

## ORIGINAL MANUSCRIPT

# De-constitutionalisation and majority rule: A democratic vision for Europe

Fritz W. Scharpf\*

**Article by an MPIfG researcher**Fritz W. Scharpf: De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe. In: *European Law Journal* 23(5), 315-334 (2017). Wiley-BlackwellThe original publication is available at the publisher's web site: <https://doi.org/10.1111/eulj.12232>**Abstract**

European integration has long relied on the democratic legitimacy of its Member States without paying much attention to the increasing importance of its multilevel governing processes. At this time, however, Europe is caught in the intersection of multiple crises, all of which—Brexit as well as the euro crisis, the refugee crisis as well as the crises in Europe's relations with its Eastern and Southern 'near abroad'—are challenging the effectiveness as well as the democratic legitimacy of government on European and national levels. These dual challenges are connected: Democratic legitimacy presupposes effective governing and problem-solving capacity. Hence the failure of output legitimacy may undermine or even destroy the possibility of input legitimacy—a risk for which the fate of the Weimar Republic remains a most disturbing memento. At the same time, however, the lack of input legitimacy in the present European context will constrain and may ultimately destroy the effectiveness of measures based on non-accountable supranational authority.

## 1 | DEMOCRATIC ASPIRATIONS

Democracy is a contested normative concept. And even if Lincoln's triad of 'government of the people, for the people and by the people' should find broad agreement, different traditions of normative democratic theory put the emphasis on different elements. Thus the dominant emphasis of '**output-oriented**' legitimating arguments is on government *for the people* – that is, on the fundamental justification<sup>1</sup> for the coercive powers of governing authority by the function of protecting life, liberty and property and promoting the common interest of the governed. '**Input-oriented**' normative arguments focusing on government *by the people* emphasise the institutions and processes facilitating collective self-government or, in representative democracies, ensuring the responsiveness of governors to the interests and preferences of the governed. '**Community-oriented**' arguments, finally, focusing on government *of the people* emphasise the precondition of a political community or *demos* that qualifies as the collective 'self' of democratic self-government.

Whatever may have been said until recently for the empirical plausibility of output-oriented arguments, their legitimating power has declined dramatically under the cumulative impact of the present crises. These illustrate and demonstrate the fact that neither at the European nor at the national level does government have the capacity to

\*Max Planck Institute for the Study of Societies, Cologne. Email: [fs@mpifg.de](mailto:fs@mpifg.de)

<sup>1</sup>Bernard Williams defines the 'first political question' as the securing of order, protection, safety, trust, and the conditions of cooperation. It is 'first' because solving it is the condition of solving, indeed posing, any others. Cf. B. Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2015), at 3. In that sense, the representation of *buon governo* in Ambrogio Lorenzetti's fresco in the Sienese Palazzo Pubblico (1338–39) does indeed symbolise the basic precondition of any discourse on political legitimacy.

provide effective solutions for manifest common problems and common aspirations. In short, the present crises demonstrate the political salience of challenges to the output legitimacy of government in the multilevel European polity.

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

## 2 | THE ASYMMETRIC IMPACT OF EXCESSIVE CONSTITUTIONALISATION

In the European Union, the Treaties are legally binding for European and national authorities and their legislative, executive, administrative and judicial actions. In that regard, they perform the functions ascribed to the ‘basic law’ in constitutional democracies; they are even harder to change than most national constitutions; and just like national constitutional courts, the European Court of Justice (ECJ) has the final say in authoritative interpretation. But the Treaties differ from national constitutions in crucial respects: a ‘lean’ federal constitution must have rules organising the federal level of government; it must also allocate governing competences to the levels of government; and it will usually stipulate a number of fundamental rights protecting basic human and citizen rights and freedoms against the exercise of governing powers. The European Treaties, however, go far beyond these core functions by regulating in considerable detail a wide range of matters that democratic constitutions would leave to be determined by political legislation.<sup>2</sup> In other words, there is more constitutional law in the EU than in constitutional federal states.

### 2.1 | The problem

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

This idea, which is alien to the constitutions of democratic states, federal or unitary, originated in Germany in the 1930s in the ‘ordoliberal’ variant of normative economic theory. Opposed to laissez-faire liberalism as well as to state interventionism, it advocated a rule-based economic regime in which state intervention would be necessary but essentially limited to ensuring the stability of money and preventing the self-destruction of competitive markets through economic concentration and cartels. After World War II, ordoliberal principles had considerable influence on German economic and legal theory<sup>3</sup> and also on the monetary and competition policies shaping the German ‘social

<sup>2</sup>D. Grimm, ‘The Democratic Costs of Constitutionalization: The European Case’, (2015) 21 *European Law Journal*, 460–473; D. Grimm, ‘Europe’s Legitimacy Problem and the Courts’, in D. Chalmers, M. Jachtenfuchs and C. Joerges (eds.), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (Cambridge University Press, 2016), 241–36; D. Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie* (C.H. Beck, 2016); there is an English translation: *The Constitution of European Democracy* (Oxford University Press, 2017).

<sup>3</sup>H. Ehmke, *Wirtschaft und Verfassung: Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulierung* (C.F. Müller, 1961), at 7.55.

market economy'. But efforts to have the underlying principles constitutionalised failed in the assemblies drafting the Basic Law and also in the Federal Constitutional Court which, in an early decision,<sup>4</sup> held that democratically accountable governments and parliaments, though bound by the basic human and citizen rights protected by the constitution, were not constrained by the doctrines of any economic theory in their choice of economic policies and market interventions.

However, what had failed in Germany succeeded in the European Economic Community, whose competition rules were framed under German influence and whose early practice was shaped by a German head of the Competition Directorate committed to ordoliberalism.<sup>5</sup> What mattered even more in long run, however, was the ECJ's interpretation of Treaty provisions postulating the abolition of tariffs and the free movement of goods, services, capital and workers. They might have been treated as the political commitment to a goal that was to be realised through European legislation. Instead, the Court elevated them to the status of 'economic liberties' – that is, of subjective rights of individuals and corporations that, invested with the properties of 'direct effect' and 'supremacy',<sup>6</sup> came to have the legal force of fundamental rights which must be respected by all levels of government.

The Treaty of Rome had, of course, not included any of the typical constitutional rights of life, liberty, property, free speech, free press or free association that are generally protected by national constitutions. Instead, the Court's interpretation of economic liberties transformed issues which in national constitutions would be settled by political legislation into constitutional rights that are constraining political choices on European and national levels. In hindsight, this interpretation may be construed as a revolutionary act of judicial self-empowerment<sup>7</sup> which placed the Court's interpretation of economic liberties not only above Member State laws and constitutions, but also beyond the political choice of European legislation. Its doctrinal bases had been developed and disseminated by a transnational network of 'Euro-Law' associations;<sup>8</sup> politically, the Court's authority was not effectively challenged by the 'Masters of the Treaty';<sup>9</sup> and it is by now generally accepted by national courts as well.<sup>10</sup>

As a practical consequence of the constitutionalisation of economic liberties, private litigants are empowered to challenge national law in ordinary courts – which then are obliged to submit claims not yet supported by the settled case law to the ECJ for a preliminary opinion. It is this combination of self-interested litigation pushing against the boundaries of the current case law with the Court's methodological commitment to 'teleological interpretation',<sup>11</sup> the *effet utile* principle, and its own role as a 'motor of integration',<sup>12</sup> which has dynamically extended the protection of economic liberties – moving from intervention against protectionist discrimination to the removal of non-

<sup>4</sup>BVerfGE 4, 7, ruling of 20.07.1954.

<sup>5</sup>From 1958 to 1967, Hans von der Groeben, a high civil servant in Ludwig Erhard's ministry of economic affairs, was the first Director General for Competition in the European Commission. D.J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe', (1988) 42 *American Journal of Comparative Law*, 25–84; M. Wegmann, *Der Einfluss des Neoliberalismus auf das Europäische Wettbewerbsrecht 1946–1965* (Nomos, 2008).

<sup>6</sup>Case C-26/62, *Van Gend & Loos*, ECLI:EU:C:1963; Case C-6/64, *Costa*, ECLI:EU:C:1964:66.

<sup>7</sup>K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001); Grimm, 'Democratic Costs' and 'Europe's Legitimacy Problem', above, n. 3.

<sup>8</sup>A. Vauchez, "Integration through Law": Contribution to a Socio-history of EU Political Commonsense', *EUI Working Papers RSCAS 2008/10*, available at <http://cadmus.eui.eu/handle/1814/8307>; K.J. Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration 1953–1975', in K.J. Alter (ed.), *The European Court's Political Power. Selected Essays* (Oxford University Press, 2009), 63–91.

<sup>9</sup>K.J. Alter, 'Who Are the "Masters of the Treaty": European Governments and the European Court of Justice', in Alter, above, n. 9, 109–136.

<sup>10</sup>A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); R.D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).

<sup>11</sup>G. Itzcovich, 'The Interpretation of Community Law by the European Court of Justice', (2011) 10 *German Law Journal*, 537–560.

<sup>12</sup>T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking', (2013) 50 *Common Market Law Review*, 931–964.

discriminatory potential 'impediments' of economic choice,<sup>13</sup> from the free movement of goods to all other economic liberties, and from the free movement of workers to mobility rights derived from European citizenship.<sup>14</sup>

In light of the obvious difficulty of harmonisation through consensual legislation, judicial legislation promoting 'integration through law'<sup>15</sup> was widely considered a welcome 'bypass' to avoid potential political blockades.<sup>16</sup> And indeed, the famous *Cassis* decision<sup>17</sup> of 1978 was then used by the Commission to promote political agreement on the Single European Act and the move from unanimity to qualified majority voting, as even governments as yet unconverted to the neoliberal creed<sup>18</sup> came to prefer the legislative harmonisation of basic standards to the uncertainties of judicially imposed 'mutual recognition'.<sup>19</sup>

Yet, even after the Single European Act had generated an avalanche of European legislation on product standards promoting work safety, environmental and consumer protection, the leadership of judicial 'negative integration' and liberalisation was maintained through the progressive widening and deepening of the reach of economic liberties and of European competition law. Thus the domain of free service provision was extended to include public-sector banks<sup>20</sup> and a wide range of functions that had been performed by public infrastructure and public or publicly subsidised social services in most Member States.<sup>21</sup> The right of free establishment was extended by the *Centros*<sup>22</sup> decision to prevent the application of national company law to firms established as letter-box companies abroad for the sole purpose of operating domestically;<sup>23</sup> and free capital movement was seen to be violated by national attempts to constrain tax evasion<sup>24</sup> and to strengthen stakeholder representation in shareholder assemblies.<sup>25</sup> And finally, in a series of (in) famous decisions in 2007 and 2008,<sup>26</sup> the freedom of service provision was also held to override national wage regulations, rights of collective bargaining and collective action.<sup>27</sup>

In this context it is worth noting that the Court's enforcement of economic liberties and European competition law is not constrained by the allocation of governing competences between the Union and its Member States, or even by Treaty clauses such as Article 153, 5 or Article 168, 7 TFEU, that explicitly preclude the exercise of European

<sup>13</sup>C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge Law Journal*, 575–606.

<sup>14</sup>S.K. Schmidt, 'Who Cares about Nationality? The Path-dependent Case Law of the ECJ from Goods to Citizens', (2012) 19 *Journal of European Public Policy*, 8–24.

<sup>15</sup>M. Cappelletti, M. Secombe and J.H.H. Weiler (eds.) *Integration through Law: Europe and the American Federal Experiment* (5 vols) (De Gruyter, 1985).

<sup>16</sup>G. Falkner (ed.) *The EU's Decision Traps: Comparing Policies* (Oxford University Press, 2011); especially the chapter by P. Genschel, 'One Trap, Many Exits, but No Free Lunch: How the Joint-Decision Trap Shapes EU Tax Policy', 54–72.

<sup>17</sup>Case C-120/78, *Cassis de Dijon*, ECLI:EU:C:1979:42.

<sup>18</sup>N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Cornell University Press, 2006).

<sup>19</sup>S.K. Schmidt, 'Mutual Recognition as a New Mode of Governance', (2007) 14 *Journal of European Public Policy*, 667–681.

<sup>20</sup>D. Seikel, *Der Kampf um öffentlich-rechtliche Banken: Wie die Europäische Kommission Liberalisierung durchsetzt* (Campus, 2013).

<sup>21</sup>W. Sauter, *Public Services in EU Law* (Cambridge University Press, 2014). This is not meant to deny the influence of OECD-wide beliefs supporting the neoliberal transformation of the post-war 'mixed economies' since the 1980s. For a comparative account, see H. Wollmann, I. Koprić and G. Marcou (eds.), *Public and Social Services in Europe: From Public and Municipal to Private Sector Provision* (Palgrave Macmillan, 2016). But the ECJ's case law facilitated the implementation in Member States that were resisting.

<sup>22</sup>Case C-212/97, *Centros*, ECLI:EU:C:1999:126.

<sup>23</sup>J. Lowry, 'Eliminating Obstacles to Freedom of Establishment: The Competitive Edge of UK Company Law' (2004) 63 *Cambridge Law Journal*, 331–345.

<sup>24</sup>Genschel, above, n. 17.

<sup>25</sup>B. Werner, *Der Streit um das VW-Gesetz: Wie Europäische Kommission und Europäischer Gerichtshof die Unternehmenskontrolle liberalisieren* (Campus, 2013).

<sup>26</sup>Case C-438/05, *Viking*, ECLI:EU:C:2007:772; Case C-341/05, *Laval*, ECLI:EU:C:2007:809; Case C-346/06, *Rueffert*, ECLI:EU:C:2008:189; Case C-319/06, *Luxembourg*, ECLI:EU:C:2008:350.

<sup>27</sup>F. Rödl, 'Private Law, Democracy, Codification. A Critique of the European Law Project', in C. Joerges and T. Ralli (eds.), *European Constitutionalism without Private Law – Private Law without Democracy* (ARENA Report 3/2011) 11–157.

competences.<sup>28</sup> This effect appears constitutionally appropriate where basic human rights are at stake. But in light of the fact that in modern capitalism economic interactions have come to pervade all aspects of society, the Court may now intervene in the full range of national governing powers – whenever there are litigants, individuals or corporations, who find it in their interest to push for the greater extension of economic liberties or the rules of unfettered competition.

This is not meant to say that such efforts will invariably succeed. The Court may use its version of the *proportionality* test to tolerate some national constraints on economic liberty. Nevertheless, the balance between economic interests and public purposes is no longer defined by democratically accountable national governments and parliaments but ultimately by a Court that is committed not only to the priority of European over national competences but also to the promotion of a liberal economic constitution.<sup>29</sup>

In effect, the extension of judicial surveillance over the exercise of national competences has created a highly asymmetric regime for the heterogeneous political economies of EU Member States.<sup>30</sup> The 'legitimate diversity'<sup>31</sup> among non-liberal political economies also frustrated the promise of a 'social dimension' of European integration which Jacques Delors had associated with the completion of the 'Single Market' programme in 1992.<sup>32</sup> Even after the mid-1990s and before Eastern enlargement, when centre-left governments for a while had a majority on the European level, there was no progress in creating non-liberal regimes on the European level, and no agreement on legislative harmonisation that could stop the erosion of non-liberal national systems of social protection, industrial relations and corporate governance,<sup>33</sup> whereas a series of Treaty amendments that tried to protect national autonomy in such fields as education, health care and industrial relations by explicitly limiting European competences could not, for the reasons mentioned above, stop the progress of judicial liberalisation.

In effect, therefore, the advancement of European economic integration through the judicial extension and enforcement of Treaty-based economic liberties has generated an asymmetric negative impact on the institutions and policy legacies of non-liberal political economies – whereas Member States with liberal economic institutions and practices are hardly affected.<sup>34</sup>

By and large, therefore, 'integration through law' has not only progressed through non-political processes relying on the institutional independence and supranational authority of the ECJ;<sup>35</sup> it has also generated remarkably little open opposition at national and European levels; and it has hardly been touched by the increasing politicisation of European issues.<sup>36</sup>

<sup>28</sup>The standard argument is that even in the exercise of their undisputed governing competences, Member States must of course respect the subjective rights of individuals and corporations that are protected by the Treaties (e.g., Case C-158/96, *Kohll*, ECLI:EU:C:1998:171, §§19–20).

<sup>29</sup>M. Höpner, 'Der Europäische Gerichtshof als Motor der Integration: Eine akteursbezogene Erklärung' (2011) 21 *Berliner Journal für Soziologie*, 203–229.

<sup>30</sup>The same is of course true of the present euro regime, except that the asymmetries there are favouring 'Northern' over 'Southern' political economies, rather than 'liberal' over 'coordinated market economies' and 'liberal' over 'Bismarckian' and 'social-democratic' welfare states.

<sup>31</sup>F.W. Scharpf, 'Legitimate Diversity: The New Challenge of European Integration (2003) 1 *Zeitschrift für Staats- und Europawissenschaften*, 32–60.

<sup>32</sup>J. Delors, '1992: The Social Dimension'. Address by President Delors at the Trades Union Congress – Bournemouth, 8 September 1988, available at [http://europa.eu/rapid/press-release\\_SPEECH-88-66\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-88-66_en.htm).

<sup>33</sup>C. Barnard, 'EU Employment Law and the European Social Model', Legal Studies Research Papers, University of Cambridge, paper no. 43/2014, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2471740##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471740##).

<sup>34</sup>In this regard, the asymmetric impact of the European regime of economic liberties on 'liberal' and 'non-liberal' political economies resembles the asymmetric impact of the regime upholding the European Monetary Union on 'Northern' and 'Southern' political economies (F.W. Scharpf 2016: *Forced Structural Convergence in the Eurozone—Or a Differentiated European Monetary Community*. MPIFG Discussion Paper 16/15). In both cases, the asymmetry arises if a uniform European regime is imposed on structurally heterogeneous national polities, economies and societies.

<sup>35</sup>R.D. Kelemen, 'The Political Foundations of Judicial Independence in the European Union', (2012) 19 *Journal of European Public Policy*, 43–58; C. Joerges 'Integration Through Law and the Crisis of Law in Europe's Emergency', in Chalmers et al., above, n. 3, 299–338.

<sup>36</sup>S. Hutter, E. Grande and H. Kriesi (eds.), *Politicising Europe: Integration and Mass Politics* (Cambridge University Press, 2016).

Given the constitutional supremacy and practical irreversibility of Treaty-based case law combined with the expansive dynamism of interest-driven litigation, there is a ratcheting effect of ever tighter legal constraints on non-liberal political action at the national as well as at the European level. And quite apart from the liberalising transformation of non-liberal political economies, the consequence is a progressive narrowing of the action space and hence of the problem-solving capacity of democratic politics in the face of increasing external and internal challenges and crises. In other words, the judicial constitutionalisation, extension and enforcement of economic liberties has the effect of incapacitating democratic political action at a time where the multilevel European polity is challenged by the interaction of multiple crises that have the potential of undermining not only the democratic legitimacy but also the political viability of government at European and national levels.

But what could be done about this?

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

The present European constellation is institutionally unique. But there is a remarkably close parallel in the constitutional history of the United States in the first third of the twentieth century,<sup>37</sup> where the Supreme Court had used three bases of constitutional law to create ever tighter constraints on political action by the states as well as the federal government. With regard to state action, constitutional constraints were derived from Article I, Section 8, Clause 3 of the original constitution stating that '*the United States Congress shall have power to regulate Commerce with foreign Nations and among the several States ...*' and from the 14th Amendment providing that '*no State ... shall deprive any person of life, liberty or property without due process of law.*' In the Court's interpretation, however, the empowerment of federal legislation also implied a '*negative (or dormant) commerce clause,*' which even in the absence of legislation constrained state action impeding interstate commerce.<sup>38</sup> Moreover, the 14th Amendment, which had been adopted after the Civil War to protect former slaves against discriminatory state action, was read as a guarantee of '*substantive or economic due process*' that protected the freedom of contract of economic actors against state regulation.<sup>39</sup> In combination, the Supreme Court's interpretation of these two clauses imposed roughly the same liberalising constraints on state action which is presently imposed on EU Member States by the ECJ's interpretation of 'economic liberties'.<sup>40</sup>

At the same time, however, the federal legislation under the *commerce clause* was also constrained by the Court's 'bi-polar' interpretation of the constitutional allocation of competences.<sup>41</sup> Treating the '*police power*' as the core of the residual competences of the states, the Court intervened against federal laws purporting to regulate interstate commerce that also appeared to serve the typical public health, safety and general welfare purposes of police power measures. In a landmark case, therefore, a federal statute excluding the products of child labour from interstate commerce was held to conflict with the *police power* reserved to the states<sup>42</sup> whereas the child labour regulations of individual states were frustrated by out-of-state competition that could not be excluded under the *dormant commerce clause*.

These issues came to a head in the Great Depression of the 1930s, when the Supreme Court in a series of dramatic decisions struck down core elements of Roosevelt's New Deal programme. As the conflict had become a major issue in the 1936 elections, outright resistance and a 'Court packing plan' seemed imminent when the Democrats won

<sup>37</sup>M.P. Maduro, *We The Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart, 1998); Barnard, above, n. 14.

<sup>38</sup>J.N. Eule, 'Laying the Dormant Commerce Clause to Rest', (1982) 91 *Yale Law Journal*, 425–485.

<sup>39</sup>Ehmke, above, n. 4, 334–380; 'Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered', (1990) 103 *Harvard Law Review*, 1363–1383; M.J. Philips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Praeger Greenwood, 2001).

<sup>40</sup>Maduro, above, n. 38. Technically, the constraints imposed by the American case law were even tighter as the application of economic due process did not even require a potential trans-border impediment to the exercise of economic liberty.

<sup>41</sup>F.W. Scharpf, 'The Asymmetry of European Integration or why the EU Cannot Be a Social Market Economy', (2010) 8 *Socio-Economic Review*, 211–250.

<sup>42</sup>*Hammer v. Dagenhart*, 247 U.S. 251 (1918).

by a landslide. The confrontation was barely avoided when the Court in 1937 reversed itself<sup>43</sup> by removing the constitutional constraints on the economic policy choices of democratically accountable governments on both levels. After the 'constitutional revolution of 1937', therefore, state governments were only bound by federal legislation but not any longer by the judicial doctrines of *economic due process* and of the *dormant commerce clause*.<sup>44</sup> At the same time, federal legislation under the *commerce clause* was no longer prevented from pursuing the public health, safety and general welfare purposes that are also matters for the concurrent *police power* of the states.<sup>45</sup> In other words, even though the United States continue to be an extremely liberal political economy, policy choices at both the federal and the state level have ceased to be constrained by a judicially defined 'economic constitution'.

### 2.3 | European solutions?

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

Dieter Grimm has suggested a radical de-constitutionalisation of the European Treaties. In his view, a future Treaty of the European Union (TEU) should contain only rules of genuine constitutional status. These would have to constitute governing authorities on the European level, regulate their roles in the decision-making procedures of the Union, specify EU governing competences in relation to the Member States, and define the fundamental principles, human rights and citizen rights, which are binding on European and national authorities. Most other rules in the present Treaty on the Functioning of the European Union (TFEU) should then be downgraded to the status of ordinary or secondary European law.<sup>46</sup>

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

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

<sup>43</sup>The 'switch in time that saved nine' was actually achieved by one Justice (Roberts) changing sides in a divided Court – but then consolidated by Roosevelt's subsequent judicial appointments. See W.E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford University Press, 1995).

<sup>44</sup>Resurrecting Economic Rights', above, n. 40; Barnard, above, n. 14.

<sup>45</sup>Ehmke, above, n. 4, 381–402; F.W. Scharpf, *Grenzen der richterlichen Verantwortung: Die political-questions-Doktrin in der Rechtsprechung des amerikanischen Supreme Court* (Verlag C.F. Müller, 1965), 325–346; Eule, above, n. 39; M.H. Redish and S.V. Nugent, 'The Dormant Commerce Clause and the Constitutional Balance of Federalism', (1987) 36 *Duke Law Journal*, 569–617.

<sup>46</sup>Grimm, above, n. 3.

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

One such possibility might be the insertion of a general clause at the beginning of Part Three TFEU stating that under Titles I–IV, VI and VII, litigation and infringement proceedings may only be based on Regulations and Directives adopted under Articles 289, 290 and 291 TFEU.<sup>47</sup> A similar clause might also be inserted with regard to Article 16 of the Charter of Fundamental Rights. By not including the prohibition of discrimination on grounds of nationality under Articles 18 TFEU and 22 (2) of the Charter, however, the proposed amendments would still allow litigation and infringement proceedings challenging protectionist measures impeding the access of foreign suppliers or consumers to national markets.<sup>48</sup>

If this or a similar solution were to be adopted, there is no reason to fear that it could destroy the single market. The huge body of European legislation on economic integration, much of it codifying the *economic liberties* case law, would of course remain in place. From the perspective of member governments, therefore, the proposal would make most difference in policy areas like capital taxation, industrial relations, corporate governance, social and public services and public infrastructure, where the diversity of national traditions, institutions and preferences has so far impeded effective European legislation.<sup>49</sup> Where European legislation does exist, it could now be changed – but it would still be hard to mobilise European majorities for issues that may have political salience in only one or a few Member States. In a previous article, however, which had not focused on constitutional issues, I had proposed a procedure that would allow Member States to ask for politically controlled individual opt-outs from the European *acquis*.<sup>50</sup> It could well be combined with the present proposal.<sup>51</sup>

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

<sup>47</sup>Thus, Commission Directives adopted under Article 106 (3) TFEU would not qualify.

<sup>48</sup>This would amount to a return to the Court's case law before the *Dassonville* and *Cassis* decisions had moved from intervening against protectionist discrimination to intervention against all national rules or practices 'that are capable of hindering, directly or indirectly, actually or potentially' the exercise of a Treaty-based liberty. A return to non-discrimination would also correspond with the very cautious use of the '*dormant commerce clause*' in recent case law of the US Supreme Court. Cf. Barnard, above, n. 14.

<sup>49</sup>F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999), ch. 3.

<sup>50</sup>F.W. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', (2016) 21 *European Law Journal*, 384–405, at 403.

<sup>51</sup>Under the procedure, a Member State should notify the Commission of a national legislative initiative that would conflict with existing European legislation. After being reviewed in light of the issues at stake in the particular case, such initiatives could be denied by Parliament and Council. In effect, the possibility of re-examining the *acquis* on a case-by-case basis should result in a more fine-grained pattern of European law that is based on a political assessment of the actual need for Europe-wide uniformity, and it should eventually limit the body of binding European law to rules that serve a positive European purpose and that have the political support of current legislative majorities at the European level.



### 3 | THE JOINT DECISION TRAP

But while these reforms would enlarge the action space for democratic policy choices on the national level, their effect on European legislation might be quite limited. As was pointed out some time ago, the manifest asymmetry of negative and positive integration was a consequence not only of the 'negative' effectiveness of legal constraints on national action, but also of the political weakness of 'positive integration' and re-regulation through legislative action on the European level.<sup>52</sup>

#### 3.1 | The Problem

The problem, in a nutshell, has been, and still is, the 'joint decision trap' (JDT), i.e., the fact that European legislation must be adopted in a multiple-veto system,<sup>53</sup> and therefore presupposes broad consensus and is easily blocked by conflicting economic, institutional and political interests and preferences among the multiple participants.

This explains why judicial legislation and 'integration through law'<sup>54</sup> was widely welcomed as a non-political 'bypass'<sup>55</sup> after legislative harmonisation had stagnated in the 1970s; and it also explains the quantitative importance of legislation that appears politically uncontroversial because it merely seems to codify the Treaty-based case law.<sup>56</sup> As a consequence, European legislation is unlikely to violate any of the politically salient interests represented by national governments or any of the economic and civil society interests that have privileged access to Commission directorates or to committees and party groups in the European Parliament.

Nevertheless, as long as no harm was inflicted, and as long as democratically accountable national governments would loyally implement European law, the academic interest in the European democratic deficit was not matched by politically salient public concerns.<sup>57</sup>

But when times turned rough in the international financial and economic crisis after 2008, the constitutionalised Maastricht rules prevented effective policy responses while the procedures of unanimous Treaty revision foreclosed any attempt to change the substantive rules in order to allow discretionary political and effective legislative responses to the crisis. In its first serious challenge under the Maastricht and Lisbon Treaties, therefore, European legislation by the Community Method was incapacitated by an overly rigid constitutional straightjacket. Faced with the prospect of massive government failure, therefore, European and national leaders have tried, and are still trying, to gain more room for manoeuvre by fudging the constitutional constraints – whose legal force they cannot challenge as long as they are unable to agree on formal changes. In order to gain more flexibility, they have widened the discretionary powers of non-accountable supranational actors and they have relied on conflict resolution through intergovernmental negotiations outside of the Treaty and under the influence of asymmetric bargaining powers.

#### 3.2 | Supranational and intergovernmental flexibility

The first of these options is exemplified by the extension of the discretionary powers of the European Central Bank (ECB). Since its political independence is more securely institutionalised than that of any other central bank, it has been able to interpret the narrow mandate defined by the Maastricht Treaty within very wide limits. Hence on the

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<sup>52</sup>Scharpf, above, n. 50, ch. 3.

<sup>53</sup>F.W. Scharpf, 'The Joint Decision Trap: Lessons from German Federalism and European Integration', (1988) 66 *Public Administration Review*, 239–278; G. Tsebelis, *Veto Players. How Political Institutions Work* (Princeton University Press, 2002).

<sup>54</sup>Cappelletti, Secombe and Weiler, above, n. 16.

<sup>55</sup>Genschel, above, n. 17.

<sup>56</sup>D.S. Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press, 2015).

<sup>57</sup>F.W. Scharpf, 'Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis', in K. Armingeon (ed.), *Staatstätigkeiten, Parteien und Demokratie* (Springer, 2013), 567–596. Also available as: Discussion Paper 12/6. Cologne: Max Planck Institute for the Study of Societies, at [http://www.mpifg.de/pu/mpifg\\_dp/dp12-6.pdf](http://www.mpifg.de/pu/mpifg_dp/dp12-6.pdf).

verge of another euro crisis in the summer of 2012, President Draghi's dramatic announcement of unconventional measures was effective in stopping speculative attacks on some Southern states. And in the face of serious *ultra vires* challenges, the ECJ's *Gauweiler* decision<sup>58</sup> affirmed that the Bank was not overstepping its narrow mandate of securing price stability through measures of monetary (rather than economic) policy. Yet even when used to the limits, monetary policy acting alone has been unable to stimulate economic growth in the Eurozone. And the more the Bank's discretionary measures appear to be straining its Treaty-defined narrow mandate, the more they are also pushing against the boundaries of the limited legitimacy of politically non-accountable authority. In any case, however, the ECB's autonomous powers can only address a narrow range of problems, and even there their effectiveness is constrained by the lack of complementary action in fiscal policy.<sup>59</sup> Similarly, the Juncker Commission is straining against its narrowly defined legislative mandate under the Excessive Deficit Procedure by postponing the enforcement of deficit rules against Member States in economic and political distress. But while this exercise of 'discretion by stealth' may soften the negative impact of rigid rules, it also challenges the narrow boundaries of the Commission's legitimacy and its difficult relationship with the Council.<sup>60</sup>

In short, the problem-solving capacity of politically non-accountable authorities remains limited by narrow constitutional and legislative mandates – which may at best be somewhat extended by discretionary extensions and creative judicial interpretation. Such constraints seem to be absent when the exit from the Community Method is achieved through intergovernmental agreement – a mode of policy making whose importance is said to have generally increased in the post-Maastricht period.<sup>61</sup> But while intergovernmental action has certainly dominated recent political responses to crises in the Ukraine, the euro crisis and the refugee crisis, there is still a theoretical puzzle: if high consensus requirements explain the lack of effective political action in the JDT, why should one assume that effectiveness is increased by switching from the Community Method to bargaining among the governments involved – where the decision rule is generally unanimity or, at best, consensus?

In approaching an answer, it seems useful to distinguish between intergovernmental policy making within and outside the institutional framework of the European Treaties. In the former case, bargaining takes place in a 'compulsory negotiation system'<sup>62</sup> in which unilateral action is ruled out and objectives can only be achieved through (near) universal agreement. Outside of the EU rules, by contrast, negotiations are 'voluntary' in the sense that participation is not institutionally ensured, and that outcomes are binding only for those who agreed. In matters not regulated by the existing Treaties, therefore, 'coalitions of the willing' may commit themselves to common action, while others may prefer to stay outside. The Schengen agreement is a celebrated example of how European integration could be advanced outside of – and subsequently integrated into – the legal framework of the Treaties. The Fiscal Compact was adopted under international law to avoid a British veto against amending the Treaties. But the ECJ's obvious difficulty to justify the Treaty creating the European Stability Mechanism (ESM) in its *Pringle*<sup>63</sup> decision<sup>64</sup> suggests that the option of intergovernmental action outside of the Treaties in areas that are arguably within the competence of the Union will not be generally available – except under the constraining rules of 'enhanced cooperation' (Articles 20 TEU, 326–334 TFEU).

<sup>58</sup>Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400.

<sup>59</sup>P. De Grauwe, 'The Political Economy of the Euro', (2013) 16 *Annual Review of Political Science*, 153–170.

<sup>60</sup>V.A. Schmidt, 'The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?' Discussion Paper 015/2015, European Commission. Fellowship Initiative 2014–2015, available at [http://ec.europa.eu/economy\\_finance/publications/eedp/pdf/dp015\\_en.pdf](http://ec.europa.eu/economy_finance/publications/eedp/pdf/dp015_en.pdf); D. Seikel, 'Flexible Austerity and Supranational Autonomy: The Reformed Excessive Deficit Procedure and the Asymmetry between Liberalization and Social Regulation in the EU', (2016) 54 *Journal of Common Market Studies*, 1398–1416.

<sup>61</sup>C. Bickerton, D. Hodson and U. Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', (2015) 53 *Journal of Common Market Studies*, 703–722.

<sup>62</sup>F.W. Scharpf, *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research* (Westview, 1997), at 143–145.

<sup>63</sup>Case C-370/12, *Pringle*, ECLI:EU:C:2012:756.

<sup>64</sup>B. De Witte and T.W. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle', (2013) 50 *Common Market Law Review*, 805–848.

If decisions have to be reached in the institutional framework of the EU, and if the Community Method appears blocked by disagreement in the Council, it is nevertheless true that intergovernmental agreement is often reached in Summit meetings among the heads of state and government.<sup>65</sup> One obvious reason is the greater opportunity at the higher hierarchical level for inter-sectoral package deals. Beyond that, leaders may have the political authority to accept concessions that lower-level negotiators would have to reject. Moreover, the group dynamics and the drama of summit meetings may also provide an emotional and political push that increases the perceived importance of reaching a common European solution in comparison to the national concessions required.

This is not meant to say that differences in national power resources are fully neutralised by institutional voting rules. But it suggests that their importance increases as formal voting procedures are bypassed by informal intergovernmental bargaining.

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

### 3.3 | Activating the politics of European legislation

Under these conditions, effective problem solving on the European level does seem to require reforms that help to activate political demand for European solutions and to politicise the policy choices in European legislation. A first step might have to reduce the negative control of the European agenda that is implicit in the Commission's monopoly of legislative initiatives. In exceptional cases, to be sure, the European Council may, by intergovernmental consensus, mandate the development of a particular policy initiative. Beyond that, however, problems, policy purposes and potential solutions that are not taken up by the Commission will remain excluded from the European policy-making process. And though the Commission President may have a few political priorities, the gatekeeping function is primarily exercised by the specialised Directorates-General and shaped by the distinct technical orientations and the political sensitivities of their professional staffs.<sup>66</sup>

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

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

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<sup>65</sup>M. Hartlapp, 'Organizing Exits from the Joint-Decision Trap? Cross-Sectoral (Non) Coordination in the European Union', in Falkner, above, n. 17, 181–198.

<sup>66</sup>M. Hartlapp, J. Metz and C. Rauh, *Which Policy for Europe? Power and Conflict Inside the European Commission* (Oxford University Press, 2014).

## 4 | FROM LEGITIMATING CONSENSUS TO LEGITIMATE MAJORITY RULE?

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

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

### 4.1 | Factual presuppositions of legitimate majority rule

Constitutional democracies on the national level take majority rule for granted, but they limit its domain through the rule of law and the constitutional protection of (individual) human and citizen rights and of (collective) rights of specific minority groups. Beyond that, they differ in the extent to which the straightforward exercise of majority rule is further impeded by institutional ‘checks and balances’, super-majoritarian voting rules and multiple veto positions that are supposed to provide protection against the ‘tyranny of the majority’ or ‘populist democracy’.<sup>67</sup> In this regard, the EU’s Community Method is surely located at the extreme end of Arend Lijphart’s comparative classification of majoritarian and consensus democracies.<sup>68</sup> Hence, if a reduction of its consensus requirements is considered, one needs to examine the legitimating arguments and assumptions justifying the exercise of majority rule in majoritarian democracies on the national level.

The theoretical starting point is, again, the interest-based consensus principle, or its reverse implication: if no harm is done, consensus may be presumed. Hence the need for justification is low for policies that are roughly compatible with the interests and preferences of those affected; and it is highest for policies imposing unequal and uncompensated sacrifices or violating highly salient values and preferences of a minority. In a next step, this distinction is linked to assumed differences in the interests, values and preferences of the polity’s membership: in homogeneous and egalitarian political communities it seems plausible to believe that majoritarian policy choices, even though they are not preferred by the opposition, will not generally violate highly salient concerns of the minority.<sup>69</sup> In socially

<sup>67</sup>W.H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (Waveland Press, 1982).

<sup>68</sup>A. Lijphart, *Patterns of Democracy* (Yale University Press, 1999), at 42–47.

<sup>69</sup>This point is conceded even by normative political theorists starting from liberal premises that have no place for the ‘communitarian’ concept of a socially or culturally constituted *demos*: T. Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview, 1996); A. McGann, *The Logic of Democracy: Reconciling Equality, Deliberation, and Minority Protection* (University of Michigan Press, 2006). In their view, democracy implies majority rule (and proportional elections) because only these are compatible with the fundamental principle of political equality. Nevertheless, the legitimacy of democratic rule presupposes a ‘common world’ in which ‘the fulfillment of all or nearly all of the fundamental interests of each person are connected with the fulfillment of all or nearly all of the fundamental interests of every other person’; see T. Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford University Press, 2008), at 80. It is the rough equality in which constituents are affected that justifies equal participation and majoritarian decisions. These real-world preconditions of political equality and democratic majority rule are presently not seen to exist beyond the boundaries of the modern state: *ibid.*, 83, and T. Christiano, ‘Democratic Legitimacy and International Institutions’, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 119–137.

divided and unequal societies, by contrast, majority rule is likely to be more distrusted and the minority's tolerance for policy choices violating its interests or preferences is likely to be lower – which is why checks and balances and supra-majoritarian are often considered necessary for ensuring the cohesion of the polity.

If put into practice, an institutional framework reflecting the principles of *demoi-cracy* might indeed reduce present legal constraints on democratic self-government on the national level.<sup>70</sup> However, its capacity for dealing with conflicting national interests and preferences in the face of crises and challenges requiring effective political action on the European level appears to be even lower than it is at present. From what has been said, therefore, it would follow that the consensual ground rules of the Community Method may indeed represent the maximum of legitimate political integration and of legitimate capacity for political action that can be achieved by the European Union under present conditions.

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

## 4.2 | Deliberative democracy and majority vote

In recent contributions to a possible theory of democracy beyond the nation state, structural and static arguments have been replaced by dynamic approaches suggesting that democratic legitimacy may be generated through political processes as such.<sup>71</sup> In line with a general 'constructivist turn' in social and political science, the basic assumption is that 'socially constructed' interest and value positions need not be taken as given but may change under the influence of empirical and normative arguments,<sup>72</sup> which resonates with the liberal ideal of 'government by discussion'.<sup>73</sup> In present normative discussion, the basic approach is represented by theories of discursive or deliberative democracy<sup>74</sup> that combine Habermas' theory of communicative action with an epistemic version of democratic theory.<sup>75</sup> The former postulates that in principle truth-oriented exchanges of arguments are under ideal circumstances capable of attaining unforced agreement, not only on issues of fact but also in normative controversies. In the political sphere, therefore, ideal deliberative processes should also be able to resolve conflicts of political interests and preferences through general agreement on the empirically and normatively optimal solution. In that sense, the ideal of deliberative democracy is meant to provide a radically consensus-oriented version of political legitimacy which – as universal consensus defines the common good – would also avoid any tension between output-oriented and input-oriented democratic legitimacy.

<sup>70</sup>J. Sievers and S.K. Schmidt, 'Squaring the Circle with Mutual Recognition? *Demoi-cratic Governance in Practice*', (2015) 22 *Journal of European Public Policy*, 112–128.

<sup>71</sup>D. Archibugi and D. Held (eds.), *Cosmopolitan Democracy: An Agenda for A New World Order* (Polity, 1995); P. Nanz and J. Steffek, 'Legitimation durch Deliberation? Die Rolle der Zivilgesellschaft in der supranationalen Politik', in M. Knodt and B. Finke (eds.), *Europäische Zivilgesellschaft. Konzepte, Akteure, Strategien* (VS Verlag, 2005), 79–102; D. Archibugi, M. Koenig-Archibugi and R. Marchetti (eds.), *Global Democracy: Normative and Empirical Perspectives* (Cambridge University Press, 2011).

<sup>72</sup>H. Müller, 'Arguing, Bargaining and all that: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations' (2004) 10 *European Journal of International Relations*, 395–435.

<sup>73</sup>J. Habermas, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Luchterhand, 1962); there is an English translation: *The Structural Transformation of the Public Sphere* (MIT Press, 1989).

<sup>74</sup>J.S. Dryzek, *Discursive Democracy: Politics, Policy, and Political Science* (Cambridge University Press, 1990); J. Bohman, *Public Deliberation* (MIT Press, 1996).

<sup>75</sup>J. Habermas, *Theorie des kommunikativen Handelns* (2 vols) (Suhrkamp, 1981); there is an English translation: *Theory of Communicative Action* (MIT Press, 1984 and 1987).

As deliberation can be practised in any setting – local, national, global, scientific, bureaucratic or political – academic interest mainly focuses on the ideal preconditions of truth-oriented and non-strategic discussion and unforced agreement and on their approximation in experimental and empirical settings.<sup>76</sup> To qualify as a plausible theory of political *democracy*, however, further assumptions must be introduced. Thus Habermas<sup>77</sup> postulates the existence of a ‘public sphere’ with universal access where all social and political propositions, concerns and demands may be freely articulated and publicly debated in open-ended discourse. The need for binding decisions is to be accommodated on a second, institutional level, where deliberations are focused on the resolution of specific legal or political issues. To satisfy democratic requirements, however, institutionalised deliberation must continue to be immersed in, informed by, transparent to, and publicly justified in relation to the ongoing stream of discussion in the public sphere.

Decision-oriented deliberations, however, cannot be open-ended; they must be terminated at some point even if full consensus has not been reached. And in that case, Habermas, following Joshua Cohen, suggests that decisions are to be reached by majority vote. The rule is justified if the vote itself is part of the ongoing deliberative praxis. It is then not a free-standing, voluntarist decision, but a reflection of the current state of truth-oriented exchanges of information and arguments – which implies that ‘the fallible opinion of the majority will for the time being provide the rational basis of common praxis.’<sup>78</sup> Thus, if the process as a whole is truth-oriented, the majority vote appears as a legitimate shortcut that approximates, for the time being, a consensual solution.<sup>79</sup> In contrast to *demos*-oriented legitimating arguments, therefore, the theory of deliberative democracy offers a legitimization of majority rule that is generated by the process of political communication and policy-oriented deliberation itself.

But even if all that is conceded on the theoretical level, there are still two fundamental objections against considering deliberative democracy as a pragmatically plausible and normatively convincing justification of majority rule on the European level. The first is empirical. The communication processes, on which the theory relies for its legitimating arguments, do not (yet) exist. There is presently no pan-European public space; and the national compartments of public debates are at best linked through highly selective reports in the quality press which, even if they are increasing,<sup>80</sup> cannot substitute for the legitimating function of Europe-wide discourses. Worse yet, political debates in national public spaces are increasingly framed in fundamental opposition to the European Union<sup>81</sup> and, at any rate, hardly connected to deliberations on the European level: national political parties are not competing over European policy choices, and the European Parliament is deliberating in splendid isolation from national

<sup>76</sup>K. Grönlund, A. Bächtiger and M. Setälä (eds.), *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (ECPR Press, 2014); L. Baccaro, A. Bächtiger and M. Deville, ‘Small Differences that Matter: The Impact of Discussion Modalities on Deliberative Outcomes’ (2016) 46 *British Journal of Political Science*, 551–566.

<sup>77</sup>J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1992), chapter VII; there is an English translation: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity, 1995); J. Habermas, ‘Hat die Demokratie noch eine epistemische Funktion? Empirische Forschung und normative Theorie’, in J. Habermas, *Ach, Europa. Kleine politische Schriften XI*, (Suhrkamp, 2008), 138–191; there is a shorter English version, ‘Does Democracy still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research’, (2006) 16 *Communication Theory*, 411–426.

<sup>78</sup>Habermas, *Faktizität und Geltung*, above n. 78, at 371, my translation.

<sup>79</sup>The argument is reminiscent of the Condorcet Jury Theorem, which had been anticipated by Rousseau (see B. Grofman and S.L. Feld, ‘Rousseau’s General Will: A Condorcetian Perspective’, (1988) 82 *American Political Science Review*, 567–576). If truth is assumed to exist and if all participants are independently searching for it, then the greater number of votes justifies a presumption of getting it right. But these conditions are rarely met in real-world decisions (see K.K. Ladha, ‘The Condorcet Jury Theorem, Free Speech, and Correlated Votes’, (1992) 36 *American Journal of Political Science*, 617–637).

<sup>80</sup>T. Risse (ed.), *European Public Spheres: Politics is Back* (Cambridge University Press, 2015).

<sup>81</sup>T.A. Börzel, ‘From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics’, (2016) 54 *Journal of Common Market Studies*, 8–31.

political debates.<sup>82</sup> In short, European decision processes still lack the political infrastructure and the communicative linkages that would allow policy-oriented deliberation (assuming that it occurs on the European level) to be considered deliberative *democracy*.

The second problem of deliberative democracy in the European context is the claim that 'in principle' it should be able to resolve all types of conflict through consensus-oriented arguing, rather than through strategic bargaining. When what is at stake is the legitimacy of majority rule on the European level, this assumption is obviously critical – and it is also obviously unrealistic. This is not meant to deny that deliberating participants may change their prior preferences, or that randomly selected citizens in 'mini publics' may achieve agreement on controversial political issues. There is also empirical research showing that actual stakeholders in local conflicts may sometimes (but by no means always) resolve these through well-designed mediation procedures.<sup>83</sup> And there is no reason to deny that not only bargaining but also arguing plays a role on the European level – in the Committee of Permanent Representatives and the Council Secretariat,<sup>84</sup> in some Comitology committees<sup>85</sup> or even in committees of the European Parliament. But none of this evidence suggests that fundamental conflicts of interest, identity or normative value orientations could also be resolved through real-world deliberative processes in national politics, let alone on the European or transnational level.<sup>86</sup> So the conclusion must be: in constellations where consensual resolution through deliberation is not within reach, majority rule cannot be legitimated by invoking the epistemological claims of deliberative democracy.

At the same time, however, the obvious unrealism of in-principle theories should not stop the search for pragmatic approximations. A parallel example on the rational choice side is the Coase Theorem<sup>87</sup> which postulates that in the absence of transaction costs, self-interested and rational bargainers will always be able to reach agreement on the welfare optimum. But even though the assumed condition is totally unrealistic, the theorem stimulates the pragmatically useful search of rational choice negotiation theories for constellations and strategies that may facilitate agreement by reducing transaction costs.<sup>88</sup> Similarly, deliberation is likely to be more effective among groups that share an important political purpose, whereas – as Yanis Varoufakis<sup>89</sup> had to find out – the resort to deliberative reasoning in a constellation framed as zero-sum conflict may well contribute to further polarisation. In other words, the

<sup>82</sup>In my view, the most important obstacle to any attempts to 'democratise' European legislation is the lack of a political linkage between the Members of the European Parliament (MEPs) and their voters. In Germany, for instance, all 93 MEPs are elected from country-wide closed lists put up by their respective national parties. Their lack of grass-roots connections appears glaring when compared to the intense relationship of members of the US House of Representatives with the voters, the party activists and the media in their single-member districts. And even in Germany, where the outcome of national elections is determined by proportional vote, half of the seats are filled by plurality votes in single-member districts. And as all candidates on party lists must also stand in one of these local districts, local winners will generally face local MPs elected on the list of another party as competitors for the attention of local voters. None of these local links exist for MEPs who generally remain unknown to voters in any locality, and who are thus free to engage in European-level deliberations and power games without ever having to worry about maintaining their electoral bases. Habermas' proposal of European elections with pan-European lists of candidates would of course maximise the isolation of European elites; see J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', (2015) 21 *European Law Journal*, 546–557, at 548)

<sup>83</sup>K. Holzinger, 'Negotiation in Public Policy-Making: Exogenous Barriers to Successful Dispute Resolution', (2001) 21 *Journal of Public Policy*, 81–106; N. Deitelhoff and H. Müller, 'Theoretical Paradise: Empirically Lost? Arguing with Habermas', (2005) 31 *Review of International Studies*, 167–179.

<sup>84</sup>J. Lewis, 'How Institutional Environments Facilitate Cooperative Negotiation Styles in EU Decision Making', (2010) 17 *Journal of European Public Policy*, 650–666.

<sup>85</sup>C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology', (1997) 3 *European Law Journal*, 273–299.

<sup>86</sup>McGann, above, n. 70; N. Deitelhoff, 'Leere Versprechungen? Deliberation und Opposition im Kontext transnationaler Legitimitätspolitik', (2012) 27 *Leviathan*, 63–80.

<sup>87</sup>R.H. Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law and Economics*, 1–44.

<sup>88</sup>Scharpf, above, n. 63, ch. 6.

<sup>89</sup>Y. Varoufakis, 'As It Happened – Yanis Varoufakis' Intervention during the 27th June Eurogroup Meeting', 28 June 2015, available at <https://yanisvaroufakis.eu/2015/06/28/as-it-happened-yanis-varoufakis-intervention-during-the-27th-june-2015-eurogroup-meeting/>. See now also Y. Varoufakis, *Adults in the Room* (Allen Lane, 2017).

pragmatic usefulness of deliberation, and hence the legitimating power of arguments derived from the theory of deliberative democracy, will vary with the intensity of the conflicts that need to be resolved.

### 4.3 | A pragmatic approach to deliberative majority rule

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

Instead, I continue to assume that politically salient interests and preferences are still aggregated in national political processes and represented by politically accountable national governments in European policy processes.<sup>90</sup> Hence what matters for the chances of reaching deliberative consensus are primarily the ex-ante constellations of interests and preferences among Member State governments. Regardless of the nature and origin of these preferences, such constellations can be usefully classified by the game-theoretic distinction between games of 'pure conflict', 'pure coordination' and various types of well-understood 'mixed-motive games'.<sup>91</sup> In the first type of constellations, deliberation is likely to fail, and the Community Method would be blocked, whereas in intergovernmental negotiations, an illegitimate settlement might be imposed by asymmetric bargaining power. In the second case of harmonious or converging preferences, by contrast, deliberation would be easy; the Community Method would work as well, and majority rule would also be unproblematic.

In actual practice, however, both of these extreme constellations are rare in European politics. Much more typical are constellations resembling mixed-motive games where all parties have an interest in cooperative solutions but will disagree about the specific terms of the settlement or about the distribution of its costs and benefits. If the decision rule is (near) unanimity, however, veto players may be caught in the 'negotiators' dilemma', where distributive bargaining over secondary advantages may prevent them from reaching agreement on the primary objective.<sup>92</sup> These are the conditions under which the dominance of the consensus principle under the Community Method may either prevent political action on the European level or will after endless bargaining rounds produce suboptimal compromises.

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

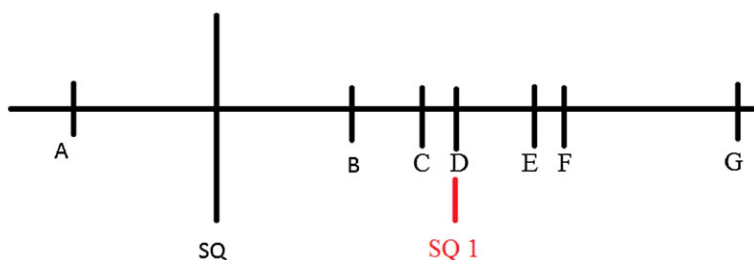
In both cases, however, the argument depends crucially on the assumed characteristics of the constellation. If original preferences should diverge more widely, majority rule may turn into the 'tyranny of the majority' under assumptions of rationally self-interested parties, and truth-oriented deliberation would not converge on solutions for which consensus could be assumed to be within reach. For an illustration, Figure 1 assumes that the multi-dimensional interests or preferences of seven actors, A, B, C, D, E, F and G, may be represented in one dimension by the

<sup>90</sup>This assumption is not shared by pro-European democrats like Jürgen Habermas who place their hope on the Europe-wide mobilisation of generalisable interests. And of course Member State governments are not only representing their national constituents, but also their own institutional self-interest. Cf. Scharpf, above, n. 54.

<sup>91</sup>Scharpf, above, n. 63, ch. 4.

<sup>92</sup>D.A. Lax and J.K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (Free Press, 1986).





**FIGURE 1** Preference Constellation and Majority Rule [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

distance of their respective ideal points from the current status quo (SQ). Even though all want to move away from SQ, they disagree not only over amounts but also over the direction. Under the unanimity rule, this conflict would block any agreement. If the issue should be decided by majority instead, the outcome favouring the 'median voter' D would be located at SQ1. It would be better than SQ for all members of a coalition including B, C, D, E, F and G. For government A, however, SQ1 appears so much worse than SQ that it would surely oppose it. If the country were nevertheless bound by the vote, it would have reason to consider the decision an illegitimate exercise of tyrannical majority power.

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

When applied to the problems of European politics, the model has two implications: it demonstrates that the legitimacy of moving from the consensual rules of the Community Method to decisions by majority rule (under the *no-demos* conditions of the European Union) depends crucially on the existence of interest constellations in which it is indeed plausible to think that consensus is within reach, and that for all parties concerned the benefits of a roughly acceptable common outcome exceed the costs of an individually suboptimal solution. At a time, however, when the extremely diverse and unequal 'peoples of Europe' are driven apart under the impact of multiple crises,<sup>93</sup> such conditions cannot be generally assumed. But where they do not exist, decisions by majority vote that violate highly salient interests or values of the minority would lack legitimacy and might provoke disruptive conflict in a Union that still depends on the consensus principle.

Unfortunately, there is no substantive ex-ante test that could generally and reliably identify constellations where the application of the majority rule would be normatively appropriate or clearly unacceptable. But there might be a procedural equivalent: the use of the majority rule could be combined with the possibility of an opt-out that would restrict the legal effect of the decision to Member States whose governments participate in the vote – and who presumably expect to gain from a European solution even if they should be outvoted on some of its details. In effect, this procedure would, at the same time, protect highly salient minority interests, reduce the probability of political blockades, and allow 'coalitions of the willing' to use the powers of European legislation to deal with common problems and to advance common purposes that are beyond the reach of individual Member States acting on their own.

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

<sup>93</sup>K. Armingeon, K. Guthmann and D. Weisstanner, 'Choosing the Path of Austerity: How Parties and Policy Coalitions Influence Welfare State Retrenchment in Periods of Fiscal Consolidation', (2016) 39 *West European Politics*, 628–647.

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

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

## 5 | DIFFERENTIATED INTEGRATION AND THE EMPOWERMENT OF DEMOCRATIC POLITICS

European integration has been promoted to serve two different purposes that were not clearly distinguished as they were thought to advance in parallel and to reinforce each other; and it was also associated with one great hope. The first purpose, driven by strong anti-nationalist motives after World War II,<sup>94</sup> has been the establishment of a United States of Europe as a supranational, externally powerful and politically integrated federal state. The other, more pragmatic purpose is best expressed by the title of Alan Milward’s bestseller, *The European Rescue of the Nation State*:<sup>95</sup> Member States agreed to a partial transfer of sovereignty, and to its joint exercise, in order to obtain European solutions for problems that could no longer be successfully resolved at the national level. And the great hope was, finally, that both purposes could be realised with democratic legitimacy. In the meantime, however, the purposes are perceived to be in partial conflict, and the hopes for democratic self-government in Europe have been disappointed.

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

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

As a consequence of these conflicts and disappointments, the present debate about European integration has become increasingly polarised. From the ‘federalist’ perspective, whose implicit hostility against the European nation

<sup>94</sup>In interpreting World War II as a catastrophe of excess nationalism, this frame fails to realise that Nazi Germany’s post-war vision was not the reinforcement of a German nation state, but the establishment of a transnational European empire under German direction. See R. Hank, ‘Wir Europäer: Nach der verlorenen Unschuld’, (2013) 67 *Merkur*, 872–885.

<sup>95</sup>A.S. Milward, *The European Rescue of the Nation State* (Oxford University Press, 1992).

state is shared not only by members of the EP and supranational institutions but also by many pro-European democrats, most of what is seen to be wrong in the European Union is explained by the recalcitrance, egotism and myopia of Member State governments defending national (and institutional) self-interest at the expense of the European common good. What would be needed is a wholesale transfer of constitutional sovereignty, competences and governing resources to a democratic European state. In the meantime, in any case, the *aquis* must be defended; and existing controls over national governments and policies must be reinforced and extended.

At the other extreme, right- and left-wing 'populist' movements, political parties and governments are blaming the rise of social inequality, economic failure, and the frustrations of global capitalism and migration on power hungry and neoliberal European politicians and bureaucrats. But there are also politically responsible and responsive governments<sup>96</sup> and democratic political parties which, in their frustration over the lack of problem-solving effectiveness and the absence of democratic accountability in European governance, may perhaps not yet be ready to imitate the 'Brexit' campaign, but are willing to explore options of 'devolution', re-nationalisation and/or a resort to intergovernmental action.

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

Hence the following arguments are mainly addressed to readers who are deeply concerned with the declining problem-solving capacity of government, the shrinking influence of democratic politics on policy choices, and the ineffectiveness of political accountability on all levels of the European polity. From their perspective, the loss of legal uniformity (which would of course place burdens on the Commission and on teachers, students and practitioners of European law) should be a lesser problem.<sup>97</sup> What may weigh more heavily, however, on the scales of pro-European democrats is the implicit strengthening of the roles of national governments in European political processes. Their aspirations for a democratic European Union would include full parliamentary powers for the EP, direct elections of the Commission President or a Commission that is fully accountable to the EP, uniform rules for EP elections, EP candidates nominated on Europe-wide lists, and so on.<sup>98</sup> The democratic ideal, in other words, is a presidential or parliamentary European constitution whose politics are shaped by Europe-wide political parties competing on politically distinct platforms over European policy choices, whereas the governments of EU Member States should have a minor role in a second legislative chamber.

Whatever one might think of the desirability of this presidential or parliamentary model and its centralised politics for the heterogeneous membership of the EU, however, it seems clear that the institutional changes suggested could not generate democratic politics under the present conditions of citizen disinterest or frustration, horizontally

<sup>96</sup>P. Mair, 'Representative versus Responsible Government', *Working Paper 2009/08*, Max Planck Institute for the Study of Societies, Cologne.

<sup>97</sup>In comparison to the presently existing degree of 'differentiated integration' (see D. Leuffen, B. Rittberger and F. Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan, 2013) and T. Duttler, K. Holzinger, T. Malang, T. Schäubli, F. Schimmelfennig and T. Winzen, 'Opting Out from European Union Legislation: The Differentiation of Secondary Law', (2017) 24 *Journal of European Public Policy*, 406–28), the increase might not be dramatic. If the problems addressed by majoritarian legislation are indeed of the *Battle-of-Sexes* variety described above, it is likely that opt-outs would be few – and in many cases of a temporary nature.

<sup>98</sup>A. Follesdal and S. Hix 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', (2006) 44 *Journal of Common Market Studies*, 533–562; S. Hix, *What's Wrong with the European Union and How to Fix It* (Polity, 2008); J. Habermas, *The Crisis of the European Union* (Polity, 2012); Habermas, above, n. 83.

fragmented political communications, and nonexistent vertical linkages or locally rooted European political parties. The proposals presented here would instead expect European democracy to arise within the existing political spaces of EU Member States. By loosening the stranglehold of constitutionalised neoliberalism, they would provide the space for political debates about the shape of European political economies. And by allowing for the possibility of majoritarian European legislation, they would widen the range of potentially feasible European policy choices, which might lessen the deadening sense of futility that presently inhibits the search for European options. It would be more plausible for national governments, political parties, labour unions and NGOs to try to mobilise political support and media attention for and against European policy initiatives which, under present rules, would be nipped in the bud. At the same time, the opt-out would also be a politically salient decision which governments would have to justify to their European peers as well as to their national publics. In the end, therefore, the politicisation of controversies over feasible policy choices, and the importance of having to build transnational coalitions for their realisation, might not only revitalise democratic politics but also contribute to the evolution of a European public space.

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

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