MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG
MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES

MPIfG Working Paper 09/1

Fritz W. Scharpf

Legitimacy in the Multilevel European Polity

MPIfG Working Paper

nck Institute
for the Study of Societies

Fritz W. Scharpf
Legitimacy in the Multilevel European Polity

MPIfG Working Paper 09/1
Max-Planck-Institut für Gesellschaftsforschung, Köln
Max Planck Institute for the Study of Societies, Cologne
February 2009

MPIfG Working Paper
ISSN 1864-4341 (Print)
ISSN 1864-4333 (Internet)

Fritz W. Scharpf is Director emeritus at the Max Planck Institute for the Study of Societies.

scharpf@mpifg.de

MPIfG Working Papers present ideas that could guide future scholarly research. They may also draw out the implications of available knowledge for a better understanding of public-policy issues. MPIfG Working Papers are refereed scholarly papers.

Downloads
www.mpifg.de
Go to *Publications* / *Working Papers*

Max-Planck-Institut für Gesellschaftsforschung
Max Planck Institute for the Study of Societies
Paulstr. 3 | 50676 Cologne | Germany

Tel. +49 221 2767-0
Fax +49 221 2767-555

www.mpifg.de
info@mpifg.de

Abstract

In order to be simultaneously effective and liberal, governments must normally be able to count on voluntary compliance – which, in turn, depends on the support of socially shared legitimacy beliefs. In Western constitutional democracies, such beliefs are derived from the distinct but coexistent traditions of "republican" and "liberal" political philosophy. When judged by these criteria, the European Union – if considered by itself – appears as a thoroughly liberal polity which, however, lacks all republican credentials. But this view (which seems to structure the debates about the "European democratic deficit") ignores the multilevel nature of the European polity, where the compliance of citizens is requested, and needs to be legitimated by member states – whereas the Union appears as a "government of governments" which is entirely dependent on the voluntary compliance of its member states. What matters primarily, therefore, is the compliance-legitimacy relationship between the Union and its member states – which, however, is normatively constrained by the basic compliance-legitimacy relationship between member governments and their constituents. Given the high consensus requirements of European legislation, member governments could and should be able to assume political responsibility for European policies in which they had a voice, and to justify them in "communicative discourses" in the national public space. This is not necessarily true of "non-political" policy choices imposed by the European Court of Justice. By enforcing its "liberal" program of liberalization and deregulation, the ECJ may presently be undermining the "republican" bases of member-state legitimacy. Where this is the case, open non-compliance is a present danger, and political controls of judicial legislation may be called for.

Zusammenfasssung

Um gleichzeitig effektiv und liberal sein zu können, ist staatliche Herrschaft auf freiwillige Folgebereitschaft angewiesen – die ihrerseits der Unterstützung durch sozial geteilte Legitimitätsüberzeugungen bedarf. In den demokratischen Verfassungsstaaten des Westens werden solche Überzeugungen aus den unterschiedlichen, aber komplementär zusammenwirkenden Traditionen der „republikanischen" und der „liberalen" politischen Philosophie hergeleitet. An diesen Kriterien gemessen erscheint die Europäische Union – wenn man sie für sich betrachtet – als eine „liberale" politische Ordnung, der jedoch alle „republikanischen" Legitimitätsmerkmale fehlen. Aber eine solche Sichtweise, die auch die derzeitige Diskussion über ein „europäisches Demokratiedefizit" bestimmt, verkennt den Mehrebenencharakter des europäischen Gemeinwesens. In ihm sind es die Mitgliedstaaten, die Entscheidungen der Union gegenüber den eigenen Bürgern durchsetzen und auch legitimieren müssen, während es für die Union ihrerseits auf die freiwillige Folgebereitschaft ihrer Mitgliedstaaten ankommt. Dabei werden diese jedoch durch die normativen Grundlagen ihrer eigenen Legitimität begrenzt. Politische Entscheidungen auf europäischer Ebene setzen breiten Konsens voraus, und die Regierungen sollten sie deshalb auch gegenüber den eigenen Bürgern in „kommunikativen Diskursen" vertreten und dafür die politische Verantwortung übernehmen können. Dies gilt jedoch nicht notwendigerweise auch für Entscheidungen der europäischen Politik, die im nichtpolitischen Modus ohne Beteiligung des Rates und des Parlaments vom Europäischen Gerichtshof bestimmt werden. Mit der gegenwärtigen Radikalisierung seines „liberalen" Programms der Liberalisierung und Deregulierung des nationalen Rechts könnte der Gerichtshof in der Tat die „republikanischen" Grundlagen der mitgliedstaatlichen Legitimität unterminieren. In diesem Falle könnte die Union sich nicht länger auf die Folgebereitschaft ihrer Mitgliedstaaten verlassen. Um diese Gefahr für die europäische Integration zu vermeiden, sollte eine stärkere politische Kontrolle der richterlichen Rechtsetzung erwogen werden.

Contents

1 Legitimacy

In my understanding, any discussion of legitimacy in the multilevel European polity needs to start from a functional perspective: Socially shared legitimacy beliefs serve to create a sense of normative obligation that helps ensure voluntary compliance with undesired rules or decisions of governing authority (Scharpf 1999, 2007; 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 aim to be simultaneously effective and liberal.

From this functional starting point, further exploration could either take 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 labelled "republican" and "liberal" (Bellamy 2006). Even though individual authors may have contributed to both of these traditions, their origins, premises, generative logics and conclusions are clearly distinguishable.

The republican tradition can be traced back to Aristotle. To 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 own self-interests 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

This paper has benefited greatly from discussions at EUI, Florence, and BIGSSS, Bremen, and from the personal comments of Martin Höpner at MPIfG, Cologne. As was true of all my recent work, Ines Klughardt's research assistance has again been invaluable.

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 – e.g., if the waiting lists in a national health system can be avoided through access to foreign providers (Martinsen 2009).

2 Aristoteles 1989, Erstes Buch, 1253a.

the "neo-Roman" theorists of the short-lived English Revolution to the political ideals of the American Revolution (Pocock 1975; Skinner 1998; Dahl 1989: ch. 2) and to contemporary concepts of "communitarian" democracy (Pitkin 1981; MacIntyre 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 for him as for Aristotle, the "virtuousness" of the collective governors becomes a critical problem – requiring the transformation of a self-interested *volonté de 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 the state has established basic security, are strict limitations on its governing powers in order to protect the fundamental value of "negative 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 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, individuals 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

3 Rousseau 1762/1959,1. Buch: 6. Kapitel; 2. Buch: 1., 4. Kapitel.

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 those 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 on 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 2006). In a sense, they are mutual antidotes against each other's characteristic perversions – 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 France.[4] But these differences seem to

4 Looking at the "semantics" of national normative discourses rather than at institutions and practices, Richard Münch (2008a: ch. 4) identifies France with republicanism and Britain with liberalism. In his view, however, both are manifestations of a common European commitment

fade in importance if we now turn our attention from the world of democratic nation states to the European Union. When 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.

The EU's liberalism is most obvious in the priority it accords 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. From early on, it has 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 status of European citizenship have been turned into individual rights of EU nationals to have access to 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 Basic Rights in the Constitutional Treaty, the Court will be able to make the European protection of individual rights complete.

At the same time, the European polity's capacity for collective political action 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 allowing access to a wide range of organized interests. Moreover, through the Council of Ministers, 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. Finally, the European Parliament, whose role in legislation has been 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; Héritier/Lehmkuhl 2008; Kohler-Koch/Rittberger 2006).

---

to "moral universalism and ethical individualism" which drives the European transformation of national societies.

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 are completely immune to 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 a number of European standard setting agencies have come to play such important roles in the licensing of pharmaceuticals and the regulation of product safety, food quality, environmental standards or workplace discrimination, that the EU's effectiveness as a "regulatory state" could be described as its 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 EU's 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, it is only possible to correct rules derived from the judicial interpretation of the Treaties through Treaty amendments, which 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 the 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: There are 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 European Union by pointing to its protection of individual rights, its pluralist openness to policy inputs, its consensual decision-making 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 concern for individual rights and responsiveness to organized interests are accompanied by a systemic neglect of redistributive policy goals. Their more salient criticism, however, is directed at the glaring democratic deficits on the input side, emphasizing the lack of a common public space, of Europe-wide political debates, of party competition and of political accountability (Greven 2000; Harlow 2002; Follesdal/Hix 2006; Hix 2008). While 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).

2 Legitimacy in multilevel polities

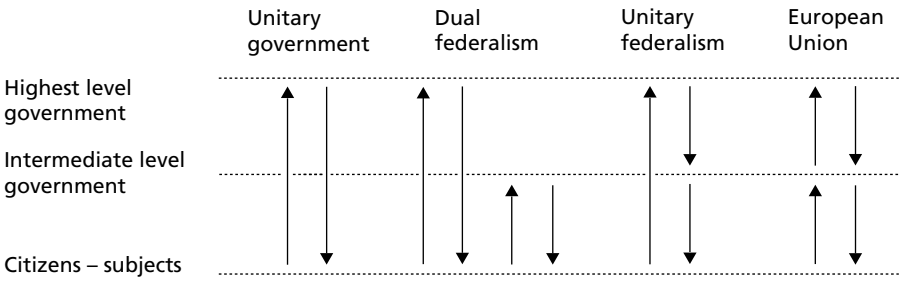
In any case, however, the European Union in its present shape is so far from meeting the republican criteria of democratic legitimacy that it cannot benefit from the coexistence and mutual reinforcement of liberal and republican principles that supports the legitimacy of constitutional democracies at 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.

When seeking 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: The central government demands compliance 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." Here, 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 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 to be second-order national elections, where parties argue 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 takes place between citizens and their respective *Länder* authorities, the dominant legitimacy relationship in Germany exists between citizens and the national government, which is held accountable for public policies that affect the citizen.

The two-level polity comprising the European Union 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 than the similarities. Compared to Germany, the Union is far more dependent upon 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 of a two-step process than it is in Germany.

Figure 1 Compliance and legitimation in multilevel governments



From the citizens' perspective, compliance is demanded exclusively by national administrative agencies, tax authorities and courts. And except where the Commission may directly prosecute the violation of competition rules, even businesses are never directly confronted by the European Union as a governing authority. By the same token, the compliance that matters from the Union's perspective 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).

Therefore, just as we see in Germany, we have a two-step compliance relationship – between citizens and their respective national governments, and between these governments and the European Union. In contrast to Germany, however, we also see a two-step legitimating relationship in the European polity. Whereas 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. In fact, they must 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 first and 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 the case, then it does not logically follow that normative discussions of EU legitimacy should treat the Union as if it were a free-standing polity, nor 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 relationship 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.

3 Legitimating member state compliance

From the perspective of member governments, membership in the European Union is fully justified in terms of 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 for any of the old

and newer member states. But just as the fact that most citizens will not emigrate is not a sufficient indicator of the democratic legitimacy of a nation state, an 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 different 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 the case in the non-political modes of EU policy making. Member states – or the European Parliament, for that matter – have no voice when the European Central Bank determines the course of monetary policy, when the Commission decides to prosecute certain EU member state practices as Treaty violations, or when the European Court of Justice uses its powers of interpretation to shape the substance of primary and secondary European law. Since the effects of policies adopted in this way 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 would seem to ensure its input legitimacy. Policies are adopted with the member states' agreement, and even where Council votes are taken by qualified majority, consensus-seeking practices are so effective that politically salient national interests which are vigorously defended by the respective governments are rarely overruled. But this does not mean that EU legislation is problem-free from the perspective of member governments.

The most obvious problem is that high consensus requirements often[5] prevent majorities of member states from achieving "European solutions" to problems which, in their

5 Often, but not always. There are indeed policy areas where EU legislation appears more "progressive" and "perfectionist" than one would 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 for this may be the strong commitment to the success of EU initiatives on the part of "Europhile" national representatives in the Council Secretariat and in COREPER (Lewis 2005). But at least one contributing cause may also be the relative weakness

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 in question 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 any existing national law that is inconsistent with it, but it will also "occupy the field" and preempt 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 a policy does not work, or if circumstances or the political preferences of most member governments 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 supported 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. As far as the monetary policy choices of the European Central Bank are concerned, the Maastricht Treaty stipulated an unconditional preference for price stability over all other goals of

---

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, we should primarily expect to see blockades and compromises on the lowest common denominator in cases 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, beneficiaries of the status-quo rule may resist later reforms. This 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 et al. (1985: 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.

economic policy (Art. 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 (Art. 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 European Union 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? To the extent that anyone considers this question at all, a negative answer is generally based on one of two arguments, neither of which seems fully convincing.

The first argument sees the Court playing a role that was institutionalized by member states to serve their rational self-interest. They agreed to give 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 European Central Bank, the Commission and the Court are doing exactly what they are supposed to do, even if individual governments may not like their decision in a particular case that affects them individually (Garrett 1992, 1995). The basic argument is analytical and game-theoretical. It presumes that the Treaty commitments of member governments should be modelled as a (symmetric) N-person Prisoners' Dilemma – i.e. a constellation where everyone will benefit from cooperation, but everyone is tempted to free-ride, in which case the cooperative arrangement would unravel and everyone would be worse off. Given these conditions, it was rational for all governments to create agencies that are beyond their direct political control, and to invest these agencies 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 where free-trade rules are concerned, but the jurisdiction of the Court extends to a wide range of policy areas that cannot be characterized in this way. 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] Moreover, not much is gained if the Dilemma argument is complemented by an "incomplete-contracts" extension (Maskin/Tyrol 1999).

This second argument 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 to have future disputes over the interpretation of their contract settled by a neutral agent. In game-theoretical 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: ch. 6). But while this argument may support the Commission's strong role as an "honest broker" in the process of European political legislation, it does not support judicial legislation.

By way of explanation, let us assume two sets of member states, one with status-quo institutions resembling "liberal market economies" and a political preference for a liberal European regime, and the other one with the status-quo institutions of a "coordinated market economy" and a preference 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 member state without its consent. In doing so, however, the Court cannot 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 on the part 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" reinforced the unanimity rule in the Council, the greater diversity of national interests after the UK, Denmark and Ireland joined the original Six almost stopped the progress of integration through political legislation. In

8 Similar empirical and theoretical objections apply to efficiency-based arguments which try to exempt the European "regulatory state" from the need for political legitimation (Majone 1996). At best, these apply to a narrow subset of European policy areas. And even here, 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).

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 putting Treaty-based economic liberties into direct effect. 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 to provide a new stimulus for 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 (Schmidt 2007; Nicolaidis/Schmidt 2007). With this change of the "default condition," an 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 which affect the functioning of the internal market (Art. 95 ECT). And since *Cassis* had reduced the bargaining power of high-regulation countries, the new legislation also had a liberalizing and deregulatory tendency.

It is true that in the 1980s, 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. But these preferences do not explain the adoption of the Single European Act. And the legislation was not reversed when, in the second half of the 1990s, there was a preponderance of left-of-center governments in the European Union. Instead, the overall pattern is now 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-theoretical or contract-theoretical arguments that try to show that self-interested member states or their governments would, or ought to, choose it as an efficiency-increasing solution.

For most governments, of course, justifications derived from normative rational-choice theory are not crucially relevant. 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

9 C-8/74, 11.7.1974.

10 C-120/78, 20.2.1979.

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 et al. 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 et al. 1985b).

for the rule of law obliges them to respect and obey the decisions of the European Court of Justice (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 corrected politically, the fact that member states have, by and large, acquiesced even when decisions were going against them, cannot be invoked as an indirect legitimation of judicial legislation.

The more pertinent question, therefore, is whether the legitimacy of ECJ jurisdiction could be equated with that of national constitutional courts. The latter 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 we postpone these fundamental doubts for the moment, we cannot equate the status of ECJ jurisprudence with that of judicial review under national constitutions. First, as Stefano Bartolini (2008) points out, we 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 matters for legislative determination rather than constitutional interpretation. As a consequence, the politically unconstrained powers of the ECJ reach 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 in which normative and cognitive understandings and shared discourses about appropriate policy choices are taken for granted (March/Olsen 1989). In public debates, the courts are important, but they are 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 upon their capacity to express "the sober second thought of the Community" (Bickel 1962: 26; Fisher 1988; Höreth 2008).

From the perspective of the member states, these preconditions of judicial self-restraint, which simultaneously limit and legitimate judicial review, are lacking in their relationship to the ECJ. Regardless of what may be true of the Court's relationship to the Commission and the European Parliament, there cannot be such shared orienta-

tions 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 about the formal legality of the Court's jurisdiction. Art. 220 ECT has clearly empowered it to apply and interpret European law. Lawyers may 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 have had to learn through bitter experience, formal legality does not necessarily equal legitimacy (Joerges/Ghaleigh 2003). It suffices to ensure acquiescence with the everyday 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* 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 then turn to a series of recent decisions in which the jurisdiction of the ECJ seems to be pushing against the limits of legitimate compliance.

12 The most obvious characteristic of ECJ jurisprudence is its extreme form of teleological interpretation *(effet util)*. But this problematic tendency is shared by modern national jurisprudence as well (Lübbe-Wolf 2007).

4 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, this law 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 does not merely require the formal existence of general elections and representative parliaments; it also 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. 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; 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.

13 It is true that the protection of human rights was at 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 (29.5.1974), BverfGE 73, 339 (22.10.1986). In the meantime, the ECJ responded, and this issue has been laid to rest (Weiler/Lockhart 1995).

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 with which 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 the 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 down in defeat.[15] If that happens, the governments will not have established the input legitimacy of these policies. But it will have reaffirmed the institutional legitimacy of the 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 und may ultimately be destroyed. This is the critical risk if governments are required to implement European law that has been created by institutionally autonomous judicial legislation without the involvement of politically accountable actors.

This is not 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 should therefore be able to provide good reasons. In principle, there could be two types of justifications.

The first of these 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

14 In real-world democracies, political responsiveness may nevertheless be quite high: In Germany, national governments are tested in 16 *Land* elections during the national parliament's four-year term; 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).

15 This was true when the Dutch government reformed disability pensions in the early 1990s (Hemerijck et al. 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/Zohlhöfer 2007).

game-theoretical terms, resemble Pure Coordination, Assurance, Battle of the Sexes, or (symmetric) Prisoners' Dilemma constellations (Scharpf 1997: ch. 6). But what if the constellation is characterized by asymmetric conflicts – so that the rule imposed by the 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).

But this 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" modelled after successful federal nation states (Nicolaidis/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 such constraints 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 the case, they also can and should be defended by member governments, even against strong domestic opposition.

5 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 sig-

nificance of the countervailing European concerns. For many decades, however, the need to develop explicit criteria for that normative balance did not arise. Most issues of European law never caught the attention of individual 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, if not downright trivial. Thus, it was hard to get politically excited about the *Cassis* decision, which said that Germany could not exclude a French liqueur on the grounds that its alcohol content was not high enough – 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 (see, e.g., Scharpf 1999) could be dismissed as unrealistic scares (Moravcsik/Sangiovanni 2003). But now, when the legal principles seem to be firmly established in its case law and accepted by national courts, the European Court and the Commission appear 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 response, Austria 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 violated students' rights to free movement and non-discrimination under Art. 12 ECT.[16] As an immediate result of the decision, more than 60 percent of the applicants at some Austrian medical faculties came from Germany.

The second series of recent decisions did in fact assert the priority of economic liberties over the social rights guaranteed by member-state constitutions. In *Viking,*[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]

16 C-147/03, 7.7.2005.
17 C-438/05, 11.12.2007.
18 C-341/05, 18.12.2007.
19 Directive 96/71/EC.

If *Viking* and *Laval* were directed against the constitutionally protected rights of Finnish and Swedish unions to pursue collective interests through industrial action, the *Rueffert*[20] and *Luxembourg*[21] cases established the priority of free service delivery over national wage legislation. *Rueffert* disallowed a Lower Saxony statute that required providers in public procurement to pay locally applicable collective-bargaining wages, whereas *Luxembourg* 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 that exceeded these standards was held to violate the freedom of service delivery. At the same time, the principle of freedom of establishment is being used to hollow out the capacity of member states to shape the rules of corporate governance in their economies (Höpner/Schäfer 2007).[22] In other cases, the Court has drastically reduced the capacity of member governments to collect revenue from mobile capital (Ganghof/Genschel 2008b; Genschel et al. 2008). Here, as in the series 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 of free movement and non-discrimination without regard to reciprocal obligations to contribute to the resources of the polity.

6 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 the way that 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 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

20 C-346/06, 3.4.2008.
21 C-319/06, 19.6.2008.
22 See, e.g., C-212/97, 9.3.1999 (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 concern about the political consequences that will follow from the asymmetric logic of the Court's jurisdiction.
24 C-26/62, 5.2.1963.

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 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 Art. 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 account of nationality and of the generalization of (non-political) citizenship rights. This trend 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 new fields.

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.

Given the impossibility of political correction, the Court was and is, of course, free to extend the reach of European rights. In the field of free trade, for instance, the Treaty forbids quantitative restrictions and "*measures having equivalent effect*" (Art. 28 ECT). Originally, this had been understood to exclude the discriminatory treatment of imports. In the early 1970s, 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]

25 C-6/64, 15.7.1964 (Costa v. 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."

27 C-8/74, 11.7.1974.

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 Arts. 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 – a fact which manifests itself in three dimensions:

First, some national concerns of major importance are simply defined as irrelevant to begin with. Among these, the issue of greatest practical importance is the refusal to consider national fiscal concerns as a potential limit on the exercise of European liberties. Thus, in the Austrian case mentioned above, 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 migrants access 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, which is reflected in the centrality of parliamentary taxing and spending powers in all constitutional democracies (Ganghof/Genschel 2008a). From a republican perspective, German students and their taxpaying parents may have good reason 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 adequate capacity on the supply side.[30] Similarly, firms and individuals availing themselves of the public infrastructure and public

28 See, e.g., C-10/90, 7.3.1991 (Masgio); C-245/94; C-312/94, 10.10.1996 (Hoever/Zachow); C-131/96, 25.6.1997 (Romero); C-160/96, 5.3.1998 (Molenaar); C-85/96, 12.5.1998 (Sala).

29 See, e.g., C-120/95, 28.4.1998 (Decker); C-158/96 28.4.1998 (Kohll); C-157/99, 12.7.2001; (Geraets-Smits/Peerbooms); C-385/99, 13.5.2003 (Müller-Fauré/Van Riet).

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 irrelevant by definition.

services in one country would be under a republican obligation to contribute to 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 is bound to 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 considered as potential limits on the exercise of European rights, the Court's treatment is highly asymmetrical. Whereas 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] Here, the Court will first evaluate (by its own lights) the normative acceptability of the specific purpose 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 which would be less restrictive on the exercise of European liberties (Haltern 2007: 751–757). 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) shows, the procedural requirements for establishing (scientific) proof can be tightened to an extent that will ensure a negative outcome for the member state.

By way of illustration, let us take the decision striking down the *Volkswagen* statute,[32] which 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 that 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]

31 C-261/81 at # 12, 10.11.1982 (Rau).

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 this assertion.

Another example is 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 this idea was quickly dismissed with the suggestion that this problem could be averted through non-discriminatory entrance 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, even over 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, without regard to national differences. The same is true where the Court recognizes other subjective rights at the European level – rights which may increase in number and variety if the Lisbon Treaty comes into force.[36] And to the extent that countervailing national concerns are considered at all, these are also defined in uniform 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 since the 1930s wage determination 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 potentially acceptable national exceptions makes no allowance whatsoever for the fact that uniform European law has an impact on national institutions and policy legacies which 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. 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 any attempted changes tend to have very high political salience everywhere.

Political resistance to change is likely to be strongest in cases where institutions and policies have a direct impact on the lives of citizens. This is most obvious for welfare state transfers and services, industrial relations, employment conditions, education or

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.)

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 discourse – 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 competencies 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"* (Art. 129/2 ECT). Exactly the same formula is repeated for education (Art. 149/4 ECT), for vocational education (Art. 150/4), and for culture (Art. 151/5), while Art. 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 and abolish national pay regulations in Germany and Luxembourg, national regulations of university admis-

37 If the Commission should find that the difference between national rules (provided that they have individually passed the proportionality test) interferes with the internal market or constitutes a distortion of competition, a harmonizing directive could still be introduced under Arts. 95 and 96/2 ECT (Haltern 2007: 740–41).

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, e.g., 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.

sions in Austria, as well as national regulations of health services and medical care in Luxembourg and the Netherlands.

In short, even unanimous amendments to the Treaties, formally ratified by 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.

7 Needed: A political balance of community and autonomy

From a pragmatic perspective, this situation 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 it cannot itself create a "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 dis-

rupt the Union. It should be realized, after all, that – even though the Court never mentioned it – *Viking* and *Laval* did 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 good normative reasons, therefore, for some kind of European review of national measures impeding free movement among member states. But such a review would need to allow for the 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 the solidarity achieved with great effort at the national level and a moral commitment to the "inclusion of the other" in a European context.

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, beggar-my-neighbor policies and discriminatory practices that would violate solidaristic obligations. Moreover – and most importantly – 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 were to be accepted, however, its adoption by a unanimous Treaty amendment seems most unlikely. But there is one scenario that might change these probabilities. I refer back to what I said about the fundamental

39 But we should remain realistic: The transnational 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 the wages of national workers are pushed downwards while protective legislation and collective agreements are being disabled.

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 "ad hocery" of a political judgment that understands that it may be necessary, for the time being, to allow 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.

dependence of the European Union and its legal system on the voluntary compliance of its member states, and about the lack of control on the part of political actors over the expansion of judicial legislation. Imagine, if you will, 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*. If that were all, such a declaration would surely trigger a constitutional crisis. There is, of course, a great deal of incomplete compliance and tacit noncompliance 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 were presented as a reasoned appeal to the political 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).

41 As "good Europeans," in other words, we should stop defining 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 also 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 rely 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 require only a simple majority in the Council.

44 Once introduced, the same rules might also be used to allow "conditional opt-outs" from the preemptive 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.

References

Alter, Karen, 2001: *Establishing the Supremacy of European Law.* Oxford: Oxford University Press.

Anderson, Christopher, et al., 2005: *Losers' Consent: Elections and Democratic Legitimacy.* Oxford: Oxford University Press.

Aristoteles, 1989: *Politik: Schriften zur Staatstheorie.* Translated and edited by Franz F. Schwarz. Stuttgart: Reclam.

Bartolini, Stefano, 2005: *Restructuring Europe: Centre Formation, System Building, and Political Restructuring between the Nation State and the European Union.* Oxford: Oxford University Press.

——, 2008: *Taking "Constitutionalism" and "Legitimacy" Seriously.* European Governance Papers, Discussion Paper 1-2008. Florence: Robert Schuman Centre for Advanced Study, European University Institute. <http://www.connex-network.org/eurogov/pdf/discuss_paper_01_2008.pdf>

Bellamy, Richard, 2007: *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy.* Cambridge: Cambridge University Press.

Berlin, Isaiah, 1958: *Two Concepts of Liberty: An Inaugural Lecture.* Oxford: Clarendon Press.

Bickel, Alexander, 1962: *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis: Bobbs-Merrill.

Börzel, Tanja A., et al., 2007: *Why Member States Do (Not) Comply with European Law.* CES Working Paper 148. Cambridge, MA: Harvard University.

Buchanan, James M./Gordon Tullock, 1962: *The Calculus of Consent: Logical Foundations of Constitutional Democracy.* Ann Arbor: University of Michigan Press.

Burkhart, Simone, 2008: *Blockierte Politik: Ursachen und Folgen von "Divided Government" in Deutschland.* Frankfurt a.M.: Campus.

Caporaso, James A., 2000: *The European Union: Dilemmas of Regional Integration.* Boulder, CO: Westview.

Caporaso, James A./Sidney Tarrow, 2008: *Polanyi in Brussels: European Institutions and the Embedding of Markets in Society.* Conference paper. American Political Science Association Meeting, Boston, August 28, 2008.

Cappelletti, Mauro/Monica Seccombe/Joseph H.H. Weiler (gen. eds.), 1985a: *Integration Through Law: Europe and the American Federal Experience.* Berlin: De Gruyter.

——, 1985b: A General Introduction. In: Mauro Cappelletti/Monica Seccombe/Joseph H.H. Weiler, *Integration Through Law: Europe and the American Federal Experience.* Berlin: De Gruyter, 1–68.

Cicero, Marcus Tullius 1995: *De re publica.* Translated and edited by Karl Büchner. Stuttgart: Reclam.

Cichowski, Rachel A., 2004: Women's Rights, the European Court, and Supranational Constitutionalism. In: *Law & Society Review* 38(3), 489–512.

Dahl, Robert A., 1967: *Pluralist Democracy in the United States: Conflict and Consent.* Chicago: Rand McNally.

——, 1989: *Democracy and Its Critics.* New Haven: Yale University Press.

Dryzek, John S., 2000: *Deliberative Democracy and Beyond: Liberals, Critics, Contestations.* Oxford: Oxford University Press.

Edin, Per-Anders/Robert Topel, 1997: Wage Policy and Restructuring: The Swedish Labor Market since 1960. In: Richard B. Freeman/Robert Topel/Birgitta Swedenborg (eds.), *The Welfare State in Transition: Reforming the Swedish Model.* Chicago: University of Chicago Press, 155–201.

Egle, Christoph/Reimut Zohlhöfer (eds.), 2007: *Ende des rot-grünen Projekts: Eine Bilanz der Regierung Schröder 2002–2005.* Wiesbaden: VS Verlag für Sozialwissenschaften.

Elster, Jon 1998: Introduction. In: Jon Elster (ed.), *Deliberative Democracy.* Cambridge: Cambridge University Press, 1–18.

Falkner, Gerda, et al., 2005: *Complying with Europe: EU Harmonisation and Soft Law in the Member States.* Cambridge: Cambridge University Press.

Ferrera, Maurizio, 2005: *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection.* Oxford: Oxford University Press.

Fisher, Louis, 1988: *Constitutional Dialogues: Interpretation as Political Process.* Princeton: Princeton University Press.

Follesdal, Andreas/Simon Hix, 2006: Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik. In: *Journal of Common Market Studies* 44(3), 533–562.

Ganghof, Steffen/Philipp Genschel, 2008a: Taxation and Democracy in the EU. In: *Journal of European Public Policy* 15(1), 58–77.

——, 2008b: Deregulierte Steuerpolitik: Körperschaftsteuerwettbewerb und Einkommensbesteuerung in Europa. In: Martin Höpner/Armin Schäfer (eds.), *Die politische Ökonomie der europäischen Integration.* Frankfurt a.M.: Campus, 311–334.

Garrett, Geoffrey, 1992: International Cooperation and Institutional Choice: The European Community's Internal Market. In: *International Organization* 46, 533–560.

——, 1995: The Politics of Legal Integration in the European Union. In: *International Organization* 49(1), 171–181.

Genschel, Philipp/Achim Kemmerling/Eric Seils, 2008: Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market. Unpublished manuscript. Bremen: Jacobs University.

Greven, Michael T., 2000: Can the European Union Finally Become a Democracy? In: Michael T. Greven/Louis W. Pauly (eds.), *Democracy beyond the State? The European Dilemma and the Emerging Global Order.* Lanham, MD: Rowman & Littlefield, 35–62.

Habermas, Jürgen 1962: *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft.* Neuwied: Luchterhand.

——, 1992: *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats.* Frankfurt a.M.: Suhrkamp.

——, 1996: *Die Einbeziehung des Anderen: Studien zur politischen Theorie.* Frankfurt a.M.: Suhrkamp.

——, 2008: Hat die Demokratie noch eine epistemische Dimension? Empirische Forschung und normative Theorie. In: Jürgen Habermas, *Ach Europa: Kleine politische Schriften XI.* Frankfurt a.M.: Suhrkamp, 138–191.

Hall, Peter A./David Soskice (eds.), 2001: *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage.* Oxford: Oxford University Press.

Haltern, Ulrich, 2007: *Europarecht: Dogmatik im Kontext.* 2nd edition. Tübingen: Mohr Siebeck.

Harlow, Carol, 2002: *Accountability in the European Union.* Oxford: Oxford University Press.

Hemerijck, Anton/Brigitte Unger/Jelle Visser, 2000: How Small Countries Negotiate Change: Twenty-Five Years of Policy Adjustment in Austria, the Netherlands, and Belgium. In: Fritz W. Scharpf/Vivien A. Schmidt (eds.), *Welfare and Work in the Open Economy, Vol. 2: Diverse Responses to Common Challenges.* Oxford: Oxford University Press, 175–263.

Héritier, Adrienne, 2003: New Modes of Governance in Europe: Increasing Political Capacity and Policy Effectiveness? In: Tanja A. Börzel/Rachel A. Cichowski (eds.), *The State of the European Union, Vol. 6: Law, Politics and Society.* Oxford: Oxford University Press, 105–126.

Héritier, Adrienne/Dirk Lehmkuhl, 2008: Introduction: The Shadow of Hierarchy and New Modes of Governance. In: *Journal of Public Policy* 28(1), 1–17.

Herzog, Roman/Lüder Gerken, 2008: Stoppt den Europäischen Gerichtshof. In: *Frankfurter Allgemeine Zeitung,* 8 September 2008, 8.

Hix, Simon, 2008: *What's Wrong with the European Union and How to Fix It.* Cambridge: Polity.

Hobbes, Thomas, 1986: *Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil.* New York: Collier Books.

Höffe, Ottfried, 2002: *Demokratie im Zeitalter der Globalisierung.* Revised and updated edition. München: Beck.

Höpner, Martin/Armin Schäfer, 2007: *A New Phase of European Integration: Organized Capitalism in Post-Ricardian Europe.* MPIfG Discussion Paper 07/4. Cologne: Max Planck Institute for the Study of Societies.

Höreth, Marcus, 2008: D*ie Selbstautorisierung des Agenten: Der Europäische Gerichtshof im Vergleich zum U.S. Supreme Court.* Baden-Baden: Nomos.
Joerges, Christian/Navraj Singh Ghaleigh (eds.), 2003: *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions.* Oxford: Hart Publishing.
Kant, Immanuel, 1961 [1785]: *Grundlegung zur Metaphysik der Sitten.* Stuttgart: Reclam.
——, 1966 [1797]: *Metaphysik der Sitten: Einleitung in die Rechtslehre.* Hamburg: Felix Meiner.
——, 1992 [1793]: *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis.* Hamburg: Felix Meiner.
Kohler-Koch, Beate/Berthold Rittberger, 2006: Review Article: The "Governance Turn" in EU Studies. In: *Journal of Common Market Studies* 44(s1), 27–49.
Kramer, Larry D., 2004: *The People Themselves: Popular Constitutionalism and Judicial Review.* Oxford: Oxford University Press.
Kurzer, Paulette, 2001: *Markets and Moral Regulation: Cultural Changes in the European Union.* Cambridge: Cambridge University Press.
Lewis, Jeffrey, 2005: The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union. In: *International Organization* 59(4), 937–971.
Lübbe-Wolff, Gertrude, 2007: Expropriation der Jurisprudenz? In: Christoph Engel/Wolfgang Schön (eds.), *Das Proprium der Rechtswissenschaft.* Tübingen: Mohr Siebeck, 282–292.
Machiavelli, Niccolò, 1966: *Discorsi: Gedanken über Politik und Staatsführung.* Stuttgart: Kröner.
MacIntyre, Alasdair, 1984: *After Virtue.* Notre Dame, IN: University of Notre Dame Press.
——, 1988: *Whose Justice? Which Rationality?* Notre Dame, IN: University of Notre Dame Press.
Mair, Peter, 2008: Popular Democracy and the European Union Polity. In: Deirdre Curtin/Anchrit Wille (eds.), *Meaning and Practice of Accountability in the EU Multi-Level Context.* Connex Report Series, Vol. 7. Mannheim: University of Mannheim, 19–62.
Majone, Giandomenico, 1996: Regulatory Legitimacy. In: Giandomenico Majone (ed.), *Regulating Europe.* London: Routledge, 284–301.
——, 1998: Europe's "Democratic Deficit": The Question of Standards. *European Law Journal* 4(1), 5–28.
March, James G./Johan P. Olsen, 1989: *Rediscovering Institutions: The Organizational Basis of Institutions.* New York: Free Press.
Martinsen, Dorte, 2005: The Europeanization of Welfare: The Domestic Impact of Intra-European Social Security. In: *Journal of Common Market Studies* 43(5), 1027–1054.
——, 2009: Extending Health Care Regulation in the European Union: Through Law and Evidence. In: *West European Politics* 32(4), forthcoming.
Martinsen, Dorte/Karsten Vrangbaek, 2008: The Europeanization of Health Care Governance: Implementing the Market Imperatives of Europe. In: *Public Administration* 86(1), 169–184.
Maskin, Eric/Jean Tirole, 1999: Unforeseen Contingencies and Incomplete Contracts. In: *Review of Economic Studies* 66(1), 83–114.
Mény, Yves/Yves Surel (eds.), 2002: *Democracies and the Populist Challenge.* Houndsmill: Palgrave Macmillan.
Michelman, Frank I.,1989: Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation. In: *Tennessee Law Review* 56(2), 203–304.
Möllers, Christoph, 2008: *Die drei Gewalten: Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung.* Göttingen: Velbrück Wissenschaft.
Moravcsik, Andrew, 1998: *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht.* Ithaca, NY: Cornell University Press.
Moravcsik, Andrew/Andrea Sangiovanni, 2003: On Democracy and "Public Interest" in the European Integration. In: Renate Mayntz/Wolfgang Streeck (eds.), *Die Reformierbarkeit der Demokratie: Innovationen und Blockaden.* Frankfurt a.M.: Campus, 122–150.
Münch, Richard, 2008b: Constructing a European Society by Jurisdiction. In: *European Law Journal* 14(5), 519–541.
——, 2008a: D*ie Konstruktion der europäischen Gesellschaft: Zur Dialektik von transnationaler Integration und nationaler Desintegration.* Frankfurt a.M.: Campus.

Nicolaïdis, Kalypso/Robert Howse (eds.): *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union.* Oxford: Oxford University Press.

Nicolaïdis, Kalypso/Susanne K. Schmidt, 2007: Mutual Recognition "on Trial": The Long Road to Services Liberalization. In: *Journal of European Public Policy* 14(5), 717–734.

Pateman, Carole, 1985: *The Problem of Political Obligation: A Critique of Liberal Theory.* Berkeley: University of California Press.

Pitkin, Hanna Fenichel, 1981: Justice: On Relating Private and Public. In: *Political Theory* 9(3), 327–352.

Pocock, John G.A., 1975: *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition.* Princeton: Princeton University Press.

Pollak, Johannes, 2008: Ist eine europäische Identität möglich? Warum wir lernen müssen, Zwiebeln zu lieben. In: Christian Joerges/Matthias Mahlmann/Ulrich K. Preuß (eds.), *"Schmerzliche Erfahrungen der Vergangenheit" und der Prozess der Konstitutionalisierung Europas.* Wiesbaden: VS Verlag für Sozialwissenschaften, 63–80.

Preuss, Ulrich K., 1999: National, Supranational and International Solidarity. In: Kurt Bayertz (ed.), *Solidarity: Philosophical Studies in Contemporary Culture 5.* Dordrecht: Kluwer, 281–292.

Rousseau, Jean-Jacques, 1959 [1762]: *Der Gesellschaftsvertrag: Oder die Grundsätze des Staatsrechts.* Translated by H. Denhardt. Stuttgart: Reclam 1769/70.

Scharpf, Fritz W., 1988: The Joint Decision Trap: Lessons from German Federalism and European Integration. In: *Public Administration* 66(3), 239–278.

——, 1997: *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research.* Boulder, CO: Westview.

——, 1999: *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.

——, 2001: Notes Toward a Theory of Multilevel Governing in Europe. In: *Scandinavian Political Studies* 24(1), 1–26.

——, 2008: Community, Diversity and Autonomy: The Challenges of Reforming German Federalism. In: *German Politics* 17(4), 509–521.

Scharpf, Fritz W./Vivien A. Schmidt (eds.), 2000: *Welfare and Work in the Open Economy.* 2 vols. Oxford: Oxford University Press.

Schmidt, Susanne K., 2007: Mutual Recognition as a New Mode of Governance. In: *Journal of European Public Policy* 14(5), 667–681.

Schmidt, Vivien A., 2004: The European Union: Democratic Legitimacy in a Regional State. In: *Journal of Common Market Studies* 42(4), 975–999.

——, 2006: *Democracy in Europe: The EU and National Politics.* Oxford: Oxford University Press.

Skinner, Quentin, 1998: *Liberty before Liberalism.* Cambridge: Cambridge University Press.

Somek, Alexander, 2008: *Individualism: An Essay on the Authority of the European Union.* Oxford: Oxford University Press.

Taylor, Charles, 1992: *The Ethics of Authenticity.* Cambridge, MA: Harvard University Press.

Tsebelis, George, 2002: *Veto Players: How Political Institutions Work.* Princeton: Princeton University Press.

Vreese, Claes de/Hermann Schmitt (eds.), 2007: *A European Public Sphere: How Much of It Do We Have and How Much Do We Need?* Connex Report Series, Vol. 2. Mannheim: University of Mannheim.

Weaver, R. Kent, 1986: The Politics of Blame Avoidance. In: *Journal of Public Policy* 6(4), 371–398.

Weiler, Joseph H.H., 1999a: The Autonomy of the Community Legal Order: Through a Looking Glass. In: Joseph H.H. Weiler, *The Constitution of Europe.* Cambridge: Cambridge University Press, 286–323.

——, 1999b: *To Be a European Citizen: Eros and Civilization.* In: Joseph H.H. Weiler, The Constitution of Europe. Cambridge: Cambridge University Press, 324–357.

——, 2003: In Defence of the Status Quo: Europe's Constitutional "Sonderweg." In: Joseph H.H. Weiler/Marlene Wind (eds.), *European Constitutionalism beyond the State.* Cambridge: Cambridge University Press, 7–23.

Weiler, Joseph H. H./Nicholas J. S. Lockhart, 1995: "Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence. In: *Common Market Law Review* 32(1), 51–94 and (3), 579–627.

Wollenschläger, Ferdinand, 2007: *Grundfreiheit ohne Markt: Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime.* Tübingen: Mohr Siebeck.

Zürn, Michael/Christian Joerges (eds.), 2005: *Law and Governance in Postnational Europe: Compliance Beyond the Nation-State.* Cambridge: Cambridge University Press.

Recent Titles in the Publication Series of the MPIfG

MPIfG Discussion Papers

DP 09/2
J. Beckert
Koordination und Verteilung: Zwei Ansätze der Wirtschaftssoziologie

DP 09/1
J. Beckert, N. Besedovsky
Die Wirtschaft als Thema der Soziologie: Zur Entwicklung wirtschaftssoziologischer Forschung in Deutschland und den USA

DP 08/13
K. Thelen, M. R. Busemeyer
From Collectivism towards Segmentalism: Institutional Change in German Vocational Training

DP 08/12
M. Höpner
Usurpation statt Delegation: Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf

DP 08/11
M. Kahancová
Embedding Multinationals in Postsocialist Host Countries: Social Interaction and the Compatibility of Organizational Interests with Host-Country Institutions

DP 08/10
A. Schäfer
Krisentheorien der Demokratie: Unregierbarkeit, Spätkapitalismus und Postdemokratie

MPIfG Working Papers

WP 08/7
W. Streeck
Von der gesteuerten Demokratie zum selbststeuernden Kapitalismus: Die Sozialwissenschaften in der Liberalisierung

WP 08/6
W. Streeck
Flexible Markets, Stable Societies?

WP 08/5
C. Deutschmann
Der kollektive „Buddenbrooks-Effekt: Die Finanzmärkte und die Mittelschichten

WP 08/4
J. Beckert, W. Streeck
Economic Sociology and Political Economy: A Programmatic Perspective

WP 08/3
W. Streeck
Industrial Relations Today: Reining in Flexibility

WP 08/2
I. Troy, R. Werle
Uncertainty and the Market for Patents

WP 08/1
G. Möllering
Inviting or Avoiding Deception through Trust? Conceptual Exploration of an Ambivalent Relationship

MPIfG Books

W. Streeck
Re-Forming Capitalism: Institutional Change in the German Political Economy
Oxford University Press, 2009

R. Mayntz
Über Governance: Institutionen und Prozesse politischer Regelung
Campus, 2009

S. Burkhart
Blockierte Politik: Ursachen und Folgen von „Divided Government" in Deutschland
Campus, 2008

L. Dobusch
Windows versus Linux: Markt – Organisation – Pfad
VS Verlag für Sozialwissenschaften, 2008

M. Höpner, A. Schäfer (Hg.)
Die Politische Ökonomie der europäischen Integration
Campus, 2008

C. Woll
Firm Interests: How Governments Shape Business Lobbying on Global Trade Cornell Studies in Political Economy
Cornell University Press, 2008

P. Manow
Im Schatten des Königs: Die politische Anatomie demokratischer Repräsentation
Suhrkamp, 2008

Ordering Information

MPIfG Discussion Papers
Order printed copies from the MPIfG (you will be billed) or download PDF file from the MPIfG website (free).

MPIfG Working Papers
Order printed copies from the MPIfG (you will be billed) or download PDF file from the MPIfG website (free).

MPIfG Books
At bookstores; abstracts on the MPIfG website.

www.mpifg.de
Go to *Publications*.

New Titles
Consult our website for the most complete and up-to-date information about MPIfG publications and publications by MPIfG researchers. To sign up for newsletters and mailings, please go to *Service* on the MPIfG website. Upon request to info@mpifg.de, we will be happy to send you our Recent Publications brochure.

ERPA
MPIfG Discussion Papers and MPIfG Working Papers in the field of European integration research are included in the *European Research Papers Archive (ERPA)* which offers full-text search options: http://eiop.or.at/erpa.

Das Max-Planck-Institut für Gesellschaftsforschung ist eine Einrichtung der Spitzenforschung in den Sozialwissenschaften. Es betreibt anwendungsoffene Grundlagenforschung mit dem Ziel einer empirisch fundierten Theorie der sozialen und politischen Grundlagen moderner Wirtschaftsordnungen. Im Mittelpunkt steht die Untersuchung der Zusammenhänge zwischen ökonomischem, sozialem und politischem Handeln. Mit einem vornehmlich institutionellen Ansatz wird erforscht, wie Märkte und Wirtschaftsorganisationen in historisch-institutionelle, politische und kulturelle Zusammenhänge eingebettet sind, wie sie entstehen und wie sich ihre gesellschaftlichen Kontexte verändern. Das Institut schlägt eine Brücke zwischen Theorie und Politik und leistet einen Beitrag zur politischen Diskussion über zentrale Fragen moderner Gesellschaften.

The Max Planck Institute for the Study of Societies conducts advanced basic research on the governance of modern societies. It aims to develop an empirically based theory of the social and political foundations of modern economies by investigating the interrelation between economic, social and political action. Using primarily an institutional approach, it examines how markets and business organizations are embedded in historical-institutional, political and cultural frameworks, how they develop, and how their social contexts change over time. The institute seeks to build a bridge between theory and policy and to contribute to political debate on major challenges facing modern societies.

MAX-PLANCK-GESELLSCHAFT