longer available to members of economic and monetary union. At the same time, the free

movement of goods, services, capital and labor and the liberalization of public-service industries have created economic constraints on national tax policies and on regulations that might increase the costs of domestic production, reduce the post-tax rates of return of domestic investments, or create incentives for welfare migration (Sinn/Ochel 2003). Member States that were unable to adjust to these constraints of economic integration would then suffer from declining investment, low economic growth, rising unemployment, higher welfare burdens and public deficits.

But, again, not all national policy areas would be equally affected by the constraints of legal and economic integration—an intuition which I tried to capture in a four-fold table defined by the dimensions of high and low European capacity crossed with high and low national capacity and in which none of the cells was empty (Scharpf 1999: 117). Of particular interest was the quadrant where European solutions were ruled out by the heterogeneity and political salience of national interests and preferences, while national solutions were impeded by the legal and economic constraints of European integration. In my view, this field would include the taxation of mobile capital and businesses, macroeconomic employment policy, industrial relations and social policy. In view of the political salience of these policy areas in national democracies, the possibility that European integration might produce a systematic "problem-solving gap" became a major concern of my later work.

Given the joint-decision trap, I never placed much hope on European solutions for these problem areas. Instead, I joined with Vivien Schmidt in a large-scale comparative project to examine national responses to international economic challenges (Scharpf/Schmidt 2000). We were able to show that countries differed greatly in both their vulnerability to the impacts of economic integration and their institutional capacity to cope with these impacts without abandoning their previous employment and social-policy aspirations. In both regards, Anglo-Saxon and Scandinavian welfare states, though very different from each other, appear to be much better situated than the Continental welfare states. Since the reasons are largely unrelated to my present theme, I will not elaborate them here—except to say that the very generous and expensive Scandinavian model, while immunized against international tax competition by the dual income tax, appears still to be extremely vulnerable to potential extensions of European competition law into the domain of publicly financed social services (Scharpf 2002; Geyer 2003).

In other words, the European problem-solving gap exists not only in Continental countries like Italy, France, Belgium and Italy which, unlike the Netherlands, have not yet learned to cope with the challenges of economic integration and liberalization, but it may still spread to Scandinavian welfare states which

so far have been able to combine highly competitive open economies with very high levels of employment, very low levels of social inequality and very generous social benefits.

Conclusion: Legitimacy—The Need to Accommodate Diversity

This brings me to my final point: under the constraints of the joint-decision trap, the European Union will not be able to do much, if anything, about filling the problem-solving gap through European measures of positive integration. Contrary to much of the current rhetoric, the hopes for a common "European social model" had already become unrealistic after the accession of the United Kingdom in the early 1970s (Ferrera 2005), and after eastern enlargement one should not even think of reviving them (Sapir 2006). The same seems to be true of harmonized taxes on capital incomes, of harmonized rules on industrial relations, or of a Keynesian concertation between European monetary policy and national fiscal and wage policies (Enderlein 2004, 2006). European problem-solving capacity could be increased by a switch from unanimous or qualified majority voting to simple majority in the Council. But, as I have argued elsewhere (Scharpf 1999, 2003), majority decisions that violate politically salient preferences in the Member States would destroy the legitimacy of EU institutions.[5]

The responses of the Parliament and the Council to recent protests against the services directive, or the strike of dock workers, seem to show that politically accountable actors at the European level are aware of these limits of their legitimacy. But legitimacy is also in question when supranational-hierarchical decisions exceed the limits of the permissive consensus which, in the past, has allowed negative integration and EU-imposed liberalization to proceed unopposed. There is as yet nothing in the institutional setting of the EU that would prevent the Commission and the Court from using the instru-

5 This is not the place for a full discussion of controversies over the democratic (i.e., "input-oriented"—Scharpf 1999) legitimacy of the European polity and its policies (e.g., Lord/Magnette 2004; Schmidt 2004). In my view, the crucial issue concerns the justification of public policies that violate the highly salient preferences of significant minorities (Scharpf 2005a). The multiple-veto character of EU policy-making in the intergovernmental and joint-decision modes more or less ensures that policies on which Commission, Council and European Parliament are in fact able to agree, are unlikely to lack legitimacy under this criterion (Moravcsik 2002). But that would not be so if simple majority voting were introduced and that is by no means ensured when EU policies are adopted in the supranational hierarchical mode.

ments of judicial legislation in ways that exceed these limits and that might, at the same time, undermine the legitimacy bases of national welfare states. Moreover, as I said before, even for political decisions in the intergovernmental and joint-decision modes, high consensus requirements can only ensure the legitimacy of initial policy choices. Once European regulations and directives are on the books, they (and their judicial interpretations) are nearly as immune to political reversal as is true of treaty-based ECJ judgments.

In both cases, therefore, EU law may indeed violate politically salient preferences in Member States and may constrain national policy choices in ways that undermine the legitimacy of the political system. Since—after eastern enlargement and the French and Dutch referendums—a general move to simple majority voting is clearly out of the question, it is unlikely that present problems could be resolved through more positive integration. Hence it seems useful to think of other ways in which the stranglehold of existing European law could be sufficiently relaxed to allow more room for manœuvre for national policy choices.[6] In principle, this could be achieved in one of two ways—either through controlled individual opt-outs or through a modified version of enhanced co-operation.

Both options would take account of the fact that successive rounds of enlargement have progressively increased the diversity of Member State institutions, economic and social conditions, and political preferences. As a consequence, the "goodness of fit" of uniform European rules has been generally reduced while a growing body of "Europeanization" research has documented the high economic, administrative and political costs of compliance with European rules that do not fit (Cowles/Caporaso/Risse-Kappen 2001; Falkner et al. 2004). With the recent accession of central and eastern European Member States plus Cyprus and Malta, and with the imminent inclusion of Bulgaria and Romania, let alone Turkey, the diversity of conditions is increasing to a point where it must defy all aspirations to effectively uniform positive integration (Zielonka 2006). Given the low level of morale in the present EU, the most likely scenario would combine ever greater difficulties in adopting new legislation with an erosion of the existing *acquis* through creeping non-compliance and "institutional hypocrisy" (Iankova/Katzenstein 2003). In comparison, it might indeed be more attractive to accommodate diversity by allowing explicit departures from uniform European legislation law (Scharpf 1994).

Opt-outs are of course not unknown in the "variable geometry" of European integration: not all EU Member States have accepted the Schengen regime, joined monetary union or co-operate in the European security and defense policy. The "social charter" was adopted in 1989 but did not apply in the UK until

6 For a thoughtful and thought-provoking critique of this argument, see Moravcsik (2003).

1997 and in each of the successive rounds of enlargement, some of the accession states were granted temporary relief from some provisions of the *acquis communautaire*. But these are considered exceptions that were either conceded under duress to avoid the veto of an unwilling member government, or that had to be accepted as a temporary expedient in accession negotiations. They were never considered a generally available instrument responding to the tension between a growing body of uniform European law and the increasing diversity of Member State economic and institutional conditions and political preferences.

If opt-outs might allow a fine-tuning of EU legislation to fit the conditions of individual Member States, enhanced co-operation could be adapted to allow the creation of European law that fits the conditions and political preferences of several, but not all, Member States. Such possibilities were first introduced with the Amsterdam Treaty, but even after the modifications adopted in Nice, the rules governing enhanced co-operation have remained so restrictive that the option has never as yet been used. The reason may have been a consequence of unfortunate "framing": ever since the early 1970s, proponents of a variable geometry have been talking about a hegemonic "core" group or an *avant garde* proceeding with "different speed" towards the ultimate goal of European political and military integration—with the clear implication that all others would find themselves relegated to the rearguard or the periphery. The current terminology avoids these connotations and could be understood to mean that different groups of Member States are facing different problems and would benefit from sets of European rules that are designed to fit their specific conditions and preferences (Scharpf 2002). But distrust is hard to overcome.

Moreover, even when understood without hegemonic implications, distrust may often be justified. The universal enforcement of common rules may be essential for protecting common interests in prisoners' dilemma constellations; individual opt-outs by one Member State may impose negative external effects on its neighbors; and enhanced co-operation may imply protectionism or a denial of solidaristic burden-sharing. It is clear, therefore, that opt-outs and enhanced co-operation could not be granted as a unilateral exit option. It should be equally clear, however, that the present regime rules out solutions to important national problems even where deviations from the *acquis* would have little or no negative effect on the interests of other Member States or of the Union as a whole. What would be needed, therefore, are rules and procedures for controlled deviation which focus on the merits of the specific case.

Exactly the same problem was faced in recent efforts at federalism reform in Germany—which had finally attempted to open the joint-decision trap by strengthening the autonomy of the *Länder* in response to growing interregional diversity after German unification (Scharpf 2005b). As initial demands for a

wholesale decentralization of legislative competencies met with strong resistance, it was proposed that the *Länder* should instead have the right to pass laws displacing or modifying existing federal rules *("Abweichungsrecht")*. This proposal was in fact adopted for a few policy areas—with the proviso that a later national statute would again prevail over the deviating *Land* legislation.[7] If the solution works in practice,[8] it may be extended to a wider range of policy areas, allowing the *Länder* to deal with specific regional problems or to experiment with novel solutions even in areas where the need for national legislation cannot generally be denied.

Given the structural similarities between German federalism and the institutional architecture of the European Union (which had inspired my original article), the institutional innovation introduced in Germany might add to the plausibility of similar proposals at the European level. Since variations in size, economic development, institutional conditions, cultural orientations and political preferences among EU Member States are so much greater than they are among the German *Länder*, the need to accommodate diversity is also much greater. At the same time, however, increasing international interdependence and mobility have increased the need for European-level regulations and seem to defy all attempts to generally limit, let alone, reduce the range of EU legislative competencies. Under these conditions, opt-outs and enhanced co-operation appear as useful devices which could respond to national diversity while allowing European legislation to proceed—but only if such deviations must be reviewed and may be controlled at the European level.

In theory, such controls might be left to the Commission and the Court in a modified version of Treaty-violation proceedings. But given their long-standing commitment to maximal Europeanization and the extensive interpretation of Treaty obligations, these institutions would not be trusted as neutral arbiters between legitimate European and national concerns. By comparison, peer review in the Council of Ministers seems more likely to achieve a fair balance between the normative commitment to integration and the need to accommodate the legitimate diversity among Member States.[9] Having voted for the European rule

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7 Articles 72 paragraph 3 and 84 paragraph 1 of the Basic Law (Deutscher Bundestag, Drucksache 16/813). The solution does not go very far, but it is at least a step in the direction of more flexible allocation of legislative competencies between national and regional governments. In principle, it would have been possible to extend deviation rights to most areas of federal legislation (Scharpf 2006).

8 The most-discussed problem is a danger of "ping-pong legislation" where a *Land* law may depart from a federal rule which is then overridden by a later federal statute, from which the *Land* may deviate again, etc.

9 A possible procedure would require the Member State to notify legislative deviations from the *acquis* to the Commission before they come into force. The Commission would review the

in question, and being suspicious of national beggar-my-neighbor policies, ministers will not lightly accept dubious arguments supporting a need for opt-outs or for enhanced co-operation. But at the same time, ministers may well expect to have to ask for similar concessions on other occasions, and thus will have reason to evaluate national claims with some empathy.

Apart from their obvious potential for accommodating diversity among EU Member States (Scharpf 2003), these solutions would have two additional benefits. First, the expectation that potential misfits between a European rule and national conditions and preferences might be subsequently modified through individual opt-outs or enhanced co-operation, might greatly reduce opposition to proposed European rules in the first place. As a consequence, majority decisions would be easier to accept, and increasing diversity among Member States may not have quite the damaging impact on positive integration which I would otherwise expect. In other words, we might at least hope for a weakening of the joint-decision trap.

If it were understood, moreover, that deviations from the *acquis* could also pertain to its interpretation by the European Court of Justice, we might even hope for a cautious politicization of the supranational-hierarchical mode of European governance. It would lose a bit of its dictatorial power as democratically accountable agents at the national and European level would gain the capacity to correct the application of judicial doctrines to specific policy problems that were not determined by the original judgment.[10] Speaking normatively, that would be a good thing: the powers of judicial legislation in the European polity seem too important, and potentially too damaging, to be left entirely to politically unaccountable bureaucrats and judges. In other words, the weakening of the joint-decision trap would also help to reduce the democratic deficit.

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case and submit it to the Council which, within six months after notification, could disallow the national deviation by majority vote. National legislation not so notified would be subject to normal treaty-violations proceedings.

10 Respect for the judiciary should prevent judgments from being politically reversed in the individual case. What can be subjected to political correction is the generalized rule derived from that judgment.

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11 Reflections on Multilevel Legitimacy (2007)

1 Democracy and Multilevel Polities

Ever since I started out as a political scientist in the late 1960s, I have worked on issues of democratic legitimacy and multilevel government, off and on. But I never did focus systematically on the relationship between the two. In my work on multilevel policy-making in German federalism, this relationship played only a marginal role—and I think for good reasons. In Germany, parliamentary democracy is institutionalized at both levels, national and regional. But German politics is so much focused on the national arena that *Länder* elections (which directly shape the party-political profile of the federal second chamber) have mostly become "second order national elections"—with the consequence of increasing the pressures of democratic accountability on the national government. Political scientists, it is true, tend to worry about the lack of political transparency under conditions of the "joint-decision trap" (Scharpf 1988), since the responsibility for national policy choices is shared among the federal majority and *Länder* prime ministers. But since dissatisfied voters are not obliged to be fair when they punish a government, blame avoidance is not a very promising strategy in German politics. So while I could talk about many things that are wrong with German federalism, a lack of political responsiveness to voter dissatisfaction would not be on my short list.

In my work on Europe, democratic legitimacy does indeed play a role (Scharpf 1999). I have no reason to retract anything that I have written on the subject—and I certainly will not bore you with a restatement. But I acknowledge that readers may have found my normative arguments somewhat inconclusive—and I tend to agree. The reason, I suggest, is that my arguments—in common with most of the literature—were focused on the European level, rather than on the implications of the multilevel characteristics of the European polity.

This paper was the keynote address on the occasion of receiving the "Award for Lifetime Achievement in the Field of European Union Studies" at the Tenth Biennial Conference of the European Union Studies Association on 18 May 2007 in Montreal, Canada.

By focusing exclusively on the legitimacy of governing at the European level, we are tempted to refer to criteria that are also employed in defining the legitimacy of the democratic nation state. And once the issue is framed in these terms, we are inevitably involved in a comparative evaluation—which, depending on our meta-theoretical preferences, can then be conducted in a critical or an affirmative spirit.

In the critical mood, we will emphasize everything that European political structures and processes lack in comparison to (usually highly idealized) models of democratic constitutionalism at national levels (e.g., Greven/Pauly 2000; Follesdal/Hix 2006). The arguments, running from the fundamental to the more contingent, are too familiar to require elaboration: the lack of a European "demos" or of a "thick" collective identity, the lack of a common political space, the lack of a common language and of Europe-wide media of political communication, the lack of a political infrastructure of Europe-wide political parties, the absence of Europe-wide political competition, the low political salience of elections to the European Parliament, the limits of EP competencies, and hence the lack of parliamentary or electoral accountability for European acts of government. In short, the European democratic deficit exists and cannot be repaired in the foreseeable future.

In the affirmative mood, by contrast, we will emphasize features where the EU compares favorably to a more realistic view of political structures and processes in real-existing member states (e.g., Majone 1998; Moravcsik 2002). Institutional checks and balances at the European level are more elaborate and provide more protection against potential abuses of governing powers than is true in most member states. Moreover, many of the governing functions of the EU belong to a category which, even in the most democratic member states, is exempted from direct political accountability. On the other hand, explicitly political EU policies continue to depend on the agreement of democratically accountable national governments in the Council and on majorities in the increasingly powerful European Parliament. At the same time, EU institutions are likely to provide more open access to a wider plurality of organized interests than is true of most member governments. In short, the alleged deficit of democratic legitimacy exists mainly in the eyes of its academic beholders.

As you may have guessed: in my view, many of the arguments on either side have considerable *prima facie* support in empirical and normative terms, but most of them are also vulnerable to empirical and normative challenges. Moreover, they are not generally in direct contradiction to each other, but tend to be located on different dimensions of a political property space—so that, even in the case of empirical agreement, the pluses and minuses could not be aggregated in a single evaluative metric. This may explain the ambivalence of my own arguments,

and it surely must also affect the evaluation of EU legitimacy by other authors who are not committed *ex ante* to either a critical or an affirmative position.

2 Legitimacy—Functional, Normative and Empirical

What I now want to add to this reinterpretation is the intuition that the ambiguities could be reduced, though not overcome altogether, if discussions of political legitimacy in the European polity were explicitly located in a multilevel framework. To make my point, however, I also need to distinguish between three perspectives on political legitimacy—the functional, the normative, and the empirical.[1]

In my view, the functional perspective is basic in the sense that it must also provide the reference for concepts of normative and empirical legitimacy. It addresses the fundamental problem of political systems—to find acceptance for exercises of governing authority that run counter to the interests or preferences of the governed (Luhmann 1969: 27–37). Such acceptance may be motivated by an expectation of effective controls and sanctions or by widely shared (and hence socially stabilized) beliefs that imply a moral obligation to comply. Both motives may or may not coexist. But in political systems that cannot also count on voluntary compliance based on normative legitimating beliefs, effective government would depend entirely on extensive and very expensive behavior controls and sanctions, and perhaps also on the repression of dissent and opposition. In other words, legitimacy is a functional prerequisite of efficient and liberal forms of government.

In the normative perspective, therefore, political philosophy and public discourses will propose and criticize arguments that could support an obligation to obey under conditions where compliance would violate the actor's interests and could be evaded at low costs. In modern, Western polities, such legitimating arguments tend to focus on institutional arrangements ensuring democratic participation, the accountability of governors, and safeguards against the abuses of governing powers.

From an empirical perspective, finally, what matters is the compliance with exercises of governing authority that is based on legitimating beliefs, rather than on threats and sanctions. The focus of empirical research may thus be either

1 Hurrelmann (2007) also proposes a multilevel framework, and he also focuses on "normative" and "empirical legitimacy." Since he pays no attention to the functional perspective, however, his operationalization of empirical legitimacy differs from mine.

on beliefs or directly on compliance behavior. In both cases, however, empirical findings will encounter problems of theoretical validity. In the first case, the notoriously loose coupling of professed beliefs and actual behavior should make us hesitate to put too much weight on Eurobarometer data suggesting general support for, or trust in, EU and national institutions.[2] By contrast, actual compliance behavior might be caused by the fear of effective sanctions as well as by strong legitimating beliefs. That would be less of a problem with data about non-sanctioned political behavior expressing greater or lesser support for governing authority. Thus, falling electoral participation rates, growing electoral volatility, more rapid government turnover, the rise of radical or system-critical political parties and an increasing incidence of violent protest could all be taken as valid indicators of declining political legitimacy. But since legitimacy should sustain actual compliance even in the absence of effective enforcement, one might also interpret increasing tax evasion, corruption and rising crime rates as indicators of declining political legitimacy.

If we now try to make use of these perspectives in evaluating political legitimacy in the multilevel European polity, it is clear that normative criteria can be discussed by reference to either the European or the national level. In the empirical perspective, however, the situation is different. While public opinion data may include questions referring to both levels, the quality of the responses and their causal significance remain dubious at best. Information on the behavioral indicators, by contrast, which would be of obvious causal relevance, seems to be available only for national polities. Worse yet, it seems practically impossible to define behavioral patterns from which theoretically valid inferences of the greater or lesser acceptance of the Union's governing authority could be derived. Upon reflection, the reason appears clear: the EU does not have to face the empirical tests of political legitimacy because it is shielded from the behavioral responses of the governed by the specific multilevel characteristics of the European polity.

In contrast to federalism in the United States (where the national government has its own administrative and judicial infrastructure at regional and local levels), practically all EU policies must be implemented by the member states. Yet, unlike German federalism (where most national legislation is implemented by the *Länder* and communes), political attention and political competition in Europe are not concentrated on the higher (i.e., European) level. European elections are not instrumentalized by political parties to shape European policy

2 Hurrelmann (2007) shares these reservations and relies on comments in the quality press instead. This permits more differentiated analyses, but is even further removed from compliance. behavior.

choices, and they are not perceived by disaffected voters as an opportunity to punish the EU government. In short, with very few exceptions (mainly where the Commission may prosecute business firms for a violation of competition rules), the EU does not have to confront the subjects of its governing authority, neither directly on the street nor indirectly at the ballot box.

Instead, it is national governments who must enact and enforce European legislation. In the BSE scare that had been badly mishandled by the EU (Vos 2000), it was they who had to slaughter and destroy hundreds of thousands of healthy cows when EU rules did not allow the export of meat from herds that were inoculated against BSE—and of course it was they who had to call out the police when protesters tried to block the massacre. As a consequence, two national ministers had to resign in reaction to rising voter dissatisfaction[3]—just as national governments must generally pay the electoral price if voters are frustrated with the effects of EU rules on food standards, state aids, public procurement, service liberalization, takeover rules or university admissions.

By contrast, the EU is not directly affected either by an erosion of political support or by an erosion of voluntary compliance among the target population of its governing authority. Since that is so, it is essentially correct to say that, in relation to private citizens, the empirical legitimacy of the EU's governing authority depends entirely on the legitimacy resources of its member states.

3 Two Normative Implications

From a normative perspective, this empirical conclusion has two major implications. The first is that the legitimacy of the EU cannot, and need not, be judged by reference to criteria and institutional conditions that are appropriate for judging democratic nation states. It is true, as EU lawyers do not cease to emphasize, that the direct effect of EU law has bestowed directly enforceable *rights* on firms and individuals—first economic rights and now even citizenship rights. Yet if the function of legitimacy is to motivate compliance with *undesired obligations*, what matters for the EU is the compliance of governments, parliaments, administrative agencies and courts within member states—which, incidentally, has always been the focus of empirical compliance research, including the one

3 See Imort (2001). Germany had committed to destroy 400,000 cows, but after violent protests by animal protection groups (and some recovery of the beef market) only 80 000 cows were ultimately killed. A play-by-play chronicle of the BSE crisis in Germany is provided in <www.netdoktor.de/feature/bse/creutzfeldt_jakob_chronik.htm>.

that just received EUSA's best book award (Falkner et al. 2005; see also, Börzel et al. 2007).

Empirically, therefore, the EU is best understood as a government of governments, rather than a government of citizens. In that role, moreover, it is extremely dependent on voluntary compliance. Unlike national governments, which can and do reinforce normative obligations with the threat of effective and potentially very drastic enforcement measures, the EU has no enforcement machinery which it could employ against member governments: no army, no police force, no jails—even the fines which the Court may impose in Treaty violation proceedings could not be collected against determined opposition.

If this is acknowledged, the normative discussion of EU legitimacy should also focus primarily on the relationship between the Union and its member states and on the normative arguments that could oblige their governments to comply with undesired EU rules. Now if the same question were asked in the German multilevel polity, a sufficient answer would point to the superior input legitimacy of political processes at the national level. *Länder* governments refusing to comply with federal legislation would thus violate the principles of popular sovereignty and representative democracy. Since the same answer could not be given for the EU, considerations of output legitimacy would necessarily have greater weight here.[4]

From the perspective of member governments it would thus be relevant to ask in what ways and to what extent membership of the European Union increases or reduces their capacity to ensure peace and security and to improve the welfare of the societies for which they are responsible. If national discourses on European legitimacy were framed in these terms, much of the present sense of malaise might evaporate.[5]

My main concern, however, is with the second implication of the multilevel perspective on political legitimacy. If the Union depends so completely on its member states, then the potential effects of EU membership on their legitimacy should also have a place in normative analyses. These effects may be positive or negative. Most important among the positive effects is surely the maintenance of peaceful relations among European nations which, for centuries, had been mortal enemies. At the same time, European integration helped to stabilize the transition to democracy: first in West Germany and perhaps also in Italy, then in Greece, Portugal and Spain, and then again in the Central and Eastern European accession states (Judt 2005).

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4 Hurrelmann (2007) found that evaluations of the EU in the German and British quality press also emphasized output-oriented criteria.

5 On the crucial importance of national discourses on the EU for legitimacy at both levels, see Schmidt (2006: Chapter 5).

More generally, one should think that the EU is strengthening the political legitimacy of its member states because it is dealing with problems that could no longer be resolved at national levels. While this argument has analytical merit, it is surprisingly difficult to substantiate empirically.[6] In any case, moreover, it would need to be balanced against the possibility that many of the problems with which member states now must cope have been caused by European integration in the first place, and that these may weaken political legitimacy at the national level (Bartolini 2005). It is these possibilities to which I will now turn.

4 European Constraints on the Political Legitimacy of Member States

There is no question that the EU is imposing tight constraints on the capacity for autonomous political action on the part of its member states—in monetary policy, in fiscal policy, in economic policy and in an increasing range of other policy areas. But to think that these constraints could undermine political legitimacy at the national level still seems a surprising proposition. Given the central role of national governments, not only as "masters of the treaties" and as unanimous decision-makers in the second and third pillars, but also in legislation by the "Community Method" in the first pillar, in Comitology and in the Open Method of Coordination, one ought to think that these constraints are mostly self-imposed, and probably for good economic and political reasons (Garrett 1992; Moravcsik 1998; Moravcsik/Sangiovanni 2003). In other words, *volenti non fit iniuria*?

This is a fair argument as far as it goes. But it does not go very far for two reasons. First, the argument applies only to the "political modes" of EU policy making in which the governments of member states have a controlling role, but it does not apply to the "non-political modes" in which the Commission, the Court and the Central Bank are able to impose policy choices without any involvement of member governments, or the European Parliament for that matter (Scharpf 2000). I will return to this in a moment.

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6 There is reason to think that political legitimacy in relatively poor accession states has been strengthened by the high rates of economic growth that could be achieved through a combination of European subsidies with unconstrained tax and wage competition. By contrast, the economic benefits of integration for the Union as a whole appear much more doubtful (Ziltener 2002; Bornschier et al. 2004).

Moreover, even for political choices, the argument holds only the first time around, when the EU is writing on a clean slate. Here, unanimity or very high consensus requirements will indeed prevent the adoption of policies that would violate politically salient interests in member states. And if no agreement is reached, national capabilities—whatever they may amount to—will remain unimpaired. But once the slate is no longer clean, these same consensus requirements will lose their benign character. Now, existing EU rules—whether adopted by political or non-political modes—are extremely hard to amend in response to changed circumstances or changed political preferences. European law will thus remain in place even if many or most member states and a majority in Parliament would not now adopt it. This constraint may be felt most acutely by recent accession states who have had to accept the huge body of existing European law as a condition of their membership, and who have little or no hope of later changing those parts of the *acquis* that do not fit their own conditions or preferences.

What matters even more here, however, is how the high consensus requirements of the political modes increase the autonomy and the power of EU policy making in the non-political modes (Tsebelis 2002: Chapter 10). In the case of the European Central Bank, it is true, the impotence of politically accountable actors was brought about intentionally (though perhaps unwisely) by the governments negotiating over the Monetary Union. The same cannot be said, however, for the non-political policy-making powers of the Commission and the Court.

Of course, the Court's responsibility to interpret the law of the Treaty and secondary European law was also established intentionally, as were the Commission's mandate to prosecute, and the Court's powers to punish Treaty violations. What was not originally foreseen, however, was the boldness with which the Court would establish the doctrines claiming "direct effect" and "supremacy" for European law (DeWitte 1999; Alter 2001)—and how these would then allow it to enforce its specific interpretation of very general Treaty commitments. What also could not have been known in advance is how the potential range of the Court's powers of interpretation could be strategically exploited by the Commission if and when it chose to initiate Treaty violation proceedings against a member state—and how successful prosecutions against some governments would then be used to change the political balance in the Council in favor of directives proposed by the Commission which otherwise would not have been supported by a qualified majority (Schmidt 2000).

Moreover, the substantive range of judicial legislation is greatly extended by the fact that its exercise is practically immune to attempts at political correction. If the Court's decision is based on an interpretation of the Treaty, it could only be overturned by an amendment that must be ratified in all twenty-seven mem-

ber states. Given the extreme heterogeneity of national interests and political preferences, this is not an eventuality that the Commission and the Court need worry about. Nor is the situation very different for interpretations of secondary EU law. In fact, the inevitable compromises between national interests favor vague and ambivalent formulations in EU regulations and directives that are effectively invitations to judicial specification. Attempts at political correction would then depend upon an initiative of the Commission and the support of qualified majorities in the Council, and if the Council should wish to change the Commission's proposal, it could only do so through a unanimous decision. As a consequence, the potential for judicial legislation is greater in the EU than under any national constitution.

5 Negative Integration and Empirical Legitimacy?

But why should one think that the non-political powers of the Commission and the Court could interfere with the political legitimacy of EU member states? A general argument might point to the inevitable loss of national autonomy and control and the reduced domain of democratically accountable governing. Instead, I wish to present a narrower argument that focuses on a specific vulnerability of national political legitimacy to the rules of negative integration that are being promoted by judicial legislation.

On the first point, I return to the distinction between normative and empirical perspectives on legitimacy. In normative discourses, the focus is on the vertical relationship between governors and the governed. What matters are institutional arrangements ensuring, on the one hand, responsive government and political accountability and preventing, on the other, the abuse of governing powers through the protection of human rights and the rule of law. At the empirical level as well, trust in the effectiveness of these vertical safeguards must play a significant role in legitimacy beliefs.

But that is not all. Voluntary compliance also has a horizontal dimension in which individual subjects will respond to perceptions of each other's non-compliance. In game-theoretic terms, this relationship can be modeled as an n-person prisoners' dilemma, in which compliance must erode in response to information about unsanctioned non-compliance (Rapoport 1970). This theoretical intuition is confirmed both by empirical research on tax evasion (Levi 1988) and on the survival or decline of cooperative institutions (Ostrom 1990) and by experimental research (Fehr/Fischbacher 2002)—all of which demonstrate that voluntary compliance with rules, whether imposed or agreed upon, does indeed

erode as a consequence of perceived non-compliance. Why should I remain law-abiding if others are allowed to get away scot-free? Hence we must assume that effective legitimating beliefs will also include expectations of a basic mutuality and fairness among citizens and of a basic reciprocity between the consumption of public goods and the obligation to contribute to their production (Rothstein 1998). It is these expectations which are vulnerable to the removal of national boundaries through negative integration (Scharpf 1999: Chapter 2).

Even in the original EEC Treaty, governments had signed sweeping commitments to negative economic integration. Customs duties and quantitative restrictions to free trade and "all measures having equivalent effect" were to be prohibited; obstacles to the free movement of persons, services and capital should be abolished; undistorted competition in the internal market was to be ensured; and any discrimination on grounds of nationality was to be ruled out. In the original understanding, however, these were political commitments whose more precise meaning and reach would in due course be spelled out through further negotiations between governments and through political legislation at the European level—and whose consequences could be controlled through re-regulation at the European level.

Under the unanimity rule, however, political progress toward market integration was slow. Beginning in the early 1970s, therefore, the Court began to give direct effect to these Treaty commitments. But given the intrinsic limitations of judicial power, it could only strike down national regulations that impeded free trade and free movement; it could not itself re-regulate the underlying problems at the European level. The resulting asymmetry was only somewhat reduced when the Single European Act introduced the possibility of qualified majority voting in the Council for regulations implementing the Internal Market program. Where conflicts of interest among member states are politically salient, European regulations can still be blocked very easily, whereas judicial legislation continues to extend the reach of negative integration (Weiler 1999).

This asymmetry of negative and positive integration has effects that may undermine expectations of reciprocity at the national level. Now capital owners may evade or avoid income and inheritance taxes by moving their assets to Luxembourg; firms may relocate production to low-cost countries without reducing their access to home markets; local service providers may be replaced by competitors producing under the regulations and wages prevailing in their home country; national firms may avoid paying the "tax price" for their use of public infrastructure by creating financing subsidiaries in member states with the lowest taxes on profits; and the latest series of ECJ decisions allows companies to evade national rules of corporate governance by creating a letter-box parent company in a low-regulation member state. Many of these examples—and the

list could easily be extended—can be interpreted as a consequence of neo-liberal and free-trade economic preferences in the Internal Market and Competition directories of the Commission and on the Court (Gerber 1994; Höpner/Schäfer 2007).[7]

But this motive alone can no longer explain the full range of Court-imposed rules of negative integration. A dramatic recent example is provided by a decision striking down, as discrimination on account of nationality, an Austrian regulation of admissions to medical education that had required applicants from abroad to show that they could also have been admitted in their home country (C-147/03, 20 January 2005). The Austrian rule had tried to deal with the disproportionate inflow of applications from Germany, where admissions are restricted by stringent *numerus clausus* requirements—and when this was voided by the Court, the proportion of applicants from Germany rose to 60 percent in some Austrian universities. In response, Austria passed a new rule limiting admissions from abroad to 25 percent of the total—against which the Commission again initiated Treaty violation proceedings that are presently on their way to the Court.

As an exercise in legal craftsmanship, the decision seems surprisingly weak: it is based on Article 12 of the EC Treaty—which, however, does not prohibit discrimination on grounds of nationality per se, but only "within the scope of application of this Treaty." Yet nothing in the present Treaty (nor even in the draft Constitutional Treaty—Article III—282) empowers the Union to regulate university admissions. Instead, Articles 3 and 149, to which the Court referred, merely authorize the Community to make "a contribution to education" (Art 3, 1 EC) and to "encourage mobility of students and teachers" (Article 149, 2 EC)—but with the explicit proviso that such actions should be limited to recommendations by the Council and to "incentive measures, excluding any harmonization of the laws and regulations of member states" (Article 149, 2 and 4 EC). In other words: the "masters of the treaty" have ruled out EU legislation that could regulate admissions to member states' universities.

Moreover, these restrictions were explicitly introduced in the Maastricht Treaty to limit the expansion of the EU's role in education. Yet the Court merely cited its own *pre-Maastricht* precedent (193/83, 13 February 1985) that had had no textual basis in the Treaty, to assert that access to vocational education was within the scope of the Treaty. Apart from the arrogance with which political corrections of judicial legislation are ignored here, the decision appears remarkable for its completely one-sided concern with maximizing educational mobil-

7 On the basic affinity between multilevel governance and neo-liberal policy preferences, see Harmes (2006).

ity and (in contrast to the legal situation among the American states) in ruling out any preference for residents of the country where the taxes are raised that finance higher education. This is like saying that the EU entitles you to claim access to a dues-financed club even if you (or your family) are not assuming the burdens of membership. Similarly, there is no concern for the structural problems Austrian medical education and medical practice will face if half or more of the available places go to students from abroad that are most likely to leave the country after graduation.[8]

This is a remarkable position which, as I said, is not logically connected to the free-market fundamentalism that may explain liberalization decisions in other areas. Instead, it must be seen as the expression of a more general pro-integration bias that treats any progress in mobility, non-discrimination and the removal of national obstacles to integration as an unmitigated good and an end in itself. In this regard, the case is by no means unique. As Dorte Sindbjerg Martinsen has shown in a fascinating series of papers, the same pro-integration bias has also been driving the case law that is progressively removing the boundaries shielding national welfare systems.[9] Its intensity is revealed by the variety of Treaty bases which the Court invoked to move forward in the same direction from one case to the next—relying sometimes on the protection of migrant workers, sometimes on the freedom of service provision, sometimes on non-discrimination, and sometimes on the new chapter on "citizenship of the Union." Moreover, when governments managed, by unanimous decision in the Council, to force the Court to retreat on one front, the ground was recovered a few years later by decisions relying on another Treaty base (Martinsen 2003, 2005a, 2005b, 2005c, 2007).

This quasi-unconditional preference for more integration through the removal of national boundaries has consistently characterized the policies proposed by the Commission and enacted by the Court. Their preference is widely shared by academic specialists in European law, who not only admire, and contribute to, the evolution of a largely autonomous legal system (Craig/Búrca 1999), but also praise the functional effectiveness of "integration through law" under conditions where political integration has been weak (Weiler 1982; Cappelletti et al. 1985). Nearly the same admiration is evident in political science studies of the judicial edifice (Alter 2001; Stone Sweet 2004) and, more generally, in the way

8 Apparently, Austria has a shortage of doctors as well as a perceived general need to expand its university education in spite of tight budget constraints. Having to introduce restrictive admissions examinations, as the Court had suggested, in order to contain the flood of German applicants would thus be counterproductive.

9 See also the magisterial study by Maurizio Ferrera (2005), which, however, is surprisingly optimistic about the possibility of a recreation of boundaries at the European level.

Europeanists in the social sciences view the "constitutionalization" of the European polity—whether achieved through "stealth" and "subterfuge" or through explicit political action (Héritier 1999; Rittberger/Schimmelfennig 2006).

This pro-integration bias, I hasten to add, is most plausible and respectable, considering the horrors of our nationalistic pasts and the manifold benefits that we derive from the progress toward an "ever closer Union." But as long as the asymmetry between political immobilism and judicial activism persists, progress is mainly achieved by non-political action, which—since the judicial power to destroy far exceeds its capacity to create—is bound to favor negative integration. The mere removal of national boundaries, however, is likely to deepen the divide between the mobile and the immobile classes in our societies, and between the beneficiaries of integration and those who have to pay its costs in terms of unemployment, lower wages and higher taxes on the immobile segments of the tax base. If left unchecked, the split is dangerous for member states if it undermines the sense of mutuality and reciprocity at the empirical base of national legitimacy. And it is dangerous for the Union if it weakens the willingness or the ability of member states to maintain the voluntary compliance on which the viability of European integration continues to depend.

6 So What Could Be Done?

To summarize: a multilevel perspective on legitimacy in the European polity suggests a change of emphasis in current normative and empirical discussions. As long as the EU is able to rely on the voluntary compliance of its member states, the alleged European democratic deficit loses much of its salience. Instead, the structural asymmetry between the immobilism of political modes of EU policy-making and the activism of non-political modes of EU policy-making appears more worrying. Moreover, there is a danger that the unrestrained pursuit of economic and legal integration may weaken the political legitimacy of member states and endanger the voluntary compliance of governments with EU rules that violate salient national interests.

But it is difficult to see how this danger might be avoided. There is apparently no way of persuading the Commission and the Court to use their non-controllable power in a more balanced way that would give more weight to the national problems that are created by the inexorable progress of negative integration. So, if judicial self-restraint cannot be counted upon, one should seek ways to increase the European capacity for political action. Given the high consensus requirements and the heterogeneity of national interests in EU 27, however,

this seems a remote possibility. I am also deeply skeptical of proposals to invigorate the political modes of EU policy-making through political mobilization and the politicization of EU policy choices (Follesdal/Hix 2006; Zürn 2006). I agree with Stefano Bartolini (2005) that the most likely outcome, under present institutional rules, would be increased conflict and even less capacity for political action—as well as frustration and increased alienation among disappointed citizens. And, for reasons explained elsewhere (Scharpf 1999), I would be even more skeptical of institutional reforms that would reduce the veto power of the Council in favor of majority rule in the European Parliament.

Instead, one might think of creating a defense for politically salient national concerns that avoids the disruptive consequences of open non-compliance and that does not depend on the good will of the Commission and the Court. A while ago I suggested that this could be achieved through a form of politically controlled opt-outs (Scharpf 2006). Member states could then ask the Council to be exempted, in a specific case, from a particular EU rule which in their view would violate highly salient national interests. I still think this would be a good idea: the Council could be counted upon to prevent opt-outs at the expense of other member states, but in the absence of significant externalities it would also have more sympathy with the plight of a fellow government than could be expected from the Commission or the Court. At the same time, the prospect that one could later apply for an opt-out might facilitate agreement in the Council on new EU legislation and thus strengthen the political modes of EU policy-making. As far as I know, however, this idea has not found any takers.

So I must leave it at that. I certainly cannot say that I have a solution. Yet I am persuaded that there is indeed an important problem—on which, as we used to say, much research remains to be done.

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Legitimacy

In my understanding, any discussion of legitimacy in the multilevel European polity needs to start from a functional perspective: Socially shared legitimacy beliefs are able to create a sense of normative obligation that helps to ensure the voluntary compliance with undesired rules or decisions of governing authority (Scharpf 1999; Höffe 2002: 40). By providing justification and social support for the "losers' consent" (Anderson et al. 2005), such beliefs will reduce the need for (and the cost of) controls and sanctions that would otherwise be needed to enforce compliance.[1] They should be seen, therefore, as the functional prerequisite for governments which are, at the same time, effective and liberal.

From this functional starting point, further exploration could take either an empirical turn, focusing on citizens' compliance behavior and justifying beliefs, or a normative turn, focusing on good reasons for such beliefs. Here, I will focus on the normative discussion.

Republican and Liberal Legitimating Discourses

Contemporary normative discourses in Western constitutional democracies are shaped by two distinct traditions of political philosophy, which may be conventionally labeled "republican" and "liberal" (Bellamy 2007). Even though individual authors may have contributed to both, the origins, premises, generative logics, and conclusions of these traditions are clearly distinguishable.

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1 The need for, or functional importance of, legitimacy is a variable, rather than a constant. It rises with the severity and normative salience of the sacrifices requested, and it falls if opt-outs are allowed—for example, if the waiting lists of a national health system can be avoided through access to foreign providers (Martinsen 2009).

The republican tradition can be traced back to Aristotle. For him, the polity is prior to the individual and essential for the development of human capabilities.[2] What matters is that the powers of government must be employed for the common good—and the problem, under any form of government, is the uncertain "virtuousness" of governors who might pursue their self-interest instead. The concern for the common good of the polity and its institutional preconditions had also shaped the political philosophy of republican Rome (Cicero 1995) which was resurrected in the Florentine renaissance (Machiavelli 1966). From there, one branch of the republican tradition leads through the "neo-Roman" theorists of the short-lived English revolution to the political ideals of the American revolution (Pocock 1975; Skinner 1998; Dahl 1989: Chapter 2) and to contemporary concepts of "communitarian" democracy (Pitkin 1981; Maclntyre 1984, 1988; Pateman 1985; Michelman 1989; Taylor 1992; cf. Habermas 1992: 324–348). The other branch leads to the radical egalitarianism of Rousseau's *Contrat Social,* which shaped the political thought of the French revolution and continues to have a powerful influence on Continental theories of democratic self-government. With the classical heritage Rousseau shares the primacy of the polity and the emphasis on the common good, to which he adds the postulate of equal participation in collective choices.[3]

But then, as for Aristotle, the "virtuousness" of the collective governors becomes a critical problem—requiring the transformation of a self-interested *volonté des tous* into a common-interest oriented *volonté générale.* This theoretical difficulty was pragmatically resolved by the invention of representative democracy, coupling the medieval representation of estates with the aspirations of democratic self-government (Dahl 1989: 28–30). Here, the orientation of representatives to the common good is to be ensured by the twin mechanisms of public deliberation (Habermas 1962; Elster 1998) and electoral accountability, while the egalitarianism of democratic republicanism is reflected in the fundamental commitment to universal and equal suffrage.

Compared to republicanism, the "liberal" tradition is younger, going back to the early modern period and Thomas Hobbes (1986), rather than to Greek and Roman antiquity. Here, priority is assigned to the individual, rather than to the polity; the state is justified by the need to protect individual interests, and individual self-determination replaces the value of collective self-determination. What matters, once basic security is established by the state, are strict limitations on its governing powers in order to protect the fundamental value of "negative

2 Aristoteles (1989).

3 Rousseau (1972/1959: Book 1, Chapter 6; Book 2, Chapters 1 and 4).

liberty," which—in the tradition of John Locke and Adam Smith—should be understood as the "freedom of pursuing our own good in our own way" (Berlin 1958: 11).

Where the need for governing powers cannot be denied, individual liberty is best preserved by a rule of unanimous decisions (Buchanan/Tullock 1962) or, in any case, by the checks and balances of multiple-veto constitutions and pluralist patterns of interest intermediation (Dahl 1967). If at all possible, decisions ought to be based on the consensus of the interests affected, rather than on majority votes.

In the Continental branch of enlightenment philosophy, by contrast, Immanuel Kant had grounded the individualist position not in self-interest, but in the moral autonomy and rationality of the individual. Being at the same time free and morally obliged to follow their own reason, they will see that their liberty is constrained by the equal freedom of all others—which means that their choices must be governed by the "categorical imperative" (Kant 1961). But given the "crooked timber" of human nature, the moral imperative alone does not suffice, in practice, to ensure the mutual compatibility of individual liberties. There is a need, therefore, for general laws that are effectively sanctioned by state authority. Such laws will approximate a state of universal liberty if they define rules to which all who are affected could agree in their capacity as autonomous and rational actors (Kant 1966, 1992). As Isaiah Berlin (1958: 29–39) pointed out, however, this potential-consensus test could justify a very intrusive regulatory state—especially when decisions are delegated to the "deliberation" of politically independent agencies or courts (Somek 2008). In other words, Kantian liberalism based on the categorical imperative, just like Rousseau's republicanism based the *volonté générale,* may well be invoked to legitimate laws and policies that depart widely from the empirical preferences of self-interested citizens.

Constitutional Democracies—and the EU?

Obviously, this rough sketch exaggerates the differences between the dual traditions of Western political philosophy, and a fuller treatment would have to be more nuanced and differentiated. What matters here, however, is the fact that the legitimacy of Western constitutional democracies rests on normative arguments derived from both of these traditions. They are all liberal in the sense that governing powers are constitutionally constrained, that basic human rights are protected, and that plural interests have access to the policy-making processes by which they are affected. At the same time, they all are republican in the sense that they are representative democracies where governing authority is obtained and withdrawn through regular, universal, free, and equal elections, where policy

choices are shaped through public debates and the competition of political parties, and where institutions that are exempt from electoral accountability will still operate in the shadow of democratic majorities or, at least, of a democratic *pouvoir constituant*. In other words, republican and liberal principles coexist, and they constrain, complement, and reinforce each other in the constitutions and political practices of all Western democracies (Bellamy 2007). In a sense, they are mutual antidotes against each other's characteristic perversion—as republican collectivism is moderated by the protection of individual liberties, whereas libertarian egotism is constrained by the institutions of collective self-determination.

Nevertheless, the actual combinations vary, and differences matter: Republican politics are facilitated in unitary states and impeded by federal constitutions; individual interests receive less judicial protection where the constitution emphasizes parliamentary sovereignty; and consensus-dependent pluralism is stronger in the United States or in Switzerland than it is in the UK, New Zealand, or in France.[4] But these differences seem to fade in importance if we now turn our attention from the world of democratic nation states to the European Union (EU). If seen by itself and judged by these standards, the Union appears as the extreme case of a polity conforming to liberal principles which, at the same time, lacks practically all republican credentials.

Its liberalism is most obvious in the priority accorded to the protection of (some) individual rights and the tight constraints impeding political action: The European Court of Justice (ECJ) is more immune from political correction than the constitutional court of any democratic state. It has, from early on, interpreted the Treaty commitment to establish a Europe-wide market and the free movement of goods, persons, services, and capital not as a programmatic goal to be realized through political legislation, but as a set of directly enforceable individual rights that will override all laws and institutional arrangements of EU member states. In the same spirit, the principle of non-discrimination on grounds of nationality and the politically rudimentary European citizenship have been turned into individual rights of EU nationals to access the social benefits and public services of all member states (Wollenschläger 2007). At the prodding of national constitutional courts, moreover, the ECJ has also begun to protect non-economic human rights, and with the inclusion of the Charter of

4 Looking at the "semantics" of national normative discourses, rather than at institutions and practices, Richard Münch (2008a: Chapter 4) identifies France with republicanism and Britain with liberalism, identifying the one with French and the other one with British political discourses. In his view, however, both are manifestations of a common European commitment to "moral universalism and ethical individualism" which drives the European transformation of national societies.

Basic Rights in the Constitutional Treaty, the Court will be able to complete the European protection of individual rights.

At the same time, the capacity for collective political action of the European polity is impeded by extremely high consensus requirements, and the input-side of its political processes could not be more pluralist, and less majoritarian in character. The Commission itself, which has a monopoly of legislative initiatives, relies on an extended infrastructure of committees and expert groups that allow access for a wide range of organized interests. Through the Council of Ministers, moreover, whose agreement by at least a qualified-majority vote is required for all legislation, all interests that have access to the national ministries in charge will also have access to the European level. The European Parliament, finally, whose role in legislation was considerably expanded in recent Treaty revisions, also prides itself on giving voice to interests and concerns that might possibly have been ignored in the Commission and the Council. In short, European legislation is characterized by very open and diversified access opportunities which, combined with very high consensus requirements, make it unlikely that its effect on major (organized) interests might be ignored in the process. And consensus is of course also the hallmark of the "New Modes of Governance" which are employed to achieve policy coordination through "soft law," "benchmarking," "deliberation," and "institutional learning" in fields where the Union may still lack the power to legislate (Héritier 2003; Kohler-Koch/Rittberger 2006; Héritier/Lehmkuhl 2008).

To complete the liberal model on the output-side, the EU has developed considerable effectiveness as a regulatory authority. It is most powerful in the field of monetary policy, where policies of the European Central Bank (ECB) are completely immunized against political intervention. Moreover, the Commission and the Court have enjoyed similar political independence in developing a very effective competition regime, not only for the private sector but also for state aids and the public-service and infrastructure functions that might distort market competition. Some of these regimes could be based directly on the Treaties, while others depended on political compromises and European legislation. Even there, however, the Commission, the Court, and standard setting agencies have come to play such important roles in the licensing of pharmaceuticals and the regulation of product safety, food qualities, environmental standards, or workplace discrimination, that its effectiveness as a "regulatory state" could be described as the EU's paramount legitimating achievement (Majone 1996, 1998).

But if the EU might well qualify by liberal standards, it would definitely fail by the criteria of republican democracy. On the output side, the Union's capacity to promote the common good is constrained by the extremely high consensus

requirements of EU legislation. They prevent effective collective action in response to many problems that member states could not deal with nationally. The notorious inability to regulate competition over taxes on company profits and capital incomes is just one example (Ganghof/Genschel 2008a, 2008b). Worse yet, these same decision rules are responsible for an extreme conservative bias of EU policy. New legislation may be based on broad consensus. But once it is adopted, it cannot be abolished or amended in response to changed circumstances or changed preferences as long as either the Commission refuses to present an initiative or a few member states object. Beyond that, rules derived from the judicial interpretation of the Treaties could only be corrected through Treaty amendments that must be adopted unanimously by all member governments and ratified by parliaments or popular referenda in all member states. In other words, once EU law is in place, the *acquis* is nearly irreversible and its correspondence with the common good becomes progressively more tenuous as time goes on.

The constraints of consensual decision-making cannot be significantly relaxed as long as the peoples of 27 member states lack a collective identity that could legitimate Europe-wide majority rule. And even if citizens were to develop a sense of common solidarity and a stronger attachment to the European polity than to their own nation state (perhaps in response to external challenges from America, Russia, or China), they would presently lack all the societal and institutional prerequisites of input-oriented democracy: No Europe-wide media of communication and political debates, no Europe-wide political parties, no Europe-wide party competition focused on highly salient European policy choices, and no politically accountable European government that must anticipate and respond to the egalitarian control of Europe-wide election returns. There is no theoretical reason to think that these deficits should be written in stone. But at present, input-oriented republican legitimacy cannot be claimed for the Union.

While these stylized diagnoses may be somewhat overdrawn, they suggest a *prima facie* plausible interpretation of current disputes over the existence of a "European democratic deficit." Authors and political actors starting from a "liberal" framework of normative political theory will find it easy to attest to the democratic legitimacy of the EU by pointing to its protection of individual rights, to its pluralist openness to policy inputs, its consensual decision rules, and the effectiveness of its regulatory policies (Moravcsik 1998, 2002). By contrast, authors and political actors viewing the EU from a "republican" perspective will point to deficiencies on the output side, where the concern for individual rights and the responsiveness to organized interests are accompanied by a systemic neglect of redistributive policy goals. Their more salient criticism is, however,

directed at the glaring democratic deficits on the input side, emphasizing the lack of a common public space, the lack of Europe-wide political debates, party competition, and political accountability (Greven 2000; Harlow 2002; Follesdal/Hix 2006, 2008). If some of these authors, nevertheless, assume that these deficiencies might eventually be overcome through institutional reforms and the mobilization strategies of European parties, they seem to underestimate the disruptive potential of political mobilization and confrontation in an institutional framework which, in the absence of a strong collective identity, would still require consensual decision making (Bartolini 2005, 2008).

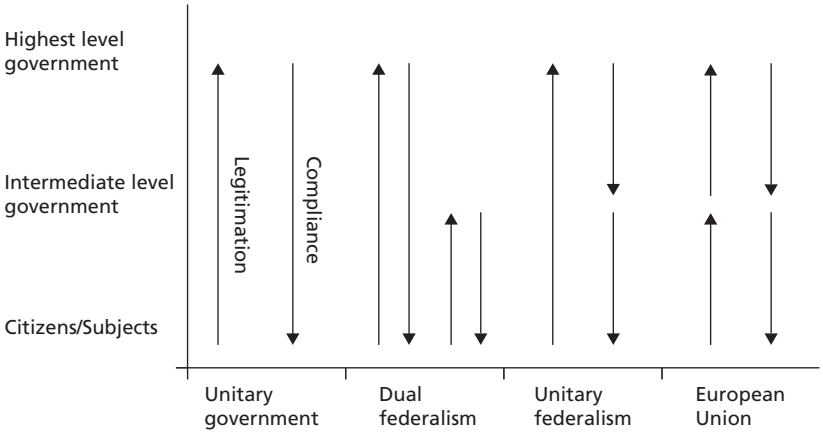
Legitimacy in Multilevel Polities

In any case, however, the EU in its present shape is so far from meeting the republican criteria of democratic legitimacy that it cannot benefit from the coexistence and mutual reinforcement of liberal and republican principles that supports the legitimacy of constitutional democracies at the national level (Preuss 1999). But does this matter if it is acknowledged that the EU is not a free-standing, single-level polity? In the two-level constellation of the European polity, the member states are indeed expected to conform to the full range of liberal as well as republican criteria of legitimacy. It seems reasonable to ask, therefore, how this constellation should be treated in normative discussions about the legitimacy of the European polity.

For an answer, it is useful to compare the compliance and legitimating relationships between citizens and governments in different institutional constellations. In a unitary state, these relationships are congruent: Compliance is demanded by the central government through its administrative agencies, and the legitimacy of these requests is established through national public discourses and the accountability of the central government to the national electorate. Congruence can also be achieved in two-level polities if their institutional architecture conforms to the model of "dual federalism." There, each level of government has its own domain of autonomous legislative authority, its own implementation structures, and its own base of electoral accountability.

Matters are more complicated, however, in a "unitary federal state" like Germany where most legislative powers are exercised nationally, whereas national legislation is implemented by the *Länder*. Hence *Land* authorities are expected to comply with federal mandates, and citizens are expected to comply with the rules enforced by the *Land* authorities, regardless of their national or local origin. In the unitary political culture of the German two-level polity, however, this

Figure 12-1 Compliance and legitimation in multilevel governments



two-step compliance relationship does not create problems of democratic accountability. Public attention and public debates are almost exclusively focused on politics and policy choices at the national level. *Länder* elections, which may affect party-political majorities at the national level (in the *Bundesrat*), are generally and justifiably considered as second-order national elections where parties fight about national issues and voters express their approval or disapproval of the national government's performance (Burkhart 2008). In other words, while the compliance relationship runs between citizens and their respective *Länder* authorities, the dominant legitimacy relationship in Germany runs between citizens and the national government which is held accountable for public policies that affect the citizen.

The two-level polity, comprising the EU and its member states, shares some important structural characteristics with German federalism (Scharpf 1988)—but in the context of a discussion about political legitimacy, the differences appear to be much more important. Compared to Germany, the Union is far more dependent on its member states: European legislation must be transposed through national legislatures; European law must be implemented through the administrative agencies and courts of the member states; and European revenue depends almost entirely on national contributions. As a consequence, compliance is even more a two-step process than is true in Germany (Figure 12-1).

From the perspective of citizens, compliance is exclusively demanded by national administrative agencies, tax authorities, and courts. And except where

the Commission may directly prosecute the violation of competition rules, even business firms are never directly confronted with the EU as a governing authority. By the same token, the compliance that matters from the perspective of the Union is the willingness and ability of its member governments to ensure the implementation of European law. This is the compliance which the Commission keeps monitoring, and which is also the subject of a growing body of compliance research (Falkner et al. 2005; Zürn/Joerges 2005; Börzel et al. 2007).

As in Germany, therefore, we have a two-step compliance relationship—between citizens and their respective national governments, and between these and the EU. In contrast to Germany, however, we also have a two-step legitimating relationship in the European polity. While in German federalism, citizens address their demands and their electoral responses to the higher (national) level of government, the higher level of the European polity is beyond the horizon of citizen's expectations and political demands; it is not the target of public debates and party competition, and it is not vulnerable to electoral sanctions (Mair 2008). As far as citizens are concerned, they are only connected to the lower (member-state) level of government through a legitimating feedback loop. And since voters are not obliged to be fair and, in any case, could not know the origin of the rules with which they are asked to comply, "the politics of blame avoidance" (Weaver 1986) is not a useful option for member governments. They must in fact carry the full burden of political accountability for their exercise of governing authority, regardless of how much European law may have contributed to it.

In the two-level European polity, therefore, the EU must be seen and legitimated not as a government of citizens, but as a government of governments. What matters foremost is the willingness and ability of member states to implement EU law and to assume political responsibility for doing so. It seems fully appropriate, therefore, that compliance research focuses exclusively on the relationship between the EU and its member states. But if that is so, then it is not obvious that normative discussions of EU legitimacy should treat the Union as if it were a free-standing polity, and that normative discussions of EU legitimacy should employ monistic concepts that ignore the two-step relationship and focus almost exclusively on the presence or absence of a "democratic deficit" in the relation between the EU and its citizens or subjects. Instead, we need to discuss the legitimating arguments that justify the compliance of member states with EU mandates, and the conditions that allow member states to legitimate this compliance in relation to their own citizens.

Legitimating Member State Compliance

From the perspective of member governments, membership in the EU is fully justified by its contribution to peace and democracy on the European continent, while the record appears more ambivalent with regard to the economic promises of integration. In any case, the attraction of membership continues to exercise its pull in the near abroad, and secession does not seem to be on the agenda of any of the old and newer member states. But just as the fact that most citizens will not emigrate is no sufficient indicator of the democratic legitimacy of a nation state, the holistic assessment of the benefits of membership will not, by itself, establish the legitimacy of all Union mandates. As is true in democratic nation states, what matters are more specific characteristics of the policy-making institutions and processes that generate the mandates with which member governments are expected to comply. Here, I find it useful to distinguish between two fundamentally differing modes of EU policy making, for which I use the labels "political" and "non-political" (Scharpf 2001).

Political modes are those in which member governments have a voice—most directly in Treaty negotiations and in those policy areas where EU legislation still requires unanimous agreement. But even where legislation by the "Community Method" depends on an initiative by the Commission and the agreement of the European Parliament, the requirement of qualified majorities in the Council and the consensus-enhancing procedures of the Council ensure member governments of a significant voice in the process. This is not so in the non-political modes of EU policy making. Member states, or the European Parliament, for that matter, have no voice when the ECB determines the course of monetary policy, when the Commission decides to prosecute certain practices of EU member states as Treaty violations, and when the ECJ uses its powers of interpretation to shape the substance of primary and secondary European law. Since the effects of policies so adopted may exceed the importance of many acts of EU legislation, their legitimacy needs to be explicitly discussed as well.

Political Modes of Policy Making

From the perspective of member governments, the high consensus requirements of EU legislation seem to ensure its input legitimacy. Policies are adopted with their agreement, and even where Council votes are taken by qualified majority, consensus-seeking practices are so effective, that politically salient national interests that are vigorously defended by the respective governments are rarely overruled. But that does not mean that EU legislation is without problems from the perspective of member governments.

The most obvious problem is that high consensus requirements will often[5] prevent majorities of member states from achieving "European solutions" to problems which, in their view should and could be resolved at the European level. From their perspective, therefore, the output legitimacy of European legislation remains systematically constrained. Nevertheless, where this is a first attempt at European regulation, failure to agree on common rules leaves member governments free to cope with the problem as best as they can at the national level. A potentially much more difficult problem arises, however, once a European rule is in place. Its "supremacy" will not only displace all existing national law that is inconsistent with it, but it will also "occupy the field" and pre-empt future attempts to deal with the same matter through national legislation.

At the same time, moreover, the existing European rule is now protected against changes by exactly the same high consensus requirements that had impeded its earlier adoption. So even if the policy does not work, or if circumstances or the political preferences of most member governments should have changed significantly, it will remain in force and cannot be reformed as long as it is still supported by either the Commission (without whose initiative no amendments are possible) or by a small blocking minority in the Council.[6] In other words, European legislation is much less reversible than national legislation which may be adopted, amended, and revoked by the same simple majorities.[7] As a consequence, the presumption that existing legislation continues to be sup-

5 Often, but not always. There are indeed policy areas where EU legislation appears more "progressive" and "perfectionist" than one should expect in light of the political preferences of the median member state—for instance, the fields of consumer protection, work safety, or environmental policy. One reason may be the strong commitment to the success of EU initiatives of "Europhile" national representatives in the Council Secretariat and in COREPER (Lewis 2005). But at least a contributing cause may also be the relative weakness of cross-sectional policy coordination within the Commission and in the Council. This may allow policy specialists whose aspirations are frustrated in inter-ministerial bargaining at home to pursue these in intergovernmental consensus within their specialized Council. Thus, blockades and compromises on the lowest-common denominator should be primarily expected where intergovernmental conflicts occur within the same specialized policy area—as seems to be true for tax harmonization, industrial relations, or social policy.

6 In fact, resistance to reform may be stronger than resistance to the initial adoption of a policy—which may benefit from a widely shared interest in having some "European solution" to pressing national problems. Once this interest is satisfied, later reforms may be resisted by the beneficiaries of the status-quo rule. The problem must be particularly acute for the new member states which are bound by an *aquis* in whose adoption they had no voice, which may not fit their conditions, and which cannot be modified to accommodate their interests and preferences.

7 Even more than two decades ago, Cappelletti, Seccombe and Weiler (1985b: 40) spoke of the "acute danger of legal obsolescence" arising from "the combination of binding instruments and irreversible Community competence coupled with the increasingly tortuous Community decision-making process." It did not become attenuated over time.

ported by a political consensus is less plausible for the EU—and the potential discrepancy is bound to increase over time.

Non-political Policy Making

The presumption of consensus is, of course, even more attenuated for the non-political modes of EU policy making in which member states have no voice. For the monetary policy choices of the ECB, an unconditional preference for price stability over all other goals of economic policy was stipulated in the Maastricht Treaty (Article 105 ECT). And even if governments might prefer a more flexible mandate today, they couldn't adopt it over the objections of even a single member state. The same is true of the Court's power to interpret European law (Article 220 ECT). If the interpretation is based on provisions of the European Treaties, reversals by unanimous Treaty amendments are practically impossible, and they are extremely difficult for the "secondary law" of European regulations and directives.

If the difficulty of reversing or amending EU law creates an asymmetry between the defenders of the status quo and the promoters of change, what matters here is that it also creates an asymmetry in the principal-agent relationship between those who are politically legitimated to formulate European law and those who have a mandate to apply it. Since application always requires some interpretation, the agents necessarily have some power to shape the content of the rules under which they operate. And the domain of that power will expand if legislators are unable to correct interpretations that deviate from the legislative intent (Tsebelis 2002). Given the immense obstacles to amending the European Treaties and secondary European law, the potential scope for judicial legislation is wider in the EU than it is in all constitutional democracies at the national level. But should this wider scope of judicial review give rise to problems of legitimacy? If the question is considered at all, a negative answer is generally based on one of two arguments, neither of which seems fully convincing.

The first sees the Court in a role that was institutionalized by member states to serve their rational self-interest. They agreed to give to the Commission the power to prosecute, and to the Court the power to decide on, alleged violations of their obligations under the Treaties—and (like the ECB) Commission and Court are doing exactly what they are supposed to do, even if individual governments may not like the decision in a particular case that affects them individually (Garrett 1992, 1995). The basic argument is analytical and game-theoretical. It presumes that Treaty commitments of member governments should be modeled as a (symmetric) N-person Prisoners' Dilemma—that is, a constellation where all will benefit from cooperation, but all are tempted to free ride, in which

case the cooperative arrangement would unravel and all would be worse off. Under these conditions, it was rational for all governments to create agencies beyond their direct political control, and to invest these with the authority to monitor and sanction violations of their commitments.

Empirically, this argument is surely over-generalized. The assumption that EU law reflects constellations of a symmetrical Prisoners' Dilemma may be plausible for free-trade rules, but the jurisdiction of the Court extends to a wide range of policy areas that cannot be so characterized. Moreover, even within its empirical domain, the argument is theoretically over-extended. The Dilemma model provides justification for creating politically independent *enforcement* agencies that will monitor compliance and may prosecute and sanction free riders. But it provides no analytical or normative support for taking the *rule-making* function out of the hands of politically accountable principals.[8] Not much is gained, moreover, if the Dilemma-argument is complemented by an "incomplete-contracts" extension (Maskin/Tirole 1999).

It suggests that in a contract situation, rational actors, realizing that they could not foresee and regulate all future eventualities, and appreciating the high transaction costs of continuous renegotiation, would agree on having future disputes over the interpretation of their contract settled by a neutral agent. In game-theoretic terms, this argument presupposes an underlying interest constellation resembling the "Battle of the Sexes"—where all parties prefer agreement over non-agreement, but disagree over the choice among specific solutions (Scharpf 1997: Chapter 6). But while the argument may support a strong role of the Commission as an "honest broker" in the process of European political legislation, it does not support judicial legislation.

For an explanation, assume two sets of member states, one with status-quo institutions resembling "liberal market economies" and political preference for a liberal European regime, and the other one with the status-quo institutions of a "coordinated market economy" and preferences for regulated capitalism at the European level (Hall/Soskice 2001). In political legislation, it might be possible to find a compromise that both sides prefer over their respective status-quo solutions. If not, the different national regimes would remain in place. If the Court is allowed to define the European rule, however, it must do so in a specific case that challenges and may invalidate the existing law of a particular

8 Similar empirical and theoretical objections apply to efficiency-based arguments trying to exempt the European "regulatory state" from the need for political legitimation (Majone 1996). They apply at best to a narrow subset of European policy areas. And even there, efficiency arguments presuppose value judgments about ends and means, and efficiency-oriented decisions generate distributional consequences that require political legitimation (Follesdal/Hix 2006; Hix 2008).

member state without its consent. In doing so, however, the Court could not create a new European regime to replace national solutions; it can only remove existing national impediments to the free movement of goods, services, capital, and persons, to the freedom of establishment, to undistorted competition, and to the principle of non-discrimination. In other words, for structural reasons (which are quite independent of any "neoliberal" preferences of the judges), judicial legislation must have an asymmetric impact on our two sets of member states: By itself, it can only impose liberalizing and deregulatory policies. Under conditions of complete information, therefore, member states with coordinated market economies and concomitant political preferences would not be persuaded by an incomplete-contracts argument and would not accept rule making by judicial legislation.

In the actual history of European integration, however, that choice was not available. Since the "Luxembourg Compromise" had reinforced the unanimity rule in the Council, the greater diversity of national interests after the original six had been joined by the UK, Denmark and Ireland had almost stopped the progress of integration through political legislation. In particular, attempts at harmonizing national trade regulations had bogged down in interminable bargaining rounds. Hence the Court was widely applauded when its *Dassonville*[9] and *Cassis*[10] decisions began to remove national non-tariff barriers by giving direct effect to Treaty-based economic liberties. In effect, "good Europeans" everywhere came to welcome "Integration Through Law"[11] as an effective substitute for the perceived erosion of the "political will" of member states.

Paradoxically, however, the immediate effect was a new stimulus to political integration. The *Cassis* decision had confronted all member states with the threat of having their own regulations displaced by a rule of "mutual recognition"—a threat which, whenever the Commission so chose, could be made real through Treaty infringement prosecutions (Nicolaïdis/Schmidt 2007; Schmidt 2007). With this change of the "default condition," agreement on political harmonization became considerably more attractive. Thus, member states responded positively to Jacques Delors' Single-Market initiative and agreed to adopt the Single European Act, which introduced qualified-majority voting in the Council for the harmonization of rules affecting the functioning of the internal market (Article

9 C-8/74, 11/07/1974.

10 C-120/78, 20/02/1979.

11 This is the common title of the series of volumes produced by the famous "European Legal Integration Project" of the EUI Law Department (Cappelletti/Seccombe/Weiler 1985a). It should be noted, however, that the editors of the series were very much aware of the normative and pragmatic ambivalences implied by the divergence of legal and political integration (Cappelletti/Seccombe/Weiler 1985b).

95 ECT). And since *Cassis* had reduced the bargaining power of high-regulation countries, the new legislation also had a liberalizing and deregulatory tendency.

In the 1980s, it is true, that effect did indeed correspond to the political preferences of a majority of "liberal" governments in the Council (Moravcsik 1998). But it is not explained by these preferences. And it was not reversed when, in the second half of the 1990s, there was a preponderance of left-of-center governments in the EU. Instead, the overall pattern is shaped by an institutional constellation in which political legislation must be negotiated in the shadow of judicial decisions which, for structural reasons, have a liberalizing and deregulatory impact. In other words, the empowerment of judicial legislation in the European polity cannot be justified by game-theoretic or contract-theoretic arguments that try to show that it would, or ought to be, chosen as an efficiency-increasing solution by self-interested member-states or their governments.

For most governments, of course, justifications derived from normative rational-choice theory are not of crucial relevance. What did, and does, matter much more for them is the socially shared expectation that they should operate as "a government of laws and not of men," that courts should have the authority "to say what the law is," and that respect for the rule of law obliges them to respect and obey the decisions of the ECJ (Alter 2001). By itself, of course, this syllogism would not define the proper domains of judicial and political legislation (Möllers 2008). It is, of course, true that judge-made law, disciplined by its internal juristic logic and by the running commentary of the legal profession, continues to play a very important and legitimate role in common-law as well as in civil-law countries. But in constitutional democracies, it is developed in the shadow of democratically legitimated legislation, which could (but generally will not) correct it by simple-majority vote. Since ECJ jurisprudence cannot be politically corrected, the fact that member states have by and large acquiesced when decisions were going against them, cannot be invoked as an indirect legitimation of judicial legislation.

The more pertinent question is, therefore, whether the legitimacy of ECJ jurisdiction could be equated with that of national constitutional courts. These may indeed override parliamentary legislation—and for that reason, the legitimacy of judicial review continues to be considered problematic in polities with a strong democratic tradition (Bickel 1962; Kramer 2004; Bellamy 2007). But even if these fundamental doubts are postponed for the moment, the status of ECJ jurisprudence cannot be equated with that of judicial review under national constitutions. First, as Stefano Bartolini (2008) pointed out, it would have to ignore the fact that national constitutions are generally limited to rules that organize the institutions of government and protect civil liberties and human rights. By contrast, the European Treaties, as they are interpreted by the ECJ, include a wide range of detailed provisions which in constitutional democracies are mat-

ters for legislative determination, rather than constitutional interpretation. As a consequence, the politically unconstrained powers of the ECJ reach so much further than the powers of judicial review under any national constitution. Even more important, however, is a second difference:

The judicial review exercised by national constitutional courts is embedded in national political cultures with taken-for-granted normative and cognitive understandings and shared discourses about appropriate policy choices (March/Olsen 1989). In public debates, the courts are important, but by no means the only, interpreters of common value orientations. They must assume that the commitment to the common values of the polity is shared by all branches of the national government, and that all are oath-bound to uphold the constitution. They will thus approach legislation in a sprit of judicial self-restraint, and with a presumption of its constitutionality. And if they must nevertheless intervene against the majorities of the day, the legitimacy of their intervention depends on their capacity to express "the sober second thought of the Community" (Bickel 1962: 26; Fisher 1988; Höreth 2008).

From the perspective of member states, these preconditions of judicial self-restraint, which at the same time limit and legitimate judicial review, are lacking in their relationship to the ECJ. Regardless of what may be true in its relationship to the Commission and the European Parliament, there cannot be such shared orientations between the Court and the governments, legislatures, and publics of the Union's 27 extremely heterogeneous member states, and there is certainly no presumption of Treaty-conformity when the Court is dealing with national legislation. Instead, from the Court's perspective, European integration is a mission to be realized against the inertia or recalcitrance of member states; and European law is not the expression of shared values but an instrument to discipline, and transform national policies, institutions and practices.

So where has this discussion led us? There is of course no question of the formal legality of the Court's jurisdiction. Article 220 ECT has clearly empowered it to apply and interpret European law. Lawyers will dispute some of its interpretations, but they will not judge them *"ultra vires."*[12] Given the sweeping generality of some Treaty provisions and the intentional ambiguities in secondary law, it would in any case be extremely difficult for the Court to follow the "original intent" of the masters of the Treaties or of the multiple authors of legislative compromises. But as Europeans had to learn through bitter experience: formal legality does not necessarily equate with legitimacy (Joerges/Ghaleigh 2003). It

12 The most obvious characteristic of ECJ jurisprudence is its extreme form of teleological interpretation *(effet util),* But this tendency is shared by modern national jurisprudence as well (Lübbe-Wolf 2007).

suffices for ensuring acquiescence with the every-day constraints and demands imposed by governing authorities in fundamentally legitimate polities. But when highly salient interests and normative preferences are violated, positive legitimating arguments are needed to stabilize the routines of voluntary compliance.

In the relationship between member-states and the EU, the Roman-law maxims of *pacta sunt servanda* and *volenti non fit iniurua* will have considerable weight. Their governments or their predecessors have participated in creating present-day EU institutions, including the authorization of policy making in the non-political decision modes; and governments of the newer member states have knowingly joined the previously established institutions and the accumulated *acquis*. But these obligations are limited by the third Roman maxim of *"ultra posse nemo obligatur."* And as I suggested above, the capacity of member states to comply with EU law reaches its limits when doing so would undermine their own legitimacy in relation to their national constituencies. In the following sections, I will first explore the general conditions of this legitimating relationship, and I will then turn to a series of recent decisions where the jurisdiction of the ECJ seems to pushing against the limits of legitimate national compliance.

The Need for Justification

Since the law of the Union must be implemented by its member states, it is the legitimacy of the member state that must ensure citizen compliance and citizen support. As conceptualized above, it is based on "liberal" as well as "republican" normative foundations. By and large, however, the EU law generated through judicial legislation is unlikely to challenge the specifically liberal principles of national constitutions.[13] But what may indeed be at stake is the "republican" legitimacy of national governments.

Democratic republicanism requires not merely the formal existence of general elections and representative parliaments, but it presumes that the mechanisms of electoral accountability may make a difference for public policy. At a minimum, this (input-oriented) requirement implies that governments will be responsive to citizen interests and preferences, and that changing governments may have an effect on policies that are strongly opposed by popular majorities.

13 It is true that the protection of human rights was in issue when the German constitutional court initially considered the possibility that it might have to review the constitutionality of EU law in its *Solange* decisions—BverfGE 37, 271 (29/05/1974), BverfGE 73, 339 (22/10/1986). In the meantime, the ECJ responded and this issue has been laid to rest (Weiler/Lockhart 1995).

At the same time, however, governments are under a "republican" (and output-oriented) obligation to use the powers of government for the common good of the polity. In the normative traditions of constitutional democracies, both of these obligations are of equal and fundamental importance. But their implications may conflict when public-interest oriented policies are unpopular while popular policies may endanger the public interest. Under these conditions, normative political theory from Aristotle to Edmund Burke did accord priority to the public interest, whereas even theorists of democracy who reject the paternalistic or technocratic implications of output-oriented arguments (Greven 2000; Bartolini 2005; Hix 2008) will rarely defend radical populism as a normatively acceptable alternative (Mény/Surel 2002).

Instead, modern democratic theory focuses on the interactions between governors and the governed. Responsible governments must pursue the common good, but its substantive understanding, and the policies serving its attainment, should arise from deliberative interactions in the shared public space of the polity (Habermas 1962, 1992, 2008; Dryzek 2000; Greven 2000; de Vreese/Schmitt 2007). More specifically, Vivien Schmidt (2004, 2006) focuses on the role of policy-oriented "communicative discourses" in which governors must explain and justify the unpopular policies which they consider necessary and normatively appropriate. The more these policies violate highly salient interests or deviate from the strongly held normative preferences of their constituency, the more urgent is the need for justification showing how the measures in question will serve the values of the polity under the present circumstances.

If these communicative discourses succeed in persuading the constituency, input-oriented policy legitimacy is maintained. If they fail to persuade, governments are at risk. In general, of course, electoral accountability is neither a precisely targeted nor a very sensitive mechanism of popular control. Voters only have a single ballot to express their pleasure or displeasure over a multitude of policy choices, assorted scandals, and the personality traits of leading candidates; and even if public protest was concentrated on a single issue yesterday, it may have disappeared from public attention by the next election.[14] But if a policy does violate highly salient interests or deeply held normative convictions of the constituency, a government that sticks to its guns but fails to convince may indeed go

14 In real-world democracies, political responsiveness may nevertheless be quite high: In Germany, national governments are tested in 16 *Land* elections during the 4-year term of the national parliament; in all competitive democracies, opposition parties will try their best to refresh voters' memories before the next election; and in any case, governments cannot know in advance which issue will ultimately be decisive for which voters. By the "rule of anticipated reactions," they will therefore try to respond to all potential grievances if they can (Scharpf 1997: 183–188).

down in defeat.[15] If that happens, the government will not have established the input legitimacy of these policies. But it will have reaffirmed the institutional legitimacy of a system of responsible and democratically accountable government.

The opposite is true, however, if policies that violate politically salient interests and normative convictions in national polities are not, and cannot be explained and justified in communicative discourses. When that happens, the legitimacy of constitutional democracies will be undermined and may ultimately be destroyed. This is the critical risk if governments are required to implement European law that has been created without the involvement of politically accountable actors by institutionally autonomous judicial legislation.

That is not meant to say that judge-made European law that violates politically salient interests or deeply held normative convictions in member-state polities could never be justified as being necessary and appropriate. But it suggests that justification is more demanding here than it is in the case of political legislation in which governments had a voice and for which they, therefore, should be able to provide good reasons. In principle, there could be two types of justifications.

The first would appeal to "enlightened" national self-interest. It would try to show how, all things considered, the country would benefit more from the policy or rule in question than from its absence. In essence, these are arguments that would facilitate agreement in a political bargaining process—and they would justify compliance with European rules that are in fact providing effective solutions under conditions which, in game-theoretic terms, resemble Pure-Coordination, Assurance, Battle of the Sexes, or (symmetric) Prisoners' Dilemma constellations (Scharpf 1997: Chapter 6). But what if the constellation is characterized by asymmetric conflicts—so that the rule that is imposed by non-political European authority cannot be justified in terms of the enlightened self-interest of the member state in question? Analytically, one might then try to justify uncompensated national sacrifices by reference to the collective self-interest of the Union as a whole. However, depending on the salience of the sacrifice requested, this justification would presuppose a collective European identity that is strong enough to override concerns of national self-interest. Unfortunately, however, that is a precondition which not even the most enthusiastic "Europeans" would claim to see presently fulfilled in the Union of 27 member states (Pollak 2008).

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15 This was true when the Dutch government reformed disability pensions in the early 1990s (Hemerijck/Unger/Visser 2000: 220–224) and it was again true in Germany when the Schröder government pursued its "Agenda 2010" reforms in spite of mass protests and rapidly declining popular support (Egle/Zohlnhöfer 2007).

But that does not mean that asymmetric national sacrifices could never be justified in national discourses. The most powerful of such justifications is, of course, the achievement of European integration itself. The outcome has not been, and may (and perhaps should) never be, the creation of a "United States of Europe" modeled after successful federal nation states (Nicolaïdis/Howse 2003). But integration has been able to establish peace and cooperation among European nations after centuries of internecine warfare, and to secure democracy and respect for human rights on a continent that has brought forth the most pernicious regimes in human history. These outcomes could not have been attained by the bloody-minded pursuit of national self-interest. Being part of the European community of nations presupposes member states whose institutions and policies are compatible with the basic requirements of communality, and whose preferences are modified by a normative commitment to the "inclusion of the other" (Habermas 1996) and by a "principle of constitutional tolerance" that disciplines the assertion of national constitutional powers at the expense of shared values and interests (Weiler 1999b, 2003). The preservation of these achievements may indeed justify constraints on national autonomy even where these may conflict with politically salient interests and preferences in member polities. Hence, European rules protecting the preconditions of communality, regardless of whether they are formulated in political or non-political processes, can be justified on substantive grounds—and if that is so, they also can and should be defended by member governments even against strong domestic opposition.

The Court Is Pushing against the Limits of Justifiability

Given the equally valid legitimation arguments supporting democratic self-determination at the national level and the normative claims of European communality, however, a convincing justification must assess the relative weights at stake in the specific case. The greater the political and normative salience of the national institutions and policy legacies that are being challenged, the greater must be the normative and practical significance of the countervailing European concerns. For many decades, however, the need to develop explicit criteria for that normative balance did not arise. Most of the issues of European law never caught the attention of national publics, and the Court itself seems to have taken care to develop its doctrines in a long series of decisions where the substantive outcomes at stake were of very low political salience or downright trivial. Thus, it was hard to get politically excited about the *Cassis* decision which

told Germany that it could not exclude a French liqueur on the ground that its alcohol content was too low—but which, in doing so, also introduced the crucial doctrines of mutual recognition and home-country control.

That is why earlier warnings of the implications of ECJ jurisprudence for the viability of national social systems (e.g., Scharpf 1999) could be dismissed as unrealistic scares (Moravcsik/Sangiovanni 2003). But now, as the legal principles seem firmly established in its case law and accepted by national courts, the European Court and the Commission seem ready to face more serious political conflicts. I will briefly mention only a few recent decisions that illustrate this more intrusive and potentially more damaging judicial strategy:

The first case has nothing to do with the neoliberal preferences which are often ascribed to the Court and the Commission. Austria, where university education is free and accessible to all graduates of a gymnasium saw its medical faculties overcrowded by applicants from Germany whose grades were not good enough to qualify under the German *numerus-clausus* regime. In defense, Austria had adopted a rule under which applicants from abroad had to show that they would also be eligible to study medicine in their home country. The Commission initiated a Treaty violation procedure, and the Court found that the Austrian rule was violating students' rights to free movement and non-discrimination under Article 12 ECT.[16] As an immediate result of the decision, more than 60 percent of applicants at some Austrian medical faculties came from Germany.

The second series of recent decisions was indeed about the priority of economic liberties over social rights guaranteed by member-state constitutions. In the *Viking* case,[17] a Finnish shipping company operating from Helsinki had decided to reflag its ferry as an Estonian vessel. The Finnish union threatened to strike, the company sued for an injunction, and the case was referred to the ECJ, which defined the strike as an interference with the company's freedom of establishment. In the *Laval* case,[18] a Latvian company building a school in Sweden refused to negotiate about wages at the minimum level defined by Swedish collective bargaining agreements. The ECJ defined the Swedish union's industrial action as violation of the company's freedom of service delivery that was not covered by a narrow reading of the Posted Workers' Directive.[19]

If *Viking* and *Laval* were directed against the constitutionally protected rights of Finnish and Swedish unions to pursue collective interests through in-

16 C-147/03, 07/07/2005.
17 C-438/05, 11/12/2007.
18 C-341/05, 18/12/2007.
19 Directive 96/71/EC.

dustrial action, the *Rueffert*[20] and *Luxembourg*[21] cases established the priority of free service delivery over national wage legislation. *Rueffert* disallowed a statute of Lower Saxony that required providers in public procurement to pay locally applicable collective-bargaining wages, whereas Luxembourg had transposed the Posted Workers' Directive in a statute requiring all providers to observe local labor law including the automatic adjustment of wages to the rate of inflation. In both cases, the Court defined the Directive as setting maximum, rather than minimum standards, with the consequence that local legislation exceeding these were held to violate the freedom of service delivery. At the same time, the freedom of establishment is being used to hollow out the capacity of member states to shape the rules of corporate governance in their economies in accordance with national institutional traditions political preferences (Höpner/Schäfer 2007).[22] In other cases, the Court has drastically reduced the capacity of member governments to protect their revenue systems against tax avoidance that is facilitated by decisions protecting the freedoms of capital movement and of service delivery (Ganghof/Genschel 2008b; Genschel/Kemmerling/Seils 2008). Here, as in the line of decisions enforcing the access of EU citizens to public services and social transfers in other member states (Ferrera 2005; Martinsen 2005, 2009; Martinsen/Vrangbaek 2008), the Court gives priority to the subjective rights to free movement and non-discrimination without regard to reciprocal obligations to contribute to the resources of the polity.

The Liberal Undermining of Republican Legitimacy

In these decisions and others, the Court has obviously intervened against important and politically salient laws, institutions, and practices of individual member states. But why should it be impossible to justify these interventions in national communicative discourses? The root of the problem is a basic asymmetry in how the Court defines the balance between the legitimate concerns of member-state autonomy and the legitimate requirements of European community.[23] It has its origin in the very first decision postulating the direct effect of European

20 C-346/06, 03/04/2008.

21 C-319/06, 19/06/2008.

22 See, for example, C-212/97, 09/03/1999 *(Centros)*; C-112/05, 23/10/2007 *(Volkswagen)*.

23 As Joe Weiler (1999a) explained in a different context, the issue is not, or at least not initially, a conflict over the location of a *Kompetenz-Kompetenz* in the multilevel European polity, but a deep concern about the political consequences following from the asymmetric logic of the Court's jurisdiction.

law in *Van Gend en Loos* (1963).[24] In order to establish this doctrine, the Court had to interpret the obligation of a member state to maintain existing tariffs as the subjective right of a company against the state. Combined with its nearly simultaneous assertion of the supremacy of European law,[25] this construction has permitted the Court to define and expand subjective rights against member states, and thus to shift the balance between the rights and obligations of citizens or subjects that had been established in national polities.

Since the commitments in the original Treaty were primarily intended to achieve economic integration, their transformation into "economic liberties" does account for the strongly "market-liberal" effects of the Court's jurisprudence. It should be noted, however, that where the primary or secondary European law provided a handle for the definition of non-economic subjective rights, the Court has been similarly ready to intervene against national impediments to their exercise. This has long been true for decisions enforcing and extending the equality of men and women in the work place under Article 141 ECT (Cichowski 2004); and it is now also true of the extension of rights to the free movement of persons outside of the labor market, of rights of non-discrimination on accounts of nationality, and of the generalization of (non-political) citizenship rights. This has been hailed by some as a fundamental reversal of the Court's market-liberal bias (Caporaso 2000; Caporaso/Tarrow 2008)—whereas it is, in fact, only the application of its negative-integration and liberalizing logic to fields that have newly become accessible to the Court's jurisdiction.

In the framework developed by the ECJ, the European concerns that might justifiably override democratically legitimated national institutions and policy legacies are defined as subjective rights of individuals and firms, rather than as substantive requirements on which the viability of the European community of nations, or the internal market, for that matter, would depend. Given the simultaneous assertion of the supremacy doctrine, this definition has the effect of transforming the hierarchical relation between European and national law into a hierarchical relationship between liberal and republican constitutional principles.[26] Subjective rights derived from (the interpretation of) European law may, in principle, override all countervailing national objectives, regardless of their salience as manifestations of democratic self-determination.

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24 C-26/62, 05/02/1963.

25 C-6/64, 15/07/1964 (*Costa* vs. *ENEL*).

26 Richard Münch (2008b: 540) has described the legal order created by the jurisdiction of the ECJ as being "made for competitive economic actors. It is more appropriate for the market citizen of liberalism than for the political citizen of republicanism or for the social citizen of welfare states in the social democratic or conservative sense."

Given the impossibility of political correction, the Court was and is of course free to extend the reach of European rights. In field of free trade, for instance, the Treaty forbids quantitative restrictions and "measures having equivalent effect" (Article 28 ECT). Originally, that had been understood to exclude the discriminatory treatment of imports. In the early seventies, however, that understanding was replaced by the famous *Dassonville* formula, according to which "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[27] In other words, instead of effective discrimination, a merely hypothetical impediment to free trade, free capital movement, free service delivery, or free establishment would now be enough to strike down a national rule.

It is true that after *Dassonville,* the *Cassis* decision also began to systematize the somewhat haphazard public-order exceptions (e.g., in Articles 30, 39/3, 46/1, 55, or 58/1b ECT) through which the Treaty had tried to limit the obligations to liberalize national economies. In most areas, therefore, the Court does now allow for the possibility that the exercise of European liberties could be limited by (some) countervailing national concerns (Haltern 2007: 742–755). But if this has the appearance of a balancing test, the balance is highly asymmetrical—which manifests itself in three dimensions.

First, some national concerns of major importance are simply defined as irrelevant to begin with. Of greatest practical importance among these is the consistent refusal to consider national fiscal concerns as a potential limit on the exercise of European liberties. Thus, in the Austrian case mentioned before, the effect which the free movement and non-discrimination of German students would have on the budgetary constraints of Austrian medical education is entirely ignored. The same is true in cases where the free movement of persons is invoked to allow the access of migrants to national social transfers,[28] or where the freedom of service provision requires national health (insurance) systems to pay for services consumed abroad (Martinsen 2005, 2009).[29] Moreover, revenue concerns are declared irrelevant when national rules against tax avoidance are treated as violations of free capital movement (Ganghof/Genschel 2008b).

By treating the fiscal implications of its decisions as irrelevant, the Court is destroying the link between the rights and duties of membership in the polity

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27 C-8/74, 11/07/1974.

28 See, for example, C-10/90, 07/03/1991 *(Masgio);* C-245/94; C-312/94, 10/10/1996 *(Hoever and Zachow);* C-131/96, 25/06/1997 *(Romero);* C-160/96, 05/03/1998 *(Molenaar);* C-85/96, 12/05/1998 *(Sala).*

29 See, for example, C-120/95, 28/04/1998 *(Decker);* C-158/96 28/04/1998 *(Kohll);* C-157/99, 12/07/2001 *(Geraets-Smits* and *Peerbooms);* C-385/99, 13/05/2003 *(Müller-Fauré* and *Van Riet).*

which is reflected in centrality of parliamentary taxing and spending powers in all constitutional democracies (Ganghof/Genschel 2008a). In a republican perspective, German students and their taxpaying parents may have good reasons to protest against the spending priorities of their own governments, but that would not give them a legitimate claim against taxpayers in Austria. The same would be true of other tax-financed services, of social transfers or of public-health systems, and of compulsory health insurance systems in which total contributions must finance an adequate capacity on the supply side.[30] Similarly, firms and individuals availing themselves of the public infrastructure and public services in one country would be under a republican obligation to pay the tax price of their maintenance.

By replacing the reciprocal link between entitlements and contributions with the assertion of unilateral individual rights, the Court may seem generous. But its generosity ignores the club-good character of most of the benefits and services provided by the solidaristic nation state. Allowing the easy exit of contributors and the easy entry of non-contributors must undermine the viability of these clubs. If the logic of these decisions will shape national responses, the most likely outcome will not be universal generosity but private insurance, private education, and gated communities for those who can afford them, and eroding public benefits, public services, and public infrastructure for those who cannot pay for private solutions (including the no longer discriminated migrant students, workers, and their families).

Second, even where national public-interest objections, or nationally protected collective rights, are in principle considered as potential limits on the exercise of European rights, the Court's treatment is highly asymmetrical. While European liberties, no matter how trivial their violation may be in the specific case, are accorded full value, all countervailing arguments are discounted by a substantive and procedural "proportionality" test.[31] In this, the Court will first evaluate (by its own lights) the normative acceptability of the specific purpose that is allegedly served by a national measure. And even if the purpose is accepted in principle, the government must show that, first, the measure in question would, in fact, be effective in serving the stated purpose and, second, that this purpose could not also have been served by other measures that would be less restrictive on the exercise of European liberties (Haltern 2007: 751–757).

30 This is not meant to deny that the "inclusion of the other" may imply an obligation to provide non-contributory benefits in many constellations. If this obligation is asymmetrically subordinated to fiscal concerns, the trade-off may indeed be corrected through judicial intervention. But that balancing question cannot be addressed if fiscal considerations are treated as being by definition irrelevant.

31 C-261/81 at # 12, 10/11/1982 *(Rau)*.

For all of these conditions, the burden of proof is on the member state defending a particular impediment to the exercise of European liberties and, as Dorte Martinsen (2009) is showing, the procedural requirements for establishing (scientific) proof can be tightened to an extent that will ensure a negative outcome for the member state.

For an illustration, take the decision striking down the *Volkswagen* statute[32] which had defined 20 percent of all shares (instead of the usual 25 percent) as a blocking minority. In the Court's view, this rule created a potential deterrent to direct investments from other member states,[33] while evidence showing that VW stock was in fact widely traded internationally and that the share of direct foreign investments was as high as in comparable companies, was declared irrelevant. In other words, the existence of an impediment to the free movement of capital is treated as an incontrovertible presumption.[34]

Or take the Austrian case, where the Court did at least entertain the idea that the danger of overcrowding in Austrian universities might be a valid national concern. But the idea was quickly dismissed with the suggestion that this problem could be averted through non-discriminatory entry exams.[35] The fact that Austria may have needed to give priority to Austrian students in order to train a sufficient number of medical practitioners for its own health care system remained completely outside the range of permissible arguments. In the asymmetrical jurisprudence of the Court, in other words, European rights are substantively and procedurally privileged and will generally prevail over even very important and politically salient national concerns.

A third problem arises from the discrepancy between the uniformity of European law and the diversity of national republican institutions. The Treaty-based economic liberties are of course defined at the European level and without regard to national differences. The same is true where Court recognizes other subjective rights at the European level—which may increase in number and variety if the Lisbon Treaty will come into force.[36] And where countervailing national concerns are considered at all, these are also defined in uniform

32 C-74/07, 23/10/2007. The discussion quoted is at # 55.

33 The Court conceded that private shareholders might set the blocking minority at 20 percent of all shares, but insisted that a democratically accountable legislature could not do so.

34 Since under the *Dassonville* formula a *potential* impediment is sufficient to constitute a violation of free-movement rights, it is indeed difficult to see what kind of evidence could disprove the assertion.

35 C-147/03 at # 61.

36 As the *Laval* decision made clear, however, such rights (including the freedoms of expression, assembly and the protection of human dignity) can be exercised only within the tight constraints of the proportionality test whenever they might impede the economic liberties rooted in the Treaty. C-341/05 at # 94.

and (highly restrictive) terms by the Court. For an example, take the decision in the *Laval* case, where the Court would have accepted minimum wages to be set by state legislation, but disallowed the delegation to collective-bargaining agreements. In doing so, it ignored the fact that minimum-wage legislation, while common in many EU member states, was totally unacceptable in "neo-corporatist" Sweden, where wage determination since the 1930s has been left entirely to highly organized unions and employers' associations (Edin/Topel 1997).

In short, the Court's regime of Treaty-based rights and of potentially acceptable national exceptions make no allowance whatever for the fact that uniform European law has an impact on national institutions and policy legacies that differ widely from one member state to another. Such differences exist not only in the field of industrial relations, but also in corporate governance, public services, public infrastructure, media policy, social policy, pension policy, health care, vocational and academic education, or public infrastructure, and so on. Present solutions differ because they have been shaped by country-specific historical cleavages and by difficult compromises between conservative, progressive and liberal political forces—which is why attempted changes tend to have very high political salience everywhere.

Political resistance to change is likely to be strongest where institutions and policies have a direct impact on the lives of citizens—which is most obvious for welfare state transfers and services, industrial relations, employment conditions, education, or health care. In many instances, existing policies have attained the status of a "social contract" whose commitments support the legitimacy of the national polity. That is not meant to suggest that such normatively charged institutions and policy legacies should or could be immune to change. In fact, their continuing viability under external and internal pressures is often quite uncertain (Scharpf/Schmidt 2000). But if the legitimacy of the national polity is to be preserved, such changes must be defended and justified in national communicative discourses—by governments who must be ready to face the consequences of their electoral accountability.

In fact, the text of the Treaty does recognize the need to respect the autonomy of member-state political processes in precisely these policy areas. In Maastricht and Amsterdam, European competences have been explicitly denied in policy areas of high normative salience at the national level. Thus, Article 137/5 ECT stipulates that European competencies in the field of social affairs "shall not apply to pay, the right of association, the right to strike or the right to impose lockouts." Similarly, European measures in the field of employment "shall not include harmonisation of the laws and regulations of Member States" (Article 129/2 ECT), and exactly the same formula is repeated for education (Article 149/4 ECT), for vocational education (Article 150/4), and for culture (Article 151/5),

while Article 152/5 ECT provides that "Community action […] shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care." In other areas, the Treaty has for similar reasons maintained the requirement of unanimous decisions in the Council.

In the Court's legal framework, however, these prohibitions could at best[37] impede *political legislation* at the European level. But they are considered irrelevant for *judicial legislation* where it is protecting Treaty based liberties:[38] That is why the cases cited could and did indeed regulate strikes in Finland and Sweden, they did abolish national pay regulations in Germany and Luxembourg or national regulations of university admissions in Austria as well as national regulations of health services and medical care in Luxembourg or the Netherlands.

In short, even unanimous amendments to the Treaties, formally ratified in all member states, could not protect the autonomy of national political processes against judicial intervention. In the absence of a political mandate, and ignoring explicit Treaty provisions that were intended to limit the reach of European law, the Court is now intervening in areas that are of crucial importance for the maintenance of democratic legitimacy in EU member states.

Needed: A Political Balance of Community and Autonomy

From a pragmatic perspective, this appears dangerous: National welfare states are under immense pressure to cope with and adjust to external and internal changes (Scharpf/Schmidt 2000). But this adjustment must be achieved through legitimated political action. The Court can only destroy existing national solutions, but

37 If the Commission should find that the *difference* between national rules (provided that they individually have passed the proportionality test) interferes with the internal market or constitutes a distortion of competition, a harmonizing directive could still be introduced under Articles 95 and 96/2 ECT (Haltern 2007: 740–741).

38 The typical formula is that, yes, member states retain the right to shape their own social security and health care systems. But in doing so, they must of course observe Community law. See, for example C-158/96 at # 16, 19–20 *(Kohll)*. This illustrates the fundamental significance of the Court's initial dogmatic choice: By treating the Treaty commitments to creating a common market characterized by the free movement of goods, etc. not only as a source of legislative competencies, but as a guarantee of individual rights, the Court eliminated the *legal* possibility of defining areas of national competence that cannot be reached by European law. As is true in national federal constitutions, nationally defined and enforced individual rights are a powerful centralizing force which may reach any and all substantive fields. While legislative powers may be limited through constitutional amendments, the judicial protection against impediments to the exercise of individual rights knows no legal limits. If limits are considered desirable, therefore, they can only be political.

it cannot itself create "Social Europe." At the same time, political action at the European level is impeded by the prohibitions stipulated in the Maastricht and Amsterdam Treaties, and if these were lifted, by high consensus barriers and the politically salient diversity of existing national solutions. In short, European law as defined by the Court is undermining national solutions without being able to provide remedies at the European level. The practical effect must be a reduction of the overall problem-solving capacity of the multilevel European polity.

From a normative perspective, what matters is that the Court's interventions are based on a self-created framework of substantive and procedural European law that has no place for a proper assessment of the national concerns that are at stake, and in which the flimsiest impediment to the exercise of European liberties may override even extremely salient national policy legacies and institutions. Within this highly asymmetrical juristic framework a normatively persuasive balance between the essential requirements of European communality and the equally essential respect for national autonomy and diversity cannot even be articulated. By the same token, the legal syllogisms supporting these judicial interventions could not possibly persuade opponents in communicative discourses between member-state governments and their constituents. In short, the politically unsupported extension of judge-made European law in areas of high political salience within member-state polities is undermining the legitimacy bases of the multilevel European polity.

But this cannot be a plea for unconstrained member-state autonomy or a relocation of the *Kompetenz-Kompetenz* to the national level (Weiler 1999a). The result might indeed be an escalation of protectionist and beggar-my-neighbor policies that could well disrupt the Union. It should be realized, after all, that *Viking* and *Laval* did obviously involve a distributive conflict between high-wage and low-wage member states whose fair resolution would have raised difficult normative issues—and the same may also be true of the *Rueffert* and *Luxembourg* cases.[39] There are, therefore, good theoretical reasons for some kind of European review of national measures impeding free movement among member states. But the review would need to allow for a fair consideration of all concerns involved—which the jurisdiction of the ECJ does not. Its self-referential legal framework prevents any consideration of the normative tension between solidarity achieved, with great effort, at the national level and a moral commitment to the "inclusion of the other" in a European context.

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39 But we should remain realistic: The trans-national redistributive benefits (for workers from low-wage countries) that may follow from these judgments are likely to be dwarfed by intra-national redistributive damages, as wages of national workers are pushed downwards as protective legislation and collective agreements are being disabled.

But which institution would be better qualified to assess the balance between politically legitimate, and divergent, national concerns on the one hand, and the equally legitimate constraints that national polities must accept as members of a European community of states? In my view, the European institution that would be uniquely qualified to strike a fair balance is the European Council.[40] From the perspective of individual member states, its decision would be a judgment of peers who are aware of the potential domestic repercussions which may be caused by the obligation to implement European law, and who must realize that they might soon find themselves in the same spot. At the same time, however, these peers would also be fully aware of the dangers of protectionist free-riding, of beggar-my-neighbor policies, and of discriminatory practices that would violate solidaristic obligations. Moreover, and most important, in their role as "masters of the Treaties," the members of the European Council would be best placed to determine whether and where the Court, in its interpretation of primary and secondary European law has so far exceeded the legislative intent that a political correction appears necessary.

Even if the basic logic of this suggestion should be accepted, however, its adoption by a unanimous Treaty amendment seems most unlikely. But there is a scenario that might change these probabilities. Remember what I said about the fundamental dependence of the EU and its legal system on the voluntary compliance of its member states, and about the lack of control of political actors over the expansion of judicial legislation. And now imagine that the governments of some member states, say Austria or Sweden or Germany, would openly declare their non-compliance with specific judgments that they consider to be *ultra vires*. Without more, such a declaration would surely trigger a constitutional crisis. There is of course a lot of incomplete compliance and tacit non-compliance among EU member states, but a declaration of open non-compliance would strike at the foundations of the European legal system. That is why governments would, and indeed should, hesitate to trigger this "nuclear option." But what if the declaration was presented as a reasoned appeal to the political

40 Joe Weiler (1999a: 322) called for a "Constitutional Council" composed of sitting members of national constitutional courts to decide issues of competence; and a similar proposal was recently promoted by Roman Herzog, former president of the German constitutional court and of the European convention that produced the Charter of basic rights (Herzog/Gerken 2008). In my view, being a judicial body that is bound by its own precedents and obliged to generalize its decision rules, this Council would also tend to define uniform standards that could not accommodate the legitimate diversity among member-state institutions and practices. What is needed is the disciplined "adhocery" of a political judgment that understands that it may be necessary to allow, for the time being, national parliaments and courts to have the last word on abortion in Ireland, alcohol in Sweden and drugs in the Netherlands (Kurzer 2001), even if that should interfere with European liberties protected elsewhere.

judgment of the European Council and coupled with the promise that a (majority) vote affirming the ECJ decision would be obeyed? This would separate the protest against the ECJ from the charge of disloyalty to the Union.[41]

Whether the Council would accept the role thrust upon it by such a declaration is of course highly uncertain. If it did, however, the Union would finally have a forum[42] and procedures[43] in which the basic tension between the equally legitimate concerns of community and autonomy could be fairly resolved.[44] Similarly, welcome would be the probable effects on the jurisprudence of the Court itself. Faced with the possibility of political reversal in the Council, it could be expected to pay more systematic attention to the relative weight of national concerns that might justify minor impediments to the exercise of the Treaty-based liberties. If that were the case, European law, even in the absence of "republican" input legitimacy, would cease to be characterized by the single-minded pursuit of rampant "individualism" (Somek 2008).

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41 As "good Europeans," in other words, we should stop to take automatic compliance with any type of European rule as the criterion of our goodness. We should seek to strengthen the European political capacity for collective action through legislation and through enhanced capabilities in the field of foreign and security policy. But we should become critical of the anti-democratic effects of "integration through non-political judicial legislation."

42 In order to ensure procedural viability, the Council would need to relay on the preparatory work of a permanent committee that would hear and evaluate the relevant claims and arguments. But the final decision would have to remain with the heads of governments.

43 In my view, the affirmation of the ECJ judgment should need only a simple majority in the Council.

44 Once introduced, the same rules might also be used to allow "conditional opt-outs" from the pre-emptive effect of the legislative *acquis*. This would ease the problems caused by the near-irreversibility of existing secondary law, and the possibility of later opt-outs could also facilitate political agreement on new legislation. A similar solution has been discussed in the context of federalism reform in Germany (Scharpf 2008). But these extensions go beyond the present argument and their discussion would exceed the limits of this article.

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13 The Double Asymmetry of European Integration—Or: Why the EU Cannot Be a Social Market Economy (2009)

> The conclusion that, in a federation, certain economic powers, which are now generally wielded by the national state, could be exercised neither by the federation nor by the individual states, implies that there would have to be less government all round if federation is to be practical. (Friedrich A. Hayek 1948[1939])

Will history repeat itself? The ideological hegemony of orthodox liberalism ended with the Great Depression of the 1930s, and it may well be that the current global crisis will also end the quarter-century of triumphant neoliberalism not only in Obama's America and in the International Monetary Fund, but also in the European Union. And in fact, after decades of cheap talk about the "social dimension" of European integration or the superiority of the European social model over American capitalism, Christian Democrats and Social Democrats have finally managed to write the commitment to create a European social market economy into the hard letter of Article 3 (3) of the Lisbon Treaty on the European Union. So the *finalité* of the European political economy is going to be redefined by the ideas that have shaped the socially inclusive and institutionally coordinated social market economies (SMEs) on the Continent and in Scandinavia, rather than by the liberal market economies (LMEs) of the Anglo-Saxon countries and some of the new member states. Or so one might think.

F. A. Hayek, however, the doyen of market liberalism, would have disagreed. Writing in 1939, in the heyday of post-Depression (i.e. Keynesian) economics and politics and before the beginning of the war that would leave Europe in shambles, he anticipated postwar European integration. And he was sure that integration would be good for market liberalism—not because of any hopes for its renewed ideological hegemony, but because it would reduce the institutional capacity of the state to govern the capitalist economy and to burden it with a

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large welfare state. Hayek's insights were never lost on his neoliberal followers who supported European integration not so much on economic than on normative-political grounds (e.g., Mestmäcker 1988; Buchanan 1995/96). But it seems that they were neither understood by the Christian and Socialist "founding fathers" of European integration—the Schumans, De Gasperis, Adenauers and Spaaks—nor by subsequent generations of "good Europeans" in politics, trade unions and academia whose ideological preferences or manifest interests were quite opposed to unfettered market liberalism.

One reason is that the liberalization that Hayek foresaw was slow in coming. He had assumed that political integration would come first, and that a strong federal government would then create a common market and centralize the policies that could interfere with it. At the same time, however, conflicts of interest among member states were supposed to prevent the creation of a strongly redistributive welfare state whose burdens would fall unequally on economically strong regions. In Europe, however, the historical sequence occurred in reverse order, with political integration postponed after the European Defense Community failed in 1954. The European Economic Community began as a customs union whose members were committed to creating a successful common market that they hoped would eventually facilitate political integration as well. In the meantime, the EEC attempted to remove barriers to trade through intergovernmental negotiations, while its member states took charge of social regulations, social transfers, public services and public infrastructure functions.

For more than two decades, this de facto division of functions between the Community and its member states remained essentially intact. And as long as that was true, there was little reason to worry about the impact of European integration on the interests and values that were served by the existing domestic socioeconomic regimes. Since the early 1980s, however, economic integration has accelerated and intensified and the liberal transformation which Hayek had expected has indeed been taking place in the multilevel European polity. For the Continental and Scandinavian social market economies, this transformation has become increasingly disruptive, and it is important to understand its causes. Was it brought about by the political dominance of certain (neoliberal) ideological preferences, in which case there might still be hopes for a political reversal? Or was it the belated but inexorable consequence of the structural factors associated with the integration of heterogeneous nation states that Hayek postulated?

In the literature, the most influential attempts to explain European liberalization refer to the interests, ideologies and strategies of influential political actors. In Andrew Moravcsik's (1998) account, every step that has deepened economic integration and liberalized regulatory regimes is explained by the (primarily economic) interests and preferences represented by governments of the

larger member states. By contrast, Nicolas Jabko (2006) attributes the surge of liberalizing legislation to the Commission's "strategic constructivism," which persuaded a heterogeneous coalition of political actors that "the market idea" was the solution to all that was wrong in Europe. At the time however, unanimity was still the decision rule of the Community. So some of the smaller member states could easily have blocked initiatives serving the interests of the big three, and there surely must also have been veto players who were not lured by the pied pipers of neoliberalism. So why didn't these dogs bark?

The basic difficulty with both of these explanations, interest-based or ideological, is that they focus exclusively on the agency of purposeful actors while ignoring the (institutional) structure within which actors must define their strategic choices (Giddens 1984). They try to explain Treaty revisions and legislative action by reference to the interests, preferences, worldviews and strategies of actors in national governments, the Commission and the European Parliament while ignoring or downplaying the effect of formal and informal decision rules and the impact which judicial decisions have on the available options of political actors. Instead, structure and agency should be considered as complementary rather than mutually exclusive, explanatory approaches (Scharpf 1997). In the highly structured European policy processes, decision rules—and, more generally, institutions—are bound to create strong asymmetries, favoring some actors and some policy goals, and impeding or obstructing others.[1]

The present essay will explore the impact of two institutional asymmetries: the first one favoring policy-making by nonpolitical actors and impeding political action at the European level, and the second one favoring negative integra-

1 Some readers have suggested that by focusing exclusively on structural conditions, the following text seems to argue not for a balance between structure and agency, but for a structural determinism that leaves no room for the potential of creative agency. The short response is that my purpose here is to make actors more aware of the structural obstacles they would have to overcome if they tried to create a European social market economy. At a more theoretical level, what I will describe here is a pattern of distributed competences but interdependent policy choices. Of course, the Court could have chosen different interpretations of the Treaties, and the Commission, the Council, the Parliament, political parties and organized actors could have responded differently to the evolution of the case law and to opportunities for Treaty revision. If all these choice options could have been combined and employed in a concerted fashion, the overall process of integration could of course have taken a very different direction. But such instances of "positive coordination" are extremely demanding and very rare even in the hierarchical organization of a national government (Mayntz/Scharpf 1975: 145–150; Scharpf 1997: 112–114, 132–135). In the constellations of EU policy making, however, multiple actors with differing worldviews are pursuing different goals. Hence the far more likely outcome is "negative coordination," where each actor considers only its own, limited competences and tends to treat the positions of others as given when assessing its own strategic options. In other words, the structural constraints are mutually created and reproduced by strategic actors with distributed powers and non-holistic action perspectives.

tion and impeding specific policies of positive integration (Scharpf 1999: Chapter 2). These institutional asymmetries, I will then try to show, have the effect of undermining the institutions and policy legacies of "social market economies" at the national level, and they also impede efforts to re-create similar institutions and policies at the European level.

1 Integration through Politics and Integration through Law

The first of these asymmetries concerns the relationship between legislative and judicial powers in the processes of European integration. In the original allocation of functions, European integration was to be achieved either by intergovernmental agreement on amendments to the Treaties or by European legislation initiated by the Commission and adopted by the Council of Ministers. As a consequence, member governments retained control over the extent and the speed of economic unification and liberalization.[2] After tariff barriers had been removed, further progress on the removal of non-tariff barriers was to be achieved through the legislative harmonization of national rules. Thus governments would decide when trade would be liberalized and for which products; when controls over capital movements would be lifted and to what extent; which conditions would permit workers to seek employment and firms to provide services or establish undertakings in another member state, and so on. Since the Luxembourg Compromise of 1966 had prolonged the practice of unanimous decision-making, all governments could be sure that no legislation could remove existing economic boundaries without their agreement (Palayret/Wallace/Winand 2006). As long as this condition went unchallenged, member states could also control the interaction effects between economic liberalization and the functional requirements of their nationally bounded welfare states, their systems of industrial relations, and their public revenue, public services and public infrastructure functions. In other words, the member states could ensure that even in the EEC, economic integration would not exceed the limits of what John Ruggie (1982) described as the "embedded liberalism" of the postwar world economy—that is, a regime in which markets would be allowed to expand within politically defined limits that would not undermine the preconditions of social cohesion and stability at the national level.

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2 This is not so in the field of competition law, including the control of "public undertakings," "services of general economic interest" and of "state aids" (Articles 81–98 ECT), where the Commission may intervene directly against distortions of competition—leaving it to the affected parties to appeal to the Court.

Initially, moreover, these preconditions were fairly similar in the Original Six, all of which had fairly large Bismarckian-type pension and health care systems that were primarily financed by wage-based contributions. They also had highly regulated labor markets and industrial-relations systems, and all had a large sector of public services and infrastructure functions that were either provided directly by the state or in other ways exempted from market competition. Since France had also succeeded in gaining Treaty protection for its more stringent rules on gender equality in the workplace while agriculture was to be organized in a highly regulated, subsidized and protectionist regime, disagreement on the pace of integration in the competitive sectors of the economy was relatively moderate. All that changed, of course, with the first enlargement, which brought the UK, Denmark and Ireland into the Community—and thus member states with very different types of liberal and social democratic welfare states and labor relations (Esping-Andersen 1990), different agricultural interests and, in the case of Ireland, a very different state of economic development. At the same time, moreover, the world economy was shaken by the first oil-price crisis, and while all national economies were in deep trouble, they diverged widely in their sometimes protectionist responses to the crisis (Scharpf 1991).

As a consequence of the greater diversity of member-state interests and preferences, the harmonization of national rules through European legislation became more difficult. And as European markets continued to be fragmented by incompatible national product standards and trade regulations, it seemed that legislative integration might not progress much beyond the customs union that had been achieved in the first decade. In the face of political stagnation, therefore, hopes turned to the possibility of judicial solutions that might bypass political blockades in the Council. This presupposed that the European Court of Justice (ECJ) would be willing and able to engage in large-scale judicial legislation. It would have to interpret the unchanged text of the Treaties in ways that would propel European integration beyond the frontier that had been reached under the high consensus requirements of political legislation.

The doctrinal groundwork for this option had already been laid in the early 1960s by two bold decisions of the Court. The first one interpreted the commitments that member states had undertaken in the Treaty of Rome not merely as obligations under international law but as a directly effective legal order from which individuals could derive subjective rights against the states.[3] The second one asserted the supremacy of this European legal order over the law of member states.[4] With these decisions, the Court claimed a status for Com-

3 *Van Gend & Loos*, C-26/62, 5.2.1963.

4 *Costa v. Enel*, C-6/64, 15.7.1964.

munity law that differed fundamentally from that of all other international organizations. Why and how they came to be accepted has become a fascinating research question.[5] The most convincing explanation focuses on the response of national courts to the referral procedure of Article 234 (ex 177) ECT:[6] The option of requesting the preliminary opinion of the ECJ on issues requiring the interpretation of European law had the effect of empowering ordinary national courts in the course of ordinary litigation to review the validity of national legislation—which may have been particularly attractive for lower-court judges.[7] Moreover, as Burley and Mattli (1993: 44) and Maduro (1998: 11, 16–25) have pointed out, acceptance by national courts and academic lawyers was facilitated by the Court's strict adherence to a style of formal reasoning that emphasized logical deduction from legal principles (even if these had originally been self-postulated) rather than the analysis of substantive economic or social problems or policy goals that might justify the particular interpretation.

The strategy of using law "as a mask for politics" (Burley/Mattli 1993: 44) also helped to immunize judicial legislation against political objections. In cases referred to the ECJ, the government whose laws were challenged was not necessarily directly involved as a litigant, and if it was, it was bound to present its objections within the court-defined frame of legal reasoning. Since the Court tended to announce far-reaching doctrinal innovations in cases with low or even trivial substantive importance, it would have been difficult or impossible to mobilize political opposition against the Court's jurisprudence at the national level, let alone the European one. Yet once the "habit of obedience" (Maduro 1998: 11) was established, European law, as interpreted by the ECJ, was woven into the fabric of the law of the land, which ordinary national courts apply in ordinary litigation. To challenge an ECJ ruling, then, governments would have to confront their own judicial system and renounce the respect for the rule of law on which their own legitimacy depends (Haltern 2007: 192–194). For all intents and purposes, therefore, ECJ interpretations of European law are now "higher law" in the member states.

The effectiveness of the Court's judicial legislation is also greatly enhanced by the extreme difficulty of a political reversal. At the national level, courts and

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5 See for example Burley/Mattli (1993); Garrett (1995); Mattli/Slaughter (1995); Slaughter/Stone Sweet/Weiler (1998); Alter (2001); Stone Sweet (2004).

6 Haltern (2007: 187) calls it the "crown jewel among European procedures of legal protection without which a European rule of law would be unimaginable."

7 Where judicial review exists nationally and is exercised by the highest court or a specialized constitutional court, it may be envied by lower-court judges. It makes sense, therefore, that there are fewer referrals from member states without a tradition of judicial review—and with a strong tradition of majoritarian democracy (Wind/Martinsen/Rotger 2009).

constitutional courts are of course also involved in law-making through interpretation. But judicial interpretations of a statute may be corrected by simple majorities in parliament, and even interpretations of constitutional law could usually be revised by qualified parliamentary majorities. By contrast, ECJ decisions based on primary European law could only be reversed by Treaty amendments that need to be ratified in all member states. And decisions interpreting secondary European law cannot be corrected without an initiative of the Commission that needs the support of at least a qualified majority in the Council, and usually an absolute majority in the European Parliament. Given the ever increasing diversity of national interests and preferences, such corrections were and are in theory improbable and in practice nearly impossible. In other words, ECJ interpretations of European law are much more immune to attempts at political correction than is true of judicial legislation at the national level.

By the early 1970s, the basic foundations of judicial power had been built, and the ECJ could begin to expand its domain. In the 1960s, it had only intervened against national violations of unambiguous prohibitions in the Treaty and against protectionist measures that were clearly designed to prevent the market access of foreign suppliers. In 1974, however, a much wider claim was asserted in the *Dassonville* formula which interpreted Article 28 (ex 30) ECT. This article prohibited "quantitative restrictions on imports and all measures having equivalent effect." In the Court's view, this now meant that "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered measures having an effect equivalent to quantitative restrictions."[8] Under this formula, any national rules and practices affecting trade could now be construed as non-tariff barriers to trade. It was no longer necessary to assert that they served protectionist purposes or discriminated against foreign suppliers, or even that any border-crossing transaction was involved at all. A *potential* impediment would suffice to define a national measure as having an effect "equivalent to quantitative restrictions" on trade.

Given the practically unlimited sweep of the definition, the existence of a "potential impediment" to the exercise of European economic liberties would not, as such, be a disputable issue in future decisions. But the Court also came to realize that the *Dassonville* formula was too wide to be enforced as a strict prohibition in all cases where it might apply. Instead of narrowing the excessive reach of the prohibition, however, the famous *Cassis* decision[9] introduced a doctrinal solution that allowed much more flexible controls over the content of

8 C-8/74, 11.7.1974 at § 5.
9 C-120/79, 20.2.1979.

national policy choices. The textual base was found in Article 30 (ex 36) ECT, according to which even quantitative restrictions could be applied if they served certain specified public-policy purposes, such as "public morality, public order or public security; the protection of health and life of humans, animals and plants […] etc.," provided that these would not "constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States" (Article 30 [ex 36] ECT).[10]

On the face of it, however, Article 30 ECT did not appear very flexible: its somewhat casuistic list could be interpreted to completely exempt national rules that served one of the specified policy purposes from the reach of Article 28 ECT. Since the regulation in question—a German law specifying the minimum alcohol content of liqueurs—had been presented as a measure protecting human health, and since it applied to domestic and imported goods without discrimination, that might have been enough to settle the case. In order to avoid this outcome, the Court had to reinterpret the language of Article 30 ECT.

The first step was to replace the closed list of exemptions specified by the Treaty with its own open-ended formula, according to which

> obstacles to movement within the Community […] must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defense of the consumer.
> (C-120/78, 20.2.1979 at § 8.)

In this new formula, the specific exemptions granted by the Treaty were reduced to the status of justifications which "may be recognized as being necessary in order to satisfy" one of the Court-defined "mandatory requirements." And finally, in case the national regulations could not be so justified, the Court announced a new rule of "mutual recognition" stipulating that products "lawfully produced and marketed in one of the member states" must be allowed in the national market.

By adding new justifications ("fiscal supervision," "defense of the consumer") that had no basis in the text of Article 30 (ex 36) ECT and by introducing the new list with "in particular," the Court had visibly gone beyond the outer limits of text-based Treaty interpretation and asserted its claim to share the Treaty-amending powers of the unanimous member states. But it had done so in a way that was unlikely to provoke political opposition, since it seemed to widen, rather than restrict, the domain of permissible member-state legislation. Moreover, by extending the range of possible exceptions, it introduced a degree of flexibility without having to correct the sweeping *Dassonville* prohibition of all

10 Similar exemptions are specified in Articles 39, 43, 46, 58 ECT.

national regulations or practices that might hinder the exercise of Treaty-based liberties.[11] And it did so by establishing a procedural asymmetry between rule and exception: if an impediment to the exercise of European liberties is alleged, the Court takes judicial notice of its potential effect—which then establishes the rebuttable presumption of a Treaty violation. The presumption may be rebutted, however, if the member state is able to justify the measure in question by reference to one of the "mandatory requirements" accepted by the Court. Yet being treated as exceptions from the general rule of free trade, these requirements are to be narrowly interpreted. And even if that hurdle is overcome, the measure in question must still pass the Court's "proportionality" test—where the burden of proof is on the member state[12] to show that its regulation will in fact achieve the alleged purpose, and that the same policy goal could not also be realized by other measures that would restrict trade to a lesser degree.[13]

As a consequence, the *Cassis* formula[14] maximizes the Court's quasi-discretionary control over the substance of member-state policies. Even in policy areas where no powers have been delegated to the European Union, it is for the Court, rather than for national constitutions and national democratic processes to determine the legitimate purposes of national policy. And it is for the Court, rather than for national governments and legislatures to judge the effectiveness and necessity of measures employed in the pursuit of allowable policy purposes (Haltern 2007: 741–766).

The *Dassonville* and *Cassis* doctrines were subsequently extended from free trade to free service delivery, free establishment, free capital movement, and the

11 A correction, limited to the free movement of goods, was later introduced in *Keck and Mithouard* (C-267/91 and C-268/91, 24.11.1993), where the Court distinguished between rules that might hinder the access of foreign products to the national market and rules "specifying selling arrangements" to which only a discrimination test should be applied.

12 Dorte Martinsen (2009) has shown that the increasing liberalization of transnational access to national health care has largely been achieved by tightening the evidentiary standards for proving the "proportionality" of restrictive rules.

13 In *Cassis* the Court held that the German regulation was not *effective* in serving its alleged public-health purpose, and that it was not *necessary* for achieving its alleged consumer-protection purpose (which might also have been achieved by less burdensome labeling requirements).

14 The formula found its definitive and more abstract expression in the *Gebhard* case (C-55/94, 30.11.1995), where, with regard to the freedom of establishment, the Court postulated that national regulations that "are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty" must fulfill four requirements: "they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

free mobility of workers (Oliver/Roth 2004).[15] In a similar process, moreover, European competition law has been extended to promote the access of private providers to the *service-public* and infrastructure functions that member states had previously excluded from the market or protected against unfettered competition (Smith 2001; Biondi/Eeckhout/Flynn 2004; Grossman 2006; Ross 2007; Damjanovic/de Witte 2008). In principle, therefore, no area of national law, institutions and practices remained immune to the potential reach of European economic liberties and the rules of undistorted market competition.

In other words, by the end of the 1970s, European integration had reached a highly asymmetric institutional configuration: Attempts to remove national barriers to trade through legislative harmonization continued to be severely impeded by the "joint decision trap" (Scharpf 1988, 2006), whereas "Integration through Law"[16] was able to move forward without political interference through the seemingly inexorable evolution of judicial doctrines protecting and extending the Treaty-based rights of private individuals and firms. As I will argue in the next section, however, this asymmetry between judicial and legislative action also had a powerful impact on the capacity for, and the direction of, European political legislation.

2 Judicial Deregulation and Legislative Liberalization

Substantively, the main thrust of judicial action is to extend the reach of "negative integration" (Scharpf 1999). To understand this, one must realize that integration through law could only be achieved because, ever since *Van Gend & Loos*

15 There are, however, interesting differences among these liberties with regard to the type of national regulation that the Court will never allow as a "mandatory requirement." When the free movement of capital and persons is an issue, the court will generally not accept revenue and budget concerns as an imperative requirement (Schmidt 2007, 2009c). For the trade in goods, regulations of product qualities may be justified, whereas regulations of the conditions of production could never justify a restriction on imports. For services, however, where production and consumption will often occur *uno actu*, regulations of the qualifications of service providers and the process of service provision could massively affect the quality of the service itself. Hence they could not generally be denied the status of a justifiable "mandatory requirement." This explains why the Bolkestein proposal of a services directive met with massive opposition when it postulated the mutual recognition of regulations adopted and implemented in the country of origin as a general rule.

16 This was the title of a large-scale research and multi-volume publication project coordinated at the European University Institute, Florence. See Cappelletti/Seccombe/Weiler (1985). On the support which this concept had received early on from an enthusiastic Euro-law community, see Vauchez (2008) and Alter (2009: Chapter 4).

(C-26/62, 5.2.1963), the Court had reinterpreted the commitments of member states to create a common market as subjective rights of individuals and firms against these member states.[17] Without this reinterpretation, the doctrine of "direct effect" could hardly have been invoked by private litigants in national courts, from where they would reach the European Court of Justice through the preliminary reference procedure (Article 234 ECT). And without these private "enforcers" (Kelemen 2003), European law could never have achieved its present scope and effectiveness. This has a powerful effect on the substantive direction of the ECJ's case law.

First, the questions the Court will receive and the cases it will see must inevitably constitute an extremely skewed sample of all the interest constellations that are affected by European integration. They will reflect the interest of parties who have a major economic or personal stake in increased factor or personal mobility, and who also have the financial and organizational resources[18] to pursue this interest by seeking judicial redress against national laws and regulations (Conant 2002; Kelemen 2003). What the Court will not see, however, are cases promoting the interests of the less mobile majority of European individuals and firms (Fligstein 2008) and, even more significantly, cases representing the interests that benefit from existing national laws and regulations. Since a favorable decision will encourage other parties to exploit the newly granted liberty from national regulation, and to push for its extension to other areas, the evolution of the case law will not tend to a stable equilibrium in which opposing interests are fairly accommodated (as in the common law of contracts, which can be expected to generate a stable balance between the interests of buyers and sellers). Instead, and independently from any liberal preferences the judges might entertain, its dynamic expansion will be driven by the persistent push of liberalizing interests searching for new obstacles to remove[19] (Schmidt 2009b).

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17 Remarkably, in two early (and very integration-minded) German commentaries on the Treaty of Rome, there is no suggestion of judicially enforceable subjective rights. What is emphasized is the empowerment of the Council to adopt directives that will allow the free movement of goods, persons, services and capital, as well as free establishment (von der Groeben/von Boeckh 1958; Meyer-Marsilius 1960). At the same time, however, relatively small Euro-law associations collaborated with the Court to invent, develop, publicize and propagate the legal concepts that were used in this transformation of Treaty commitments into constitutionally protected basic rights (Vauchez 2008; Alter 2009: Chapter 4).

18 As Lisa Conant (2003) has shown, even consumer interests in liberalized air services could not get a hearing before the Court until major air carriers became interested in opening national markets.

19 Progress may of course come late in some areas, and slow down temporarily in others. But given the constitutional status of Treaty interpretations and the steadying influence of judicial precedents and legal discourse, the overall development is likely to be shaped by the unidirectional effect of a "ratcheting mechanism."

It needs to be said, however, that "liberalization" is not necessarily to be understood in a market-liberal or neoliberal sense. Given the dominant focus of the Treaty of Rome on economic integration, it is of course true that most of the Court's case law responds to the economic interests of business enterprises and capital owners. At the same time, however, the Court has, from early on, protected the social rights of migrant workers against discrimination on grounds of nationality, and it has expanded the guarantee of equal pay for men and women (Article 141 ECT) into a workplace-oriented regime of gender equality (Cichowski 2004). In highly innovative—or even "artistic" (Hilpold 2008)—decisions, it has also approximated the status of mobile students to that of migrant workers and, in the case enforcing access to *Austrian* universities,[20] it has even ruled that Austrian taxpayers should pay for the education of German medical students who did not qualify for admission at home. At the same time, the (active and passive) freedom of service provision was used to allow the access of foreign providers to domestic health care systems, and to require that patients seeking ambulatory and stationary health care abroad should be reimbursed by their national systems (Martinsen/Vrangbaek 2008; Martinsen 2009). In the meantime, moreover, the combination of EU citizenship, freedom of movement and nondiscrimination on grounds of nationality is used to minimize national residency requirements that would limit migrants' access to national welfare systems (Wollenschläger 2007; Egger 2008).

Thus it is indeed true that the rights-based case law of the ECJ is expanding into new areas where its evolution is not, or not primarily, driven by the economic interests of big firms and capital owners (Caporaso/Tarrow 2008). In that sense, "liberalization" should now be treated as a generic term describing mobility-enhancing policies that may serve economic as well as noneconomic interests. But that should not be interpreted as progress toward the social embeddedness of the European economy or as the judicial recognition of the values of social solidarity. Instead, effective systems of social solidarity—which presently exist only within member states—may in fact be undermined if the legitimating assumptions of a basic reciprocity of rights and obligations are weakened (Menéndez 2009). Similarly, European citizenship, as defined by the Court, is not about collective self-determination. It is about individual rights of exit from, and entry into, democratically shaped and collectively financed systems of national solidarity (Somek 2008). For the new social liberties as for economic liberties, therefore, integration through law maximizes negative integration at the expense of democratic self-determination in the national polity.

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20 C-147/03, 7.7.2005.

Of even greater importance is a second structural effect. Given its rights-based interpretation of Treaty obligations, the only remedy the Court can offer to the complaints of private litigants is to disallow national regulations that impede factor mobility or personal mobility or that violate standards of nondiscrimination. Hence the immediate effect of such decisions is to deregulate existing national regimes. What the Court cannot do is establish a common European regime that would respond to some of the values and policy purposes which, as a consequence of its decisions, can no longer be realized at the national level.[21] If reregulation should be considered desirable, it could only be pursued through political legislation at the European level. And given the high consensus requirements of European legislation and ubiquitous conflicts of interest among extremely heterogeneous member states, one would indeed expect a strong asymmetry between judicially imposed negative integration and legislative positive integration (Scharpf 1999).

However, that is only part of the story. In fact, the *Dassonville-Cassis* line of ECJ decisions has become a most powerful force for the revitalization of European legislation—and it also continues to shape the substantive direction of political action at the European level. To appreciate this effect, however, one must take a closer look at the impact of the ECJ's case law on the policy options of national governments.

On their face, the Treaty-based liberties are explicitly worded to apply only to national measures affecting trade and free movement between member states or other border-crossing transactions (e.g., Articles 3[1][a], 3[1][c], 56[1] or 81[1] ECT). In the Court's practice, however, this textual constraint is not generally respected (Oliver/Roth 2004: 429–434). This ambivalence may, as Maduro (1998: 158–161) argued, reflect an unresolved normative conflict between an understanding of European economic liberties as safeguards against protectionism or as fundamental principles of a neoliberal or ordoliberal "economic constitution." In positive law, however, the ambivalence also seems to have its roots in the wide sweep of the *Dassonville* formula. If national rules with merely *potential* border-crossing effects can violate European liberties, these rules may be (and are in fact) challenged in cases which involve no border-crossing transactions at all. Where that is so, the decision must logically apply to domestic transactions as well.[22] And even if Court-defined liberties and competition rules were only applied to bor-

21 Maduro (1998: 61–78) suggested that the Court, in a spirit of "majoritarian activism," may have achieved a degree of "judicial harmonisation" by upholding national regulations if they agreed with those adopted in most other member states.

22 In the *Volkswagen* law case (C-74/07, 23.10.2007), for instance, the rule establishing a blocking minority of 20 percent (rather than the more usual 25 percent) was seen as a *potential* deterrent to foreign direct investment, and hence to free capital movement. If this was so, the rule could of course not remain in force for German investors alone. In *Cassis*, by contrast, the minimum

der-crossing transactions, the removal of national boundaries through negative integration would still have a major impact on the capacity of member states to shape their internal regimes in accordance with their own political preferences.

The reason is that, in *Cassis*, the Court had also announced the rule of "mutual recognition." If a national impediment to trade did not fit the Court's list of allowable "mandatory requirements," or failed to pass its "proportionality" test, it could no longer be applied to exclude imports. Hence, the member state would have to open its internal market to all products that were lawfully produced and marketed in their country of origin, but it was free to maintain the rule for domestic producers. As a consequence, products complying with potentially very different legal requirements would be competing in the same market, and domestic suppliers might suffer from "reverse discrimination" favoring competitors from locations with less burdensome rules. In countries with high standards, one could thus expect administrative difficulties, economic displacement effects and political pressures from disadvantaged national producers (Schmidt 2007; Nicolaïdis 2007; Maduro 2007). In other words, "integration through law" would directly or indirectly undermine the capacity of member states to shape the conditions of production and consumption in their own markets according to national political preferences.

Once this was understood, however, the *Cassis* doctrine also changed the bargaining constellation and incentives that member states faced in the processes of European legislation. While in the past national law had remained in force[23] as long as governments did not agree on a harmonization directive, the new default condition would now be "mutual recognition." This, at any rate, was the interpretation that the Commission began to spread in its early "communications" (Alter/Meunier-Aitsahalia 1994). Rather than waiting for appropriate cases to reach the ECJ through referrals from national courts, the Commission also stepped up its prosecution of Treaty infringements (op. cit.: 548; Stone Sweet 2003: 40). The immediate effect of the Court's decisions, the Commission's communications, and the actual or threatened infringement prosecutions was to create an atmosphere of legal uncertainty in which the continued viability of a wide range of national regulations was thrown into doubt (Schmidt 2008).

The Commission responded to this (largely self-created) uncertainty with reform proposals that would reempower integration through political legislation. Its

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alcohol requirement for liqueurs (which was seen as an *actual* constraint to imports) might have been maintained for domestic producers—and then might have been challenged as "reverse discrimination."

23 This would not be so in areas over which the Community has exclusive competence, so that national solutions are ruled out even if there is no agreement on European legislation (Haltern 2007: 113–118).

white paper on "Completing the Internal Market" (Commission 1985) specified a strategy for more rapid legislative integration on which a diverse coalition of economic interests and political actors could converge. The campaign culminated in the Single European Act (SEA) of 1986 which, in Article 95 ECT, reduced the consensus requirements of political action by introducing qualified-majority voting in the Council for measures serving the completion of the Internal Market.

The literature explains the success of these reform proposals and the dramatic increase in the volume of liberalizing legislation either by the liberal preferences of the British, French, and German governments in the mid-1980s (Garrett 1992, 1995; Moravcsik 1998) or by the Commission's ideological entrepreneurship, which sold the market idea as a general solution to Europe's problems (Jabko 2006). I see no reason to exclude these factors from an overall explanation. But they pay inadequate attention to the extent to which the *Dassonville-Cassis* line of recent ECJ decisions had undermined the veto positions of member states that had previously opposed European legislation. Faced with the prospect of haphazard judicial interventions against existing national regulations, and with the threat of Treaty-violation prosecutions launched by the Commission, the relaxation of the unanimity rule to facilitate the adoption of common European standards must have appeared as a lesser evil. This is by now well understood (Stone Sweet 2003, 2004; Schmidt 2009a, 2009c; Alter 2009). What is less obvious, however, is the effect of judicial decisions on the substantive direction of subsequent European legislation.

Nevertheless, the Single European Act and subsequent Treaty amendments have not only established new legislative competences of the Community; they have also launched an increasing volume of effective European legislation in areas where national competences have been constrained by the Court. Some of this legislation, it is true, merely systematizes and regularizes the case law and thus contributes to more transparent negative integration. But in quite a few areas, such as work safety, consumer protection and environmental protection, European legislation has adopted rather demanding standards that represent impressive achievements of positive integration. At the same time, there are other areas, such as capital taxation or industrial relations, where the Court's protection of economic liberties prevents action at the national level, but where neither liberalizing nor regulatory legislation could be adopted at the European level. The question of how these cross-sectional differences might be explained ought to be high on the research agenda of European legislative studies.[24] Since

24 Gerda Falkner at the Austrian Academy of Sciences (<www.eif.oeaw.ac.at>) is presently directing a project that will record and compare the progress of European legislation across a wide variety of policy areas.

all legislation will at least require qualified majorities in the Council, one should certainly expect that the degree of harmony or conflict among the original interests and preferences of national governments will make a difference. But how these preferences will affect the legislative outcome is greatly influenced by the jurisdiction of the ECJ and, in particular, by differences in the application of the *Cassis* formula.

In policy areas where the general drift of the case law has been hostile to national regulations, the default condition of political negotiations is the rule of "mutual recognition." This will undermine the bargaining power of opponents to liberalization, and the Commission may then be encouraged to propose a liberalizing directive that consolidates and generalizes the accumulated case law.[25] A case in point appears to be the recent proposal of a directive that summarizes ECJ decisions on the rights of patients to be reimbursed for health care obtained abroad.[26] But the Commission may also be tempted to exploit its greater bargaining power by proposing a directive that pushes liberalization beyond the front lines that had already been secured by the Court. When that is the case, the affected interests may mobilize political resistance in the Council and in the European Parliament, and the liberalization directive may fail or be reduced to a level significantly below the Commission's aspirations.

This seems to have happened to the "takeover directive" where the Commission had relied on the early "golden-shares" decisions of the ECJ to propose a radical liberalization of the market for company control, only to see it rejected by the European Parliament in 2001. The directive that was finally adopted in 2004[27] was much more limited in its ambitions. But in the meantime, liberalization has gone beyond this directive in the subsequent case law of the ECJ (Roth/Demetz/Donath 2008). The pattern was repeated in the case of the "services directive," where the version originally proposed by Commissioner Bolkestein was held up in the European Parliament and could only be passed in a version that excluded a range of public and social services and did not install the "country of origin" rule (Schmidt 2009c).[28] But the Treaty-based case law itself could not be reversed by legislation, and the Commission relies on it in its new proposal on cross-border health care that tries to recover some of the ground lost by Bolkestein. Similarly, recent ECJ decisions have demonstrated

25 As Susanne Schmidt (2000) has shown, such directives may be strongly supported by (former) high-regulation states whose markets the Commission had previously opened through infringement prosecutions.

26 COM (2008) 414 final. See Martinsen/Vrangbaek (2008).

27 Directive 2004/25/EC.

28 Directive 2006/123/EC.

that the "posted workers directive"[29] does not prevent the Court from invoking the Treaty-based freedom of services provision to strike down wage regulations that had been considered allowable under the directive.[30] Moreover, in fields like corporate taxation or industrial relations, where it seems obvious that both more liberalization and more harmonization would be politically unfeasible, the Commission may just leave the matter entirely to the continuing progress of the Court's case law (Ganghof/Genschel 2008).

In other words: The liberalizing effect of judicial decisions may be systematized and perhaps radicalized by European legislation. But given the constitutional status of ECJ decisions interpreting Treaty-based liberties, political attempts to use legislation in order to limit the reach of liberalization are easily blocked by the veto of "liberal" governments and, in any case, could not bind the Court and are likely to be frustrated by the subsequent evolution of the case law.

The game is different, however, in areas where the Court has, at least in principle, accepted the legitimacy of national policy purposes, and where some national rules interpreted as impediments to free movement or distortions of competition would also survive its proportionality test—which was most likely for product regulations protecting the health and safety of consumers and workers or the environment. Where that is the case, the Commission could only remove these impediments by proposing directives that would harmonize national rules under Articles 95 or 96 ECT. But under these conditions, the bargaining constellation is reversed. Now member states with high regulatory standards could defend the status quo by vetoing proposals that do not achieve the same level of protection. Moreover, the Treaty itself instructs the Commission to aim at a "high level of protection" in proposals "concerning health, safety, environmental protection and consumer protection" (Article 95 [3] ECT)—which may legitimate policy activists among the Commission staff to come up with more ambitious proposals to begin with. At the same time, it seems likely that national actors responsible for environmental protection, health and safety protection or consumer protection would also prefer more effective European rules, provided that the economic pressures of regulatory competition could be neutralized. And these would at least be reduced by having common rules within the EU.[31]

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29 Directive 96/71 EC.

30 See C-341/05, 18.12.2007 *(Laval)*; C-346/06, 3.4.2008 *(Rueffert)*; C-319/06, 19.6.2008 *(Luxembourg)*; Joerges/Rödl (2008).

31 In addition, the weakness of cross-sectional coordination in the Council (and probably also within the Commission and among committees in the European Parliament) might leave opposing interests with less veto power than they could have exerted in interministerial bargaining or public debates at the national level. The recent regulation outlawing incandescent household lamps (EC 244/2009) might be a case in point.

It is in these areas, therefore, where one could expect, and does indeed find, European legislation establishing quite demanding European standards above the level of the lowest common denominator, and perhaps also above the level achieved in the median member state (Eichener 1997; Pollak 2003; Vogel 2003; Knill 2008).

3 The Vertical and Horizontal Impact of Integration by Law

So where does this comparative overview of judicial and political legislation leave us? Integration through law has clearly not replaced integration through political legislation across all policy areas. On the contrary: judicial decisions did provide the crucial impulse for the relaunch of European legislation in the second half of the 1980s, and they have continued to provide a dynamic stimulus for further legislation ever since. There is no question, therefore, that the Court has pushed the domain of European law far beyond the frontiers that would and could have been reached if integration had continued to depend entirely on the processes of intergovernmental negotiations. In the vertical dimension, therefore, ranging from purely national to exclusively European governing competences, the jurisprudence of the Court has acted as a persistent and effective upward-directed force, extending the reach of European law and constraining the autonomy of national institutions and policy choices even in fields that the Treaties had explicitly excluded from the domain of European legislation.

This was possible because by postulating the supremacy doctrine, the Court assumed the status of a constitutional court in the relationship between the European Union and its member states. But in contrast to the constitutional courts of established federal states, the law it has created is not intended to identify and protect a stable balance between the mandates, legitimacy bases and functional requirements of both levels of government. It is an instrument for promoting a dynamic process of ever increasing European integration. And it is fair to say that in this commitment, the Court not only had the full support of the "Euro-law community" (Alter 2009: Chapter 4), but that it was also vindicated politically by the 1992 program and subsequent Treaty amendments, from Maastricht through Amsterdam to Lisbon, which progressively widened and deepened the impact of European law.

For pro-European governments, political parties, organized interests and public media, the progressive loss of national autonomy was obviously outweighed by the real and anticipated benefits of Europeanization. But why is it

then that the Constitutional Treaty was rejected by referenda in France and the Netherlands, that voter participation in European elections is falling and that the anti-European vote is rising in a growing number of member states? Why is it that the gap between elite and non-elite support for European integration is widening (Hooghe 2003; Fligstein 2008; Haller 2009) and, more specifically, why is it that solidly pro-European labor unions and center-right and center-left political parties are bewildered by a series of recent ECJ decisions which they see as exceeding the powers of the Union and interfering with national norms, institutions and policy choices that have high political salience (see, e.g., Herzog/Gerken 2008; Monks 2008; Liddle 2008; Arbeitskreis Europa 2009)?

The specific decisions, some of which also raised concern in the European Parliament (Committee 2009), had disallowed legislation intended to increase employment opportunities for the elderly,[32] required Austrian universities to admit German students who failed to qualify for medical education at home,[33] and subordinated the right to strike to the freedom of establishment,[34] the right to collective bargaining[35] and legislative wage determination[36] to the freedom of service provision, and the legislative determination of corporate governance[37] to the freedom of capital movement. Nevertheless, even left-leaning Euro-Law specialists considered these decisions as judicial business as usual and failed to see what the political noise was all about (see, e.g., Mayer 2009; Reich 2008).

The reason is that European integration has ceased to be an idealistic aspiration. It has become a reality whose hard-law constraints are increasingly felt in the economic, social and personal lives of citizens. And if these citizens are even dimly aware of how European law is produced, they must also realize that the familiar mechanisms that ensure political responsiveness in national politics will not protect their interests in European decision processes. At the same time, however, pro-European legal discourses and political rhetoric are still shaped by the idealistic commitment to promoting European integration against what they consider protectionist impediments and nationalistic opposition. As a consequence, there are no meaningful public exchanges between pro-European elites and national non-elites about the impact of integration on the life-worlds of ordinary citizens (V. A. Schmidt 2006). By the same token, European law has no place for discussions about the relative importance of European and national concerns.

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32 *Mangold*, C-144/04, 22.11.2005.
33 *Republic of Austria*, C-147/03, 7.7.2005.
34 *Viking*, C-438/05, 11.12.2007.
35 *Laval*, C-341/05, 18.12.2007.
36 *Rueffert*, C-346/06, 3.4.2008; *Luxembourg*, C-319/06, 19.6.2008.
37 *Volkswagen*, C-112/05, 23.10.2007.

In established federal states, by contrast, the constitutional discourse is necessarily bipolar, concerned with accommodating and balancing the equally legitimate concerns of central and subcentral levels of government. These balances differ in Switzerland, Belgium, Germany and the United States (Obinger/Leibfried/Castles 2005), and they may also vary over time—as in America, where the rise of national powers during the New Deal and Great Society periods was followed by a reassertion of states' rights in the New Federalism of the 1980s. In all federations and in all periods, however, constitutional law and constitutional discourses have a bipolar conceptual structure in which legitimate national and subnational concerns have equal normative status.

In European law and pro-European discourses, however, there are no concepts that could identify, define and evaluate legitimate concerns of member states that should be beyond the reach of European law. The principle of "subsidiarity," which was inserted into the Treaties at the insistence of the German *Länder*, could at best impose limits on European legislation. It was never meant to limit the judicial interpretation of Treaty-based liberties (Davies 2006). But even if this were not so, the principle focuses only on the technical effectiveness and efficiency of regulations at European and national levels, ignoring the normative and political salience of the concerns at stake. What's more, its prescriptive content becomes indeterminate when differences in the size, wealth and administrative organization of each member state affect the capacity for national solutions. What is subsidiary for Germany need not be so for Cyprus, and the national minimum wage law, which Sweden would have had to adopt in order to comply with the *Laval* decision, would have been acceptable in most member states (Schulten 2009). But it would provoke a major normative difficulty in Sweden, where wages since the 1930s have been determined exclusively by collective agreements between highly organized federated unions and employers' associations (Meidner/Hedborg 1984; Edin/Topel 1997). In other words, European law has no language to describe and no scales to compare the normative weights of the national and European concerns at stake.

This conclusion is not contradicted by the fact that the Court, in *Cassis* and afterwards, has allowed that certain national impediments to the exercise of Treaty-based liberties might be justified by "mandatory requirements of public interest." For one thing, it is entirely up to the Court to determine which national concerns may qualify as mandatory requirements. For instance, national tax rules that might impede capital mobility can never be justified by an interest in raising revenue, even though this surely must be among the most fundamental and legitimate concerns of any government (Ganghof/Genschel 2008). And national measures serving one of the acceptable policy purposes are then subjected to a proportionality test that is procedurally skewed against national

concerns. In other words, the case law does not recognize a sphere of national autonomy in which purposes of public policy and the measures through which these are to be realized should be chosen by democratically legitimated political processes. Whenever it is claimed that such measures might impede the exercise of European liberties, or might violate the prohibitions against discrimination, or might distort market competition, national institutions and policy choices are at the mercy of the ECJ's discretion, which is generally guided by a unipolar logic that maximizes Europeanization at the expense of national autonomy.[38] And it is hard to see how that could be different.[39]

This relationship, moreover, has been immune to attempts at political correction. Member states had, in Article 137 (5) ECT, explicitly ruled out EU legislation over pay, collective bargaining, strikes and lockouts, and similar prohibitions were introduced for education (Article 149 [4] ECT), vocational education (Article 150 [4] ECT), culture (Article 151 [5] ECT) and health care (Article 152 [5] ECT). But these prohibitions did not prevent the Court from disallowing national regulations of the right to strike in Sweden, of pay in Germany and Luxembourg, and of education in Austria. Within the doctrinal framework established by the case law, member states could at best constrain political legislation at the European level, but they could not prevent the Court from extending

38 Generally, that is, but not in every case. In *Preussen-Electra* (C-379/98, 13.3.2001) for instance, a German law requiring networks to purchase electricity from renewable sources at prices above the market level was not seen as a distortion of competition; in the *Brenner Blockade* case (C-112/00, 12.6.2003), Austria's non-interference with a demonstration that had temporarily blocked the Alpine transit from Germany to Italy was not seen as an impediment to the free movement of goods; and in *Doc Morris* (C-171/07, 172/07, 19.5.2009) the German law requiring pharmacies to be individually owned by a certified pharmacist was not seen as a violation of the freedom of establishment. These exceptions appear puzzling to Euro-lawyers who try to identify a general logic in the case law. In my view, they are best understood as manifestations of the Court's discretionary power—which, since it can disallow national policy choices with minimal support in the letter of the law, may also allow them for unexpected reasons. By no means, however, could these exceptional decisions provide the conceptual foundation for a general, and generally fair, balance between crucial European and national concerns.

39 That is, of course, not meant to say that individual decisions could never have gone the other way—especially where they did turn on the Court's interpretation of the proportionality test. As is true of all courts, the ECJ's resolution of specific cases is frequently the object of controversial discussions in the legal community. But that should not obscure the structural effectiveness of the path-dependent doctrinal development: Once the supremacy and direct effect of European law had been established, it followed that all Treaty-based subjective rights and liberties would override existing national regulations. And once the requirement of discrimination had been replaced by the prohibition of "potential impediments" in *Dassonville* and by the proportionality test and "mutual recognition" in *Cassis*, the toolset of progressive "negative integration through law" was complete—and with it the ratcheting mechanism that secured the front line established by judicial liberalization against political reversals through European legislation.

the reach of Treaty-based liberties into policy areas that the Treaty had explicitly excluded from the domain of delegated powers.[40] As long as these liberties are treated as constitutionally protected fundamental rights,[41] that conclusion cannot be challenged on technical-legal grounds.

But even if it were technically possible to construct effective hard-law limits of European law, including judge-made European law, it would still be difficult to define the policy areas where national autonomy ought to be protected. The German constitutional court tried to do so in its recent judgment on the Lisbon Treaty, by postulating limits on the potential domain of European powers that are defined by the need to protect the "constitutional identity" of EU member states.[42] National autonomy should prevail in areas where policy choices are specifically shaped by preexisting cultural, historical and linguistic understandings *("Vorverständnisse")*.[43] Among these, the court included issues of language, religion, education or family law.[44] These "sociocultural" matters have admittedly not been at the core of pro-integration policies, and even in the Lisbon Treaty they are not included among the exclusive or shared powers of the Union (Articles 3 and 4 TFEU). But these areas may well become more salient as the EU moves beyond economic integration and seeks to promote sociocultural integration among the "peoples of Europe." Even now, it is hard to imagine that national regulations on education or family law could remain unaffected by the Court's interpretation of European mobility, nondiscrimination and citizenship rights. Even here, therefore, autonomy could not be absolute, and a balancing test would need to be applied. If it were to be attempted, however, it would also become clear that diversity matters, and that the normative salience of particular sociocultural issues varies greatly from one member state to another (Kurzer 2001).[45]

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40 The Court's usual response is that, yes, member states retain the right to shape their own industrial relations or social security or health care systems. But in doing so, they must of course respect the Treaty-based rights of individuals and firms. See for example C-158/96, 28.4.1998 at §§ 16, 19–20 *(Kohll)*.

41 Agustín José Menéndez (2007 at § 31) goes as far as to consider "the effective upholding of the four economic freedoms […] as a *basic precondition* for the effective protection of all *fundamental rights*. This presupposes the claim that in the absence of such a protection, peace and material prosperity is at risk, and with it, political, civic and socioeconomic rights; or in brief, all rights."

42 BverfG, 2 BvE 2/08, 30.6.2009.

43 Ibid. at § 249.

44 Ibid. at § 252.

45 In national federal constitutions, if the sociocultural identity is highly salient in all regional units, the appropriate solution may be a general decentralization of competences, as is true in Switzerland. But if such concerns are much more salient in some units than in the rest of the polity, asymmetric federalism may grant more autonomy to some regional units than to others, as is true in Canada, Spain, or the United Kingdom (Agranoff 1999).

Beyond that, however, the German court also defined "constitutional identity" to require sufficient space for national policy choices shaping the economic and social conditions affecting the lives of citizens—including fiscal and social-policy choices. This raises still more difficult problems. In contrast to the very limited European competences in sociocultural matters, competences over the economy have been thoroughly Europeanized. And since their exercise would inevitably have an impact on social conditions, some social-policy competences were added in later Treaty revisions as well. In contrast to the sociocultural sphere, therefore, there is no possibility of arguing for a general presumption of national autonomy in the socioeconomic sphere. It is also true, however, that EU member states differ greatly in the institutional structures and normative premises of their existing economic and social systems, and that the specific national configurations have high political salience and may indeed be considered as part of the "constitutional identity" of EU member states.

These differences, which have been all but ignored in legal discourses on European integration, are the object of a growing body of empirical and theoretical research in comparative political economy. In this literature, two distinctions are generally used to describe the basic characteristics of the social and economic structures of advanced capitalist democracies. The first one was introduced by Esping-Andersen (1990) in his account of the "three worlds of welfare capitalism," labeled "Liberal" (or Anglo-Saxon), "Christian Democratic" (or Continental) and "Social Democratic" (or Scandinavian). His classification focuses on social-policy and industrial-relations regimes and the extent to which they are designed to ensure social equality, social security and the "decommodification" of labor. The second classification, introduced by Hall and Soskice (2001), distinguishes two fundamentally different "varieties of capitalism," namely "Liberal Market Economies" and "Coordinated Market Economies." Here the focus is on the relationship between the international competitiveness of national economies and the nation-specific institutional regimes of corporate governance, corporate finance, labor relations, industrial training and industrial R&D.

In both classifications, there is a "Liberal" or "Anglo-Saxon" ideal type in which the role of the state is reduced to a minimum. The liberal welfare state provides means-tested social assistance and basic social and health services to the needy, but leaves all others to look out for themselves in the private investment, insurance and service markets. Similarly, in the liberal market economy, the state creates the preconditions of functioning markets by protecting property rights, enforcing private contracts and establishing a regime of undistorted competition. Beyond that, it may intervene in the market to protect public health, work safety, the environment and consumers' rights. But the liberal state is expected to minimize its involvement in the provision of infrastructure functions and services,

and it is definitely not expected to interfere with economic interactions in product markets, labor markets, capital markets, skill markets and technology markets.

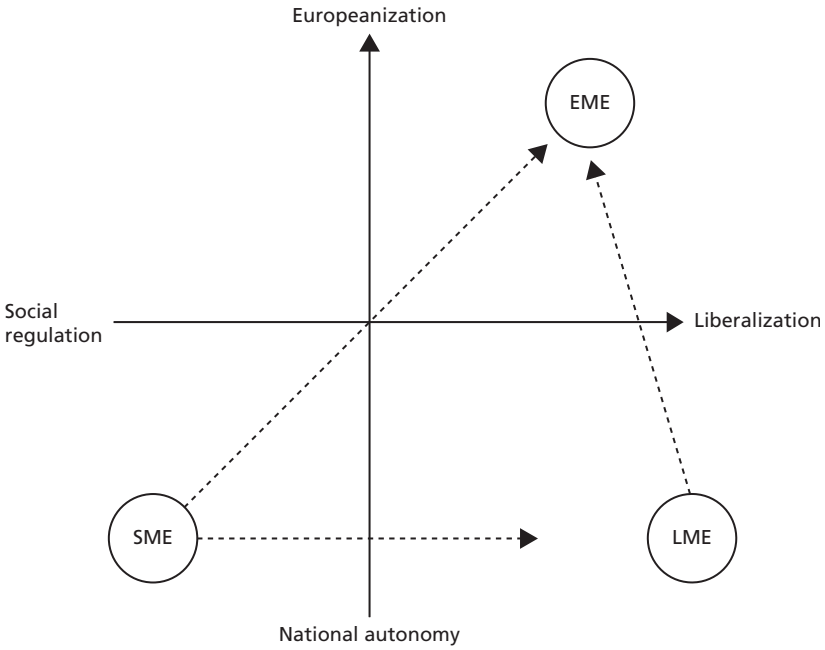
By contrast, the state in a coordinated market economy is heavily involved in maximizing the economic benefits of public infrastructure, technology and training policies. Its labor markets are highly regulated and relatively inflexible; industrial relations tend to be shaped by "cooperative" collective bargaining at the level of industries and firms, and interactions between firms and banks and among firms are embedded in relatively stable network relationships. At the same time, the Continental and Scandinavian welfare states provide not just social assistance but social security, by ensuring retirement incomes, health care, and unemployment benefits for all. The Scandinavian welfare state goes even further, providing universal social services for families with children, for the handicapped, and for the elderly. These are financed through steeply progressive taxes which, combined with the "solidaristic" wage policies of powerful and monopolistic unions, ensure a very high degree of social equality (Scharpf/Schmidt 2000a).

Both the Esping-Andersen and Hall and Soskice classifications use ideal types to provide simplified descriptions of highly complex and country-specific configurations. Hence the assignment of a country to a particular type will neither capture all features of the national institutional constellation,[46] nor is it possible to assign all countries to nonoverlapping clusters (Ahlquist/Breunig 2009). Moreover, these types were derived from configurations that matured in the "golden age" of postwar welfare states and mixed economies, and the distinctions have become more blurred in the meantime as a consequence of national responses to increasing international (global and European) challenges (Scharpf/Schmidt 2000b). Nevertheless, the two methods of classification have generated a rich body of comparative research confirming the systemic importance of the traits used to define the models.

For present purposes, I will simplify even more by collapsing the social and the economic classifications into a single distinction between liberal market economies (LMEs) and social market economies (SMEs). In other words, the ideal-type LME is assumed to have a liberal market economy *and* a liberal welfare state; and the ideal SME will combine the characteristics of a coordinated market economy with either a Continental or Scandinavian type of welfare state. This heroic simplification then allows for the construction of a two-dimensional space in which "Europeanization" and "national autonomy" describe the vertical axis of European integration, while the socioeconomic distinction between "social regulation" and "liberalization" defines a horizontal axis that is generally

46 For instance, in countries that are generally identified with the "liberal" model, this is true of the National Health Service in the UK and of Social Security and Medicare in the United States.

Figure 13-1 The effect of Europeanization on Social Market Economies (SME), Liberal Market Economies (LME) and the emerging European Market Economy (EME)



ignored in the Euro-law and Europeanization discourses. The two axes can then be used to construct a two-dimensional diagram for mapping the consequences that the Europeanization of competences and the widening domain of European law will have for member states whose existing institutions differ in the socioeconomic dimension (Figure 13-1).

Figure 13-1 is meant to show that the Court's enforcement of economic liberties will have the least effect on the institutions and practices of liberal market economies. By the same token, the governments of these member states (which by now include not only the UK, Ireland and—in some policy areas—the Netherlands, but many Central and Eastern European countries as well) have reason to welcome the removal of non-tariff barriers in other member states and the creation of competitive markets in sectors that other countries had reserved for the public sector or otherwise shielded from competition. These more liberal market economies can thus be expected to profit from negative integration and to support whatever additional initiatives for legislative liberalization and deregulation the Commission will propose.

The situation is very different for countries located near the other end of the socioeconomic spectrum. In the article cited at the beginning, F. A. Hayek (1948 [1939]) had expected that in a European federation the competition among national economies would bring about a conversion to the liberal model. In the meantime, however, Hall and Soskice and their collaborators (2001) have shown that the international competitiveness of "coordinated market economies" benefited from comparative advantages created by domestic institutions and practices that both complemented and displaced the mechanism of pure market interactions. Given their different production profiles, and their orientation to different markets, coordinated economies could be as efficient as the liberal ones—in fact, looking at the balance of current accounts, they are generally more successful in economic terms. At the same time, however, they are extremely vulnerable to the deregulation that comes with the legal constraints of negative integration and liberalization.

Thus, the Court's recent decisions are not only disabling crucial features of national labor law, industrial relations law and wage setting practices. Its interpretation of the freedom of establishment clause also allows firms to evade national rules of corporate governance by incorporating in a different jurisdiction.[47] Since we already know from the *Volkswagen* case that the Court saw the freedom of capital movement as potentially impeded by a statute defining the blocking minority in the shareholder assembly,[48] there is every reason to expect the same verdict should the ECJ have to review a statute requiring the participation of workers on the supervisory board of large companies. In short, the Court's decisions are undermining the institutional foundations on which the comparative advantages of coordinated market economies have depended. The liberal transformation, which Hayek had wrongly expected to result from the pressures of market competition, is finally occurring under the legal compulsion of ECJ jurisprudence (Höpner/Schäfer 2007).[49]

The situation is similar when it comes to the characteristic features of different types of welfare states (Falkner 2009). Once again, the Court's interventions

47 C-212/97, 9.3.1999 *(Centros)*; Roth (2008).

48 C-112/05, 23.10.2007.

49 It is frequently remarked that much of this transformation has been brought about by national legislation. That is both true and unsurprising. First, many instances may be explained by Carl Friedrich's (1937) "law of anticipated reactions": Realizing the vulnerability of their existing regulations under ECJ case law, national governments may prefer orderly adjustment to haphazard judicial interventions. What is often even more important is the fact that the politics of social market economies will usually include a sizable segment of actors in political parties, interest groups, the media and academe who are committed to market-liberal reforms. For these actors, ECJ decisions may open a political window of opportunity in which previously effective veto positions are disabled.

to ensure free mobility, undistorted competition and nondiscrimination have no effect on the privately provided social services, pensions, and health care that are characteristic of liberal welfare states. Social market economies, by contrast, use a much wider variety of institutional arrangements, including basic pensions financed through tax revenues, compulsory pension insurance, or subsidized private pension funds. Similarly, they tend to rely on publicly provided social services, on social services provided by subsidized nonprofit or private organizations, or on health care provided by public, nonprofit or private organizations and private practices—which may be financed by general taxation, compulsory insurance or by publicly subsidized private insurance, etc. These arrangements are of course affected by the impact of European law on tax revenues from mobile capital. And since more generous welfare states must necessarily regulate benefits, beneficiaries and conditions of reimbursement, they are also vulnerable to legal challenges based on European mobility, competition and nondiscrimination rules.

At the same time, the institutional variety of these solutions increases their vulnerability to economic liberties. Whenever social services and transfers are not exclusively provided by the public sector and financed by general taxation or compulsory insurance, they may be challenged under European rules on the freedom of service provision, the freedom of establishment, state aids, public procurement and competition law. Admittedly, not all these challenges have been launched yet, and not all will succeed. But ECJ and Commission decisions[50] have already put enough pressure on publicly subsidized charities in Germany to require a market-oriented reorganization of the traditional system of social services they provide. The Commission also plans to create competition regimes for social services that would emulate the market-maximizing models established for the telecommunications, transport and energy markets (Ross 2007).[51] It remains to be seen whether the Commission's plans and the Court's jurisdiction will be modified by Article 14 of the Lisbon Treaty and Article 2 of its "Protocol on Services of General Interest," which stipulates that "the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest" (Damjanovic/De Witte 2008).

At the same time, the Court has extended the rights of beneficiaries of publicly or collectively financed health care to avail themselves of more attractive or

50 Commission (2005), for example.

51 See White Paper on Services of General Interest, COM (2004) 374; Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union, COM (2006), 177 final.

more timely services offered abroad, at the expense of domestic taxpayers or insurance funds (Martinsen/Vrangbaek 2008), and the Commission has proposed a "directive on the application of patients' rights in cross-border health care"[52] that would systematize and generalize the case law. Beyond that, the Court's extension of the rights of personal mobility, nondiscrimination and EU citizenship has reduced or eliminated member states' control over EU migrants' access to nationally provided public and social services and transfers (Hatzopulos/Do 2006; Wollenschläger 2007).

From the perspective of mobile individuals, these developments must seem attractive. But since EU member states differ widely in their normative commitment to solidarity and equality, and hence in the level of social services and social transfers they provide for their citizens, the Court's generosity ignores the foundations of the social and political construction of solidarity, and it also violates the norms of reciprocity. A British citizen moving to Denmark or a German medical student moving to Austria is allowed to claim benefits that a Dane or Austrian moving in the opposite direction could not obtain. In the name of transnational solidarity, the Court has weakened or eliminated the nation-state's control over the balance of contributions and benefits and the boundaries of state generosity. This does indeed create incentives for transnational mobility, and it may contribute to the interweaving of European societies. At the same time, however, the extension of personal mobility rights for individuals creates special burdens for national welfare states with high levels of collectively financed services and transfers, and thus also creates incentives favoring convergence toward the liberal minimum of social protection (Menéndez 2009).

In short, Court-imposed negative integration and deregulation will have no great effect on the institutions and policies of LMEs with relatively low levels of social regulation and minimal welfare states. What's more, competitive opportunities for LMEs will increase as negative integration opens up and deregulates formerly protected markets in other member states. Existing economic institutions in SMEs, by contrast, will be systematically weakened by the deregulatory effect of negative integration and the competitive pressures resulting from mutual recognition, while their welfare-state institutions will be challenged by European competition law, mobility rights and nondiscrimination law. In Figure 13-1, therefore, the existing socioeconomic regimes of SMEs will be pushed to the right toward a more "liberal" configuration.

If this comes to pass, and much of it already has, member states with SME institutions and political preferences will have to turn to European legislation in order to realize the 1980s promise of a "social dimension" or the 1990s vision

52 COM (2008) 414 final.

of a "European social model" or the current postulate of a "highly competitive social market economy" (enshrined in Article 3, III of the Lisbon EU Treaty). If they do so, however, they will confront a second structural asymmetry: high consensus requirements still hamper European legislation, even after Lisbon, and generally favor status-quo positions. But this status quo has been redefined by negative integration in favor of LME member states. Since the LMEs in Europe do not depend on European legislation to maintain their own socioeconomic regimes, they are free to veto any European initiatives that would impose more demanding regulations on their liberal economies, or that would require more generous social benefits. As a consequence, the "European Market Economy" that could at best be brought about through positive integration would resemble the socioeconomic regimes of LMEs, rather than recreate a social market economy at the European level. The structural constraints of European integration have cut off access to the top-left quadrant of Figure 13-1, exactly the location toward which the pro-European Christian Democrats and Social Democrats would like to move.

4 Conclusion

The evolution of European integration has confirmed Friedrich Hayek's prediction, published in 1939, that the integration of previously sovereign nation-states in Europe would reduce the capacity of states to regulate the capitalist economy and to burden it with the costs of an expensive welfare state. It took a bit longer than expected, however, because member governments initially retained control over economic integration. This meant that they were also able to preserve the conditions of "embedded liberalism" and thus protect the integrity and diversity of national institutions and policy legacies against the pressures of economic competition. Indeed, European social market economies reached the peak of their development and institutional diversity during the first two decades of the Community's existence. Integration through law changed all that, and as a consequence European law, judicial and legislative, is now cutting deeply into the substance of the socioeconomic regimes of social market economies.

Given this state of affairs, governments, political parties, unions, publicists and academics who are at the same time committed to European integration and to the ideals of a social market economy have basically two strategic options, one proactive and one defensive. The first one would emphasize political mobilization, persuasion, campaigning and lobbying strategies to overcome the obstacles to creating equivalents to national social-market regimes at the Euro-

pean level. From what I have said before, it should be clear that I consider this as an extremely difficult and, at best, long-term option which will bring little relief to the present problems of social market economies. Above all, its protagonists need to realize that, given the consensus requirements of European legislation, it will not suffice to mobilize political support in Continental and Scandinavian member states. The most likely effect would be counterproductive confrontations with veto players defending the comparative advantages of liberal market economies. What would be needed are initiatives that are attractive from the perspective of both types of national regimes. How hard this is likely to be is presently shown by the difficulties of reaching agreement on the substance and severity of common European capital-market and banking regulations, even though common interests should be at a maximum as the worldwide crisis of unregulated financial markets has hurt the liberal economies of the UK, Ireland or the Baltic states even more than it damaged the social market economies.

In any case, I will not pursue this option further, but focus my conclusions on the need to defend and protect the national regimes of social market economies against the legal compulsions of negative integration. Given the Court's interpretation of primary European law, combined with the diversity of socioeconomic regimes at the national level and with the high consensus requirements of political action at the European level, it is easy to see that this development could not have been prevented and cannot be corrected by European legislation. What is perhaps less clear is that the asymmetry could hardly have been avoided and probably cannot be corrected by the European Court of Justice itself.[53] The most basic reason is that the legitimacy of judicial lawmaking, by common-law courts, civil-law courts or by constitutional courts, depends on the observance of a generalizing logic (Holmes 1881; Esser 1964). The decision must focus on the specific facts of a particular case, but it cannot be *ad hoc*. Even where preexisting rules are not available or do not fit, the judge-made rule must satisfy the Kantian categorical imperative: it must be possible to defend it as a general rule for all cases of this nature.

Hence even if the Court had tried to develop criteria for a fair constitutional balance between European competences and national autonomy, it would have

53 See note 39 above. One could of course ask whether the doctrinal development that established the dynamic effectiveness of negative integration could have been avoided. But one should not forget that the crucial decisions of the 1970s were widely welcomed by pro-European public opinion and political actors. And even if *Dassonville* had not added the prohibition of "potential impediments" to the rule against discrimination on grounds of nationality, that would not have been enough. There would still be legitimate national concerns that can only be protected by resort to discriminatory measures—or how else should Austria have protected its medical education against the mass inflow of students from Germany.

had to define these in general terms, which in principle could be applied to the relationship between the Union and all its member states. Yet any general criterion defined in the vertical dimension is likely to have different and highly asymmetric impacts on member states located at different positions in the horizontal dimension. Even the "sociocultural" concerns discussed by the German constitutional court vary in their normative and political salience from one country to another, and the socioeconomic differences between social market economies and liberal market economies are at the very root of the normative tension and political dissatisfaction generated by the recent progress of legal integration. But they are also at the root of the Court's problem.

A *general* rule that would respect politically salient concerns in the most highly regulated member state (say, Swedish rules on the sale of alcoholic beverages) would obviously define European economic competences far too narrowly, but an equally general rule that would merely protect the practices of the most liberal member state might massively interfere with the political identity and legitimacy of SME member states. And if the rule were to aim at a compromise between these extremes, it would merely create both problems at the same time. To put it another way: in the face of normatively salient diversity across national institutions or policy legacies, no general rule could establish a fair vertical balance. It is thus entirely understandable that the Court never tried to define general criteria for a European–national balance. Instead, the *Dassonville-Cassis* formula allowed it to assert the general supremacy of all European concerns, but to combine this with the possibility of exceptions that the Court would grant at basically its own discretion.

But even if these exceptions were guided by principles, it should be clear that the *Cassis* formula cannot accommodate the diversity of normative and politically salient national concerns. The "mandatory requirements of public interest" that might be invoked to justify national impediments are, of course, defined by the Court in general terms. How could, what is not mandatory for the UK be mandatory for Sweden? And to the extent that applications of the "proportionality test" are guided by criteria, these are of a purely technical, and hence universal, character, referring to the effectiveness and necessity of European versus national measures, rather than to their normative significance and political salience. In fact, the Court has no criteria for dealing with and assessing the "legitimate diversity" (Scharpf 2003) of the socioeconomic institutions and policy legacies that are affected by its decisions.

In each country, such institutions and legacies have often been shaped by intense political conflicts and historical compromises—which is why they differ so much from one another. Individuals have come to take them for granted and to base their life plans on them. That does not mean that they should, or could,

be protected against change. In fact, the socioeconomic regimes of SMEs are under immense pressures to adjust to dramatic changes in their internal and external policy environments. At the same time, however, such changes are highly controversial in national politics and they need to be defended in public debates by governments facing the sanctions of political accountability. Instead, the supremacy of European law allows for judicial interventions that may short-circuit these political processes. If these are to be accepted as legitimate, they need to be justified by arguments that invoke clearly important European concerns and that are highly sensitive to the specific sociocultural and politico-economic concerns that are at stake in the particular member state. This the ECJ has never attempted, and it is indeed hard to see how it could gain the necessary familiarity and empathy with the institutional traditions and the political cultures of the EU's twenty-seven member states.

But what could be a more acceptable alternative? In its decision on the Lisbon Treaty, the German constitutional court saw itself in a better position to define limits for the exercise of European powers. Emboldened perhaps by its own record of maintaining (or upsetting) the federal balance in Germany, it not only urged both houses of parliament to ensure that European legislation would not exceed the powers conferred to the Union, but also reasserted its own readiness to exercise these *ultra-vires* controls and to defend the core elements of the German "constitutional identity." And, what is more interesting in the present context, it left no doubt that this would also apply to the interpretation of Treaty by agents at the European level.[54] In other words, the supremacy of European law and the ECJ's monopoly of interpretation are seen to be constrained not only by the "principle of conferral" (Article 5 ECT; Article 5 TEU Lisbon), but also by criteria derived from the national constitution and defined by the national constitutional court's monopoly of its interpretation.

Being embedded in the German political and normative culture, the *Bundesverfassungsgericht* has of course no difficulty identifying a hard core of institutions and policy areas where democratic self-determination at the national level ought to prevail over European interventions. More over, the court also emphasizes the "integration openness" and the "Europe-friendliness" of the German constitution, and it asserts its full support for this constitutional commitment to European integration. In other words, the decision avers the court's willingness to strike a fair balance between European and national concerns in its future decisions. On the basis of its past record, there is surely no reason to doubt these commitments.

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54 BVerfG, 2 BvE 2/08 at §§ 238–241.

Nevertheless, the decision appears fundamentally flawed because the court has failed to consider its generalized implications in the light of the Kantian categorical imperative. The authority claimed by the German court could of course not be denied to the courts in all member states. And while these would surely be equally sensitive to the specific and diverse concerns of national autonomy and identity, there is no reason to expect that their understandings of the "Europe-friendliness" of their national constitutions would converge, or that they would all assign the same relative weights to the European concerns at stake. The overall result might be a chaotic form of differentiated integration through an accumulation and perhaps escalation of unilateral national opt-outs.

I have tried to show that the ECJ's *Kompetenz-Kompetenz* is not only distorting the vertical balance between the powers of the Union and the requirements of democratic self-determination in its member states, but that it also has an asymmetric impact on the horizontal balance between social market economies and liberal market economies. This double asymmetry is presently undermining political support for European integration and weakening democratic legitimacy at the national level. It needs to be challenged and corrected in order to reestablish a workable balance between the equally salient values of European "community" and national "autonomy." But a normatively and pragmatically acceptable balance cannot be achieved by asserting the power of national high courts to declare unilateral opt-outs from European law in procedures in which the interests of other EU member states and the concerns of the Union have no voice at all. The Lisbon decision may not provoke escalating conflicts culminating in secession and civil war—as the assertion of John C. Calhoun's nullification doctrine had done in the decades preceding the American civil war (Bancroft 2008; Ellis 1989). But it may still have severely disruptive effects in the European Union as well.

What we need instead are procedures that facilitate the mutual accommodation of European and national concerns. Here it does indeed make sense to leave the definition of fundamental national concerns to national governments or national courts, rather than to the uncertain empathy of the ECJ. But there must be a possibility of review in the light of similarly or more salient European concerns. One possible solution has recently been proposed by a former chief justice of the German constitutional court (Herzog/Gerken 2008). It would allow ECJ judgments to be appealed to a European Constitutional Court composed of the chief justices of all EU member states. For reasons explained elsewhere, I would prefer a political, rather than a purely judicial solution—which would again have to define *general* criteria that could not accommodate the diversity of legitimate national concerns. Instead, the political solution I proposed would allow member governments to appeal to the judgment of their peers in the Eu-

ropean Council in cases where European law is felt to impose unacceptably tight constraints on politically highly salient national concerns (Scharpf 2009).

There may well be other and better solutions, but none of them will come about unless the "good Europeans" in Continental and Scandinavian social market economies realize that integration through law is a mode of policy-making that is structurally biased against their interests and normative preferences. It systematically weakens their established socioeconomic regimes at the national level and it also generates a liberalizing bias in European legislation. Furthermore, they should understand that the socioeconomic asymmetry of European law is caused by structural conditions whose effect does not depend on the ideological orientations of members of the Court or the Commission. For this same reason, it can hardly be corrected through changes in the party-political composition of the Council or through elections to the European Parliament.

In short, good Europeans need to draw a distinction between their continuing support for political and social integration in Europe on the one hand, and their unquestioning acceptance of policy choices dictated by a nonaccountable judicial authority on the other hand. A European social market economy cannot come about, and social market economies at the national level will be destroyed, unless the politically uncontrolled dynamics of (negative) "Integration through Law" can be contained.

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