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**Working Paper**

## After the crash: A perspective on multilevel European democracy

MPIfG Discussion Paper, No. 14/21

**Provided in Cooperation with:**

Max Planck Institute for the Study of Societies (MPIfG), Cologne

*Suggested Citation:* Scharpf, Fritz W. (2014) : After the crash: A perspective on multilevel European democracy, MPIfG Discussion Paper, No. 14/21, Max Planck Institute for the Study of Societies, Cologne

This Version is available at:

<https://hdl.handle.net/10419/106264>

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MPIfG Discussion Paper 14/21

**After the Crash**

A Perspective on Multilevel European Democracy

Fritz W. Scharpf



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MPIfG Discussion Paper 14/21  
Max-Planck-Institut für Gesellschaftsforschung, Köln  
Max Planck Institute for the Study of Societies, Cologne  
December 2014

MPIfG Discussion Paper  
ISSN 0944-2073 (Print)  
ISSN 1864-4325 (Internet)

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## Abstract

At the end of the postwar period, the politically shaped configurations of normatively integrated European political economies differed greatly among “social-market” and “liberal market economies.” Such differences persist even though the characteristic achievements of social market economies have since eroded under the pressures of global capitalism and of European integration. Focusing on European integration from a social-market perspective, there is no question that it has widened the range of individual options. But it has also reduced the capacity of democratic politics to deal with the challenges of global capitalism, and it has contributed to rising social inequality and the erosion of public services and transfers.

This paper will first summarize those asymmetries of European integration which have done the most to constrain democratic choices and to shift the balance between capital, labor, and the state by establishing an institutional priority of negative over positive integration and of monetary integration over political and social integration. It will then explain why efforts to democratize European politics will not be able to overcome these institutional asymmetries and why politically feasible reforms will not be able to remove the institutional constraints. The changes that would be required to restore democratic capacities to shape the political economy could only have a chance if present veto positions were to be fundamentally shaken. On the speculative assumption that the aftermath of a deep crisis might indeed create the window of opportunity for a political re-foundation of European integration, the concluding section will outline institutional ground rules that would facilitate democratic political action at both the European and national levels.

## Zusammenfassung

Am Ende der Nachkriegsperiode waren in Westeuropa höchst unterschiedliche, aber jeweils politisch gestaltete und normativ integrierte Konfigurationen der „liberalen“ oder „sozialen Marktwirtschaften“ entstanden. Die Unterschiede bestehen weiter, auch wenn seitdem unter dem Einfluss des globalen Kapitalismus und der europäischen Integration die besonderen Errungenschaften der sozialen Marktwirtschaften erodieren. Insbesondere die europäische Integration hat zwar die Optionen der individuellen Lebensgestaltung erheblich erweitert. Aber sie beschränkte zugleich die Möglichkeit der demokratischen Politik, auf Veränderungen und Krisen der kapitalistischen Ökonomie wirksam zu reagieren, und sie hat zum Anstieg sozialer Ungleichheit und zum Abbau staatlicher Leistungen beigetragen.

Der vorliegende Text beschreibt zunächst Asymmetrien der europäischen Entwicklung – den Vorrang der negativen vor der positiven Integration und der monetären vor der politischen und sozialen Integration –, die am meisten zur Entmachtung der demokratischen Politik und zur Verschiebung der Verteilungsrelationen zwischen Arbeit und Staat auf der einen und Kapital auf der anderen Seite beigetragen haben. Er zeigt dann, weshalb eine Demokratisierung der europäischen Politik im gegenwärtigen institutionellen Rahmen diese Asymmetrien nicht überwinden und weshalb realisierbare Reformen die institutionellen Restriktionen nicht beseitigen könnten. Die Veränderungen, die erforderlich wären, um die Gestaltungsmacht der demokratischen Politik wiederherzustellen, hätten allenfalls dann eine Chance, wenn die gegenwärtigen Vetopositionen erschüttert würden. Unter der spekulativen Annahme, dass eine tiefe Krise auch Chancen für eine fundamentale Neugestaltung des Integrationsprozesses eröffnen könnte, präsentiert der letzte Abschnitt Entscheidungsregeln für eine europäische Verfassung, die politische Gestaltungsmacht auf der europäischen wie auf der nationalen Ebene verstärken würden.

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## After the Crash: A Perspective on Multilevel European Democracy

Postwar varieties of capitalism and social models in Europe have evolved under specific historical conditions and contingencies. They were shaped by political processes conditioned by specific configurations of state power, policy legacies, economic structure, cultural repertoires, and distributions of political power. Reaching their maturity in the permissive environment of postwar “embedded liberalism” (Ruggie 1982), democratically shaped European political economies differed significantly at the end of the 1960s – differences which were later captured by the concepts of coordinated and liberal market economies (Hall/Soskice 2001) and of social-democratic, conservative, and liberal welfare states (Esping-Andersen 1990). In European constitutional democracies, these diverse socio-economic configurations – which for purposes of the present discussion are collapsed into the rough distinction between “social-market” and “liberal-market” political economies – have become constitutive parts of the legitimate social order.

Since the end of the postwar period, these normatively salient configurations have changed in response to internal moral and social changes and to the external challenges of global capitalism and European integration (Streeck 2014). Focusing specifically on European integration from a social-market perspective, there is no question that it has greatly widened the range of individual options. But by prioritizing negative over positive integration and monetary over social and political integration, it has also reduced the capacity of democratic politics to deal with the challenges of global capitalism, and it has contributed to rising social inequality and the erosion of public services and transfers.

In present political debates, pro-European and left-of-center authors tend to ascribe the erosion of social-market models exclusively to the forces of globalized capitalism – against which European integration is hoped to provide the effective sword and shield. They see “more Europe,” combined with the democratization of the present union, as necessary and sufficient conditions for creating a Europe-wide, social-market economy (e.g., Collignon 2003; Bofinger et al. 2012). Considering ourselves no less pro-European, colleagues and I are more impressed with the liberalizing and deregulatory impact of EU law on social-market economies and with the democratic deficits of decision making in the present European Union (Höpner/Schäfer 2008; 2010; Scharpf 2010). In our view, “more Europe” under present institutional conditions would destroy the “legitimate diversity” of European political economies (Scharpf 2003) and would further undermine the chances of democratic self-government in Europe.

My present contribution will first summarize those aspects of European integration which have done the most to constrain the capacity of democratic politics to deal with the challenges of global capitalism – the priority of negative over positive integration and the priority of saving the euro. I will then explain why efforts to democratize European politics will not be able to overcome these constraints, and why politically feasible institutional reforms will not allow them to be removed. In my view, the changes that would be required to re-create at the European level democratic capacities to shape political economies could only have a chance if present veto positions would be fundamentally shaken. On the speculative assumption that the aftermath of a deep crisis might indeed create the opportunity for a political re-foundation of European integration, I will try to outline in the concluding section the institutional ground rules that would facilitate effective political action at both the European and national levels.

## **1 Integration through law and the priority of negative over positive integration**

Among the original six member states, and after the political failure of the European Defense Community, the European Economic Community represented a political commitment to create a common market. After the removal of tariff barriers, the way forward was to be through legislation removing nontariff barriers by harmonizing differing economic regulations (i.e., through “positive integration”). As European legislation after the “Luxembourg Compromise” of 1966 continued to require unanimity in the Council, respect for the legitimate diversity of member states was obviously secure, whereas the progress of economic integration through legislative harmonization was slow.

Governments, however, had failed to appreciate the coup-d'état of the European Court of Justice (ECJ), which in 1963 and 1964 had postulated the supremacy and direct effect of European law. As a consequence, “integration through law” (Cappelletti et al. 1985) became an option to bypass political legislation through “judicial legislation” if agreement in the Council could not be obtained. In substantive terms this meant that all European law and its judicial interpretation would gain constitutional priority over the laws and constitutions of member states. In other words, political objections to legislative harmonization could be and were bypassed by the Court's capacity to disallow national regulations and practices which, in its interpretation, were constraining undistorted competition and the free movement of goods, services, labor, and capital (i.e., “negative integration”).

The doctrine gained practical importance in the economic crises of the 1970s which had revived academic and political support for neoliberal beliefs in the efficiency of unfettered competition in deregulated markets. Economists in the European Commission tended to share these beliefs, but that was not true of all governments of “high-regula-

tion” states, some of which had managed the crises of the 1970s rather more successfully than the liberal economies. In this historical constellation, “integration through law” came to play a crucial role in promoting the liberal transformation of social-market member states.<sup>1</sup> At the national level, the judicial enforcement and extension of “negative integration” removed the state’s control over its economic boundaries and created incentives and opportunities for regulatory and tax competition. Beyond that, it has greatly reduced the space of legally allowable state action in economic matters.

In theory, of course, the liberalizing impact of negative integration might be countered by “positive integration” – that is, by uniform European rules replacing national regulations the Court had disallowed.<sup>2</sup> In contrast to negative integration, however, positive integration could not be achieved through the Court’s liberalizing case-by-case decisions.<sup>3</sup> It requires “political” legislation which, even after the Luxembourg Compromise had been replaced by the present “Community Method,” depends on an initiative by the European Commission, an absolute majority in the European Parliament, and a qualified majority of government votes in the Council. In short, European legislation must be adopted in a multiple-veto system depending on very broad political agreement – which is ever more difficult to obtain in the increasingly heterogeneous union (Höpner/Schäfer 2012). On issues which, among the old member states, would provoke conflict between “liberal” and “social market” preferences, consensus is practically out of the question, and similar conflicts between old and new member states or between creditor and debtor states in the eurozone are also beyond resolution by European legislation.

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- 1 The Court had originally interpreted the Treaty’s commitment to a free-trade regime as a prohibition of discrimination on grounds of nationality. At the end of the 1970s, however, the standard was shifted from nondiscrimination to nonimpediment even in cases lacking any trans-border aspects. From then on, all national regulations and institutions could be challenged as “nontariff barriers” impeding the exercise of the Treaty’s four “economic liberties” or as distortions of free competition. To be sure, not all challenges would succeed under the Court’s “proportionality test.” But those that did were written in constitutional stone, creating a “ratcheting effect” that allowed “progress” only in the direction of further liberalization (Scharpf 2010).
  - 2 If the “nontariff barrier” is constituted by the mere diversity of national rules, a uniform European rule of the same type could replace it. But if the national “impediment” reduces the substantive reach of a Treaty-based “economic liberty,” liberal economic constitutionalism would deny that it could be replaced by an identical European rule (cf. Mestmäcker 1973; Maduro 1998; Dardot/Laval 2013: ch. 7; Davis 2014). In practice, for instance, the case law defining patient mobility as a Treaty-based liberty became a significant constraint on uniform EU legislation trying to regulate the conditions under which national health systems would be obliged to pay for hospital care abroad (Martinsen 2014).
  - 3 This is strictly true for economic liberalization, where the Court could, at best, require the “mutual recognition” of national regulations (Schmidt 2008) but could not define common European standards. By contrast, the case law disallowing gender discrimination or age discrimination in the labor market may have the effect of directly regulating private action. Even though they are also protecting private self-interest against “community” (Weiler 2011: 691), these nondiscrimination cases are not promoting economic liberalism but, rather, socio-cultural individualism (Somek 2008; 2011).



As a consequence, there was and is practically no chance that European legislation by the Community Method would correct the liberalizing impact of judicial legislation and negative integration. It therefore was and is unreasonable for left-of-center pro-European political parties and unions to expect that political action at the European level could either create a meaningful “European Social Model” or would protect the existing social-market economies of EU member states against the pressures of interstate competition or the impact of global capitalism (Rödl 2013; Dardot/Laval 2013: ch. 7; Grimm 2014).

## 2 Monetary integration and the priority of rescuing the Euro<sup>4</sup>

When the Internal-Market program was sent on its way in the mid-1980s, the Delors Commission had proclaimed the “social dimension” to be the next item on the European reform agenda, whereas the German foreign minister asked for progress toward a European “political union” and the French government promoted monetary union to end the hegemonic role of the German Bundesbank in the European Monetary System (EMS). After the fall of the Berlin Wall and the international politics of German unification, however, it was only the French proposal that was included in the Maastricht Treaty (Marsh 2009).

Since the difficulties of the EMS had been caused by the divergence of hard-currency and soft-currency member states, some (mainly American) economists had warned that the future eurozone was not an “optimal currency area” (e.g., Mundell 1961; Eichengreen 1990; Feldstein 1997), and from a comparative political-economy perspective it also seemed clear that a currency union would severely disadvantage economies whose industrial-relations systems did not have a capacity for coordinated wage-setting strategies (Scharpf 1991: 263–269). Commission economists, however, for whom “one market – one money” appeared as the logical culmination of the Internal-Market program, downplayed these structural and institutional differences. In their view, monetary union itself would increase competitive pressures to such an extent that any structural differences would soon disappear (COM 1990).

### 1999–2008: Divergence-increasing Monetary Union

What in fact happened was just the opposite: between 1999 and 2008 the convergence of nominal interest rates and uniform European Central Bank (ECB) rates, in the face of continuing differences in national inflation rates, pushed eurozone economies ever

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4 I apologize for the fact that citations in the following section will be mainly to my own recent work, which contains ample references to the literature and relevant data.

more apart. In low-inflation Germany, real interest rates increased, domestic demand declined, unemployment escalated, and real wages fell. By contrast, real interest rates turned negative while domestic demand, employment, and nominal unit labor costs increased in Greece, Portugal, Spain, and Ireland (but not in Italy). Since the Monetary Union (EMU) had eliminated exchange-rate risks, the dramatic divergence of capital accounts was conveniently bridged by private capital flowing from surplus to deficit economies (Scharpf 2011).

When the international (Lehman Bros.) financial crisis caused a worldwide credit squeeze in the fall of 2008, deficit economies were hit hardest by the collapse of inter-bank lending. As all governments came to rescue their overcommitted banks, state debt escalated everywhere but most dramatically in deficit countries, including Ireland and Spain, whose budgets had even been in surplus before 2008. Toward the end of 2009, finally, capital markets also began to worry about the ability to pay of over-indebted governments in deficit economies, and in early 2010, rapidly rising risk premia on state bonds raised the specter of state insolvency, first for Greece, then for Ireland and Portugal, and potentially for Spain and Italy as well.

### Euro crisis and euro-rescuing policies

Under the rules of the Maastricht Treaty, which prohibited the bail-out by other member states as well as monetary state financing by the ECB, the ensuing scenario would have been clear: state insolvencies would be inevitable, state creditors would have to cut their losses, bankrupt states would leave the monetary union, and their newly independent currencies would devalue against the remaining eurozone economies in order to restore international competitiveness. As it was unclear whether the Monetary Union could then be maintained, the constellation that faced eurozone governments in the spring of 2010 was interpreted as a euro crisis (Scharpf 2014).

Governments of deficit states seem to have considered bankruptcy as the worst-case outcome to be avoided at any cost. But the governments of surplus states, led by Germany and France, also came to realize that it was in their interest to maintain the common currency. Since their banks were heavily invested in Greece, Ireland, and other deficit economies, insolvencies might unleash a second wave of banking crises which, following so soon after 2008, they would have had to face with depleted fiscal resources. Moreover, a collapse of the euro might boost nominal exchange rates to such an extent that massive job losses in export-dependent industries were to be expected. In order to rescue the euro, therefore, the Council agreed to ignore the Maastricht rules and to create rescue funds that were guaranteed by the fiscal commitments of surplus states.

The decision to rescue the euro put the focus exclusively on the state-credit crises, rather than on the economic and social crises of deficit economies. Since the “confidence of the markets” had been lost by the escalating state debt of economies with high current-account deficits, it seemed initially plausible to combine rescue credits with “conditionalities” that specified fiscal austerity and internal devaluation through wage-reducing “reforms” for debtor governments. Institutionally, agreement to these conditionalities was not defined by European legislation under the Community Method or through consensus-oriented voting in the Council but through extremely asymmetric bargaining between creditor and debtor governments that resembled conditions of an unconditional surrender.

Combined with the ECB’s expansion of the money supply and its interventions in the market for state bonds, these measures have so far averted the collapse of the euro. From the perspective of creditor states, they succeeded (for the time being) in avoiding both the need to cope with another banking crisis<sup>5</sup> and the job losses caused by a massive revaluation. From the perspective of debtor states, however, conditionalities combining fiscal austerity and internal devaluation have reduced domestic demand to such an extent that declining economic activity and escalating rates of unemployment have not only caused a deep economic and social crisis but have further increased excessive public-sector indebtedness. Hence, even though declining domestic demand has reduced imports and thus current account deficits, and even though rising unemployment has reduced average unit labor costs and thus the overvaluation of real effective exchange rates, the basic vulnerability of debtor states still remains (Streeck/Elsässer 2014). As a consequence, the original state-credit crisis could still reassert itself if the confidence of “the markets” in the ECB’s resolve and capacity to support the credit-worthiness of debtor states would come into question.

### The new euro regime

In order to reduce the risk of another euro crisis, a new regime has been designed and partly implemented over the last three years. Its options have been quite limited, however. Since the structural heterogeneity of EMU member states persists, uniform exchange-rate and monetary policies will continue to generate divergent impulses. In a federal state with full taxing powers and a large budget, these would be counteracted by the central government’s fiscal, economic, labor-market, and social policies. But these capacities are lacking at the European level. Hence, the new euro regime must attempt

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5 As private capital was withdrawn in the euro crisis, the need to finance continuing current deficits through capital imports was and is reflected in the surplus positions of “Northern” central banks on the ECB’s “Target-2” balance sheet. In effect, the private risk of creditor banks and investors has been transformed into the public risk of these central banks and the states owning them (Sinn/Wollmershaeuser 2011).

to prevent the rise of external imbalances by either transferring additional competences to the European level or by increasing central controls over the exercise of governing powers remaining at the level of EMU member states.

Thus, the new regime is adding banking regulation and supervision to the centralized competences of monetary and exchange rate policies. Beyond that, however, it adopts and extends the model established through the “conditionalities” imposed on debtor states in the euro crisis. In substantive terms, the new Fiscal Compact combined with the Six-Pack’s Excessive Deficit Procedure and the European Semester generalizes the austerity requirements that were initially imposed on debtor states. The Six-Pack regulations adopted at the end of 2011 also include a new Excessive Imbalance Procedure, which invests the Commission with practically unlimited authority to investigate economic conditions in member states, to identify imbalances on a wide variety of indicators, to define some of these as “excessive,” to recommend their correction through policy responses involving the full range of national competences, and to enforce these with severe sanctions – unless a qualified majority of the Council should interfere.

### Economic and distributional implications of the new euro regime

In substantive terms, these policies are guided by a consistent economic logic: if EMU member states continue to be structurally heterogeneous, and if the resources of a European federal state are beyond reach, the Monetary Union will generate external imbalances which cannot be corrected through the adjustment of nominal exchange rates or countercyclical monetary policies. If it is further assumed that rising state deficits may again trigger state-credit crises, the insistence on fiscal austerity and budget consolidation will also constrain the countercyclical use of national fiscal policy. In other words, economic imbalances must be prevented by the use of the remaining domestic-policy competences of national governments (Scharpf 2013).

In a booming economy, therefore, governments must prevent external deficits and rising real exchange rates by cutting domestic demand through restrictive credit regulations, tax increases, spending cuts and, above all, by somehow preventing the rise of nominal unit labor costs. If the economy is moving into a recession, however, fiscal reflation of domestic demand through tax cuts and deficit spending is ruled out, and the regime may instead force the state to adopt additional austerity cutbacks to avoid violating the deficit rules. Under these conditions, cost-reducing supply-side reforms and wage cuts appear as the only option that might contribute to an export-led recovery. But if this strategy should succeed, as it did for Germany between 2001 and 2005, the consequence will be external surpluses which will then imply external deficits elsewhere.

In economic and distributional terms, therefore, the new euro regime implies that governments must exert continuous downward pressures on public-sector functions and on wages – in the upswing to dampen the rise of external deficits, and in the downswing to stimulate export-led recovery. If successful under both conditions, this regime would institutionalize a vicious cycle of competitive internal devaluation in the eurozone, where successful wage restraint in some parts would undermine competitiveness elsewhere, requiring new rounds of fiscal cutbacks, supply-side reforms, wage concessions, and so on. As a consequence, the distributional balance between capital, labor, and the state, which became externally constrained by international capital mobility after the 1970s, will be shifted further in favor of capital incomes by the new euro regime. In other words, saving the euro will continue to reduce the role of the state and to increase social inequality in eurozone economies (Schraad-Tischler/Kroll 2014).

### Institutional implications of the new euro regime

Apart from the effectively centralized competences of exchange-rate, monetary, and (in the future) banking policy, the competences which need to be employed for the management of individual eurozone economies will remain at the member-state level. Thus, actual policies on taxation, social services and transfers, labor law, wage control, or credit regulation must be adopted and implemented by national governments. Compared to the “global” management of aggregate demand through monetary policy, these policy choices will be more complex, less well understood, and likely to have much higher political salience.<sup>6</sup>

From the perspective of the euro regime, therefore, democratically accountable national governments acting on their own cannot be relied upon to pursue precisely those policies which the Commission considers essential for avoiding another euro crisis. Hence, it is indeed necessary that these choices should be supervised by a supranational authority in charge of the eurozone at large and with the capacity to enforce its directions. That is why the European Semester requires national budgets to be reviewed by the Commission before they are even communicated to the national parliament, and that is why the Six-Pack regulations authorize the Commission to issue specific recommendations of national policy choices and to enforce these recommendations through severe sanctions. The euro group of the ECOFIN Council is formally involved in all these processes – except that the government under examination is not allowed to participate. However,

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6 The use of monetary policy instruments may draw on theoretical and econometric models that are not available for other policy instruments. Moreover, monetary policy is meant to serve macroeconomic purposes, short-term changes are expected, and debates are generally confined to an expert constituency. By contrast, policies regarding taxes, pensions, minimum wages, labor law, or mortgage rules are meant to serve their own purposes, expected to create a stable environment for private actors, and debated in their own constituencies, which may not be ready to accept the priority of macroeconomic purposes.

with regard to binding recommendations and the imposition of sanctions, the distrust of political solidarity among member governments is so acute that, under the “reversed qualified-majority” rule, the Commission’s proposals will become effective unless they are rejected by a qualified majority in the Council (Scharpf 2011; Seikel 2014).

In effect, the new euro regime depends on the supranational capacity to control and, if necessary, override democratic political processes at the national level. This power, including the authority to also override political majorities in the Council,<sup>7</sup> has been vested in the Commission by the Six-Pack regulations that were adopted as European law by the Community Method. Under normal constitutional standards, however, these regulations cannot legitimate the Commission’s exercise of this authority.

### The Commission’s authority under the euro is not a “rule of law”

Regardless of its democratic deficit, Europe has always claimed to be “a government of laws, not of men.”<sup>8</sup> It was generally accepted that the legitimacy of these laws rested either on treaties adopted by democratic member states or on European legislation adopted according to the Community Method defined by the treaties. Under these conditions, acts of government applying European law were to be accepted under the legitimating principle of “legality.” By the same logic, the Maastricht Treaty and the Stability Pact had attempted to establish a rule-based (though economically counterproductive) regime for the Monetary Union. When these rules were ignored or fudged in the international financial crisis and in the euro crisis, deviations could be justified as emergency measures that had the blessings of member governments as the “masters of the Treaty.” For fiscal policy, the new Excessive Deficit Procedure is an attempt to return to a greatly tightened rule-based regime (which presently is again proving to be economically counterproductive).

By contrast, the Excessive Imbalance Procedure, which was also established by the Six-Pack legislation, seems to be based on the recognition that the eurozone economy (or any economy, for that matter) cannot be successfully managed by predefined rules. In order to prevent the rise of external and internal macroeconomic imbalances, the Commission must respond to extremely divergent, highly contingent, and extremely variable conditions in individual member-state economies. To have any chance of success at all, therefore, the Excessive Imbalance Procedure must rely on the informed judgment of policy makers, who must be allowed to respond flexibly, even opportunistically and unequally to highly diverse and uncertain problem constellations. It must also be able

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7 The European Parliament in its unrelenting hostility against the Council would even have preferred the automatic effectiveness of Commission proposals.

8 On the *ordo-liberal* foundations of this commitment to rule-bound economic governance, see, e.g., Mestmäcker (1973), Dardot/Laval (2013: ch. 7), Joerges (2014).

to employ all policy instruments available at the national level – without regard to the division of European and national competences in the Treaties (Scharpf 2012, 2013). Hence, the Six-Pack legislation only defined the procedures through which the Commission may act; it did not and could not specify rules for the actual exercise of the Commission's functions. In total departure from any claims to rule-bound legitimacy, what the Excessive Imbalances Procedure has established is, and is meant to be, an entirely discretionary regime whose scope of delegated authority far exceeds the limits of generally allowable delegation in constitutional democracies.

In constitutional democracies, it is true that exceptionally wide discretionary authority is not entirely unheard of. But on matters with potentially high political salience, it is delegated to political actors whose authority rests, directly or indirectly, on democratic accountability. That is true of the autonomous powers of the directly elected president in the United States or in France, and it is also true of heads of governments or ministers in parliamentary democracies whose delegated authority may be limited or withdrawn by parliamentary majorities at any time. These conditions are obviously lacking in the case of the European Commission.

Even if the political role of the Council were not emasculated by the reverse-qualified-majority rule, its formal authority could not invest the Commission's discretionary decisions with democratic legitimacy. Ministers in the Council may be indirectly legitimated by being accountable to their national parliaments, which are legitimated by national elections. If that chain of legitimation is thought to be sufficient, it could legitimate the German minister of finance to accept sacrifices for Germany and to agree to general rules applying to all member states. But there is no normatively acceptable argument empowering German voters to authorize German ministers to impose discretionary orders and severe sanctions on Greece. From the perspective of Greek citizens, being ruled by the euro group of the ECOFIN Council is not democratic self-government but the rule of foreign governments. In short, it is not only the practically unlimited scope of delegation and the intrusiveness of decisions that makes the Six-Pack regime normatively unacceptable, but also the lack of democratic legitimacy of the Commission's exercise of discretionary authority.

### **3 Is democratization the answer?**

Left-of-center authors who are concerned about the erosion of social market economies and the rise of transnational and social inequality under the euro regime consider the "transfer of sovereignty" to the European Union as part of the solution, rather than as the problem. If they acknowledge present deficiencies of European action, the standard response is to reassert a commitment to a genuine democratization of the European Union (e.g., Collignon 2003; Hix 2008; Habermas 2011). What is necessary, in their

view, is to transform the union into a parliamentary democracy and the Commission into a parliamentary government and to replace the veto positions of national executives through majority rule in a bicameral European legislature. As a consequence, legitimacy deficits would be overcome because expanded European competences and resources would be employed and controlled by democratic European politics.

At this point, I will not reiterate the obvious arguments against the political feasibility of such changes under the existing rules of treaty amendment or against the adequacy of present political parties and political communications for linking the exercise of European governing powers to the interests and expressed preferences of European voters. Instead, I will argue against the desirability of majoritarian democracy in the present European Union on grounds of normative democratic theory.

### Majoritarian democracy and persistent minorities

The question about the type of collectivities in which majority rule could be justified is one of the most difficult and least explored in normative democratic theory. In regard to democracy at the European level, it cannot even be discussed without entering the normative and empirical minefield of the “no-demos” debate (Kielmansegg 1996; Habermas 2001; Risse 2014). Eventually, this field will have to be charted, but not in the present contribution. I will also not base my present argument on “communitarian” or “republican” versions of normative political philosophy (Scharpf 2012). Instead, I will turn to a strictly individualistic or “liberal” version of axiomatic democratic theory which bypasses these issues and to an author who has explicated a deductive justification of straightforward majority rule derived from normatively undisputed egalitarian principles (Christiano 1996).

In Christiano’s view, the fundamental principle of democratic equality cannot imply equality of outcomes. But it does imply equality of resources to influence the outcomes of political decisions. At minimum, therefore, democratic legitimacy presupposes the “one-man-one-vote” rule and the equality of voting power. By the same logic, democratic equality also implies neutrality: decision rules must not favor certain preferences or discriminate against others. In the abstract, both of these principles are uniquely realized by the rule of decision making by simple majority. Any super-majoritarian rules or institutions would favor some preferences over others – generally, the defenders of the status quo over the promoters of change. But the two principles justifying simple majority rule come into conflict with each other when they are applied in real-world constellations where the specific preferences of “persistent minorities” would never have a chance to influence the outcomes (Christiano 1994, 2010; Ganghof 2005: 758–759). Under these conditions – Christiano refers to the situation of Catholics in Northern Ireland as an illustration – egalitarian democratic theory must allow for the possibility of super-majoritarian correctives.



## The Community Method protects democratic legitimacy

In fact, this has been the practice of constitutional democracies (such as Switzerland, Belgium, or Canada) with deeply divided societies, structural majorities, and hence potentially persistent minorities. In order to avoid disruptive conflicts or, ultimately, disintegration, they have developed institutions and practices of “consociational” or “consensus democracy” (Lehmbruch 1967; Lijphardt 1968, 2012) with bicameral legislatures, super-majoritarian decision rules, and consensus-seeking procedures that are supposed to protect the highly salient interests and preferences of recognized minority groups. Surely no less would be required by democratic legitimacy in the EU.

Compared to consociational democracies, the economic, institutional, cultural, and political heterogeneity of European states is extreme. In terms of the varieties of capitalism, differences are now greater than they were in EU12 or EU15 in the 1980s and 1990s, when the present typologies were developed (Hall 2014; Höpner/Lutter 2014; Streeck/Elsässer 2014). In effect, not only the German model of capitalism is, in Wolfgang Streeck’s (1997) words, “parochial” and cannot be generalized – the same qualification applies in principle to all nonliberal models of capitalism and the welfare state.

From the perspective of egalitarian democratic theory, therefore, they all would qualify as persistent minorities in a Europe-wide egalitarian democracy – at least with regard to majority decisions that would interfere with the politically salient values, institutions, and interests of their parochial political economies. In fact, EU decision rules for political legislation have respected this counter-majoritarian democratic restraint. The consensus requirements of the EU’s Community Method are so high that it appears most unlikely that EU legislation would ever override the politically salient interests of even a small group of member states.

Present decision rules could, of course, be modified in some ways, perhaps to relax the Commission’s monopoly of legislative initiatives. But they could not be replaced by a regime of straightforward majority rule without provoking disruptive political conflicts and radical anti-European opposition in member states whose national politico-economic and socio-economic orders and values could be overridden by explicitly political decisions adopted by majorities of “foreigners” in the European Parliament and in the Council. In other words, the explicit switch to majority rule would destroy the protection of persistent minorities that is presently ensured by the Community Method. Furthermore, it could politicize European legislation in ways that might transform the largely dormant “no-demos issue” of EU legitimacy into conflicts that could destroy the union (Bartolini 2005).

## The price is high

The European Union, however, is paying a very high price for respecting the normative limits of majoritarian democratic legitimacy. The immediate effect is the procedural self-paralysis of legislative political action on the European level. Institutionalized veto positions are, of course, not only used in defense of the legitimate diversity of national institutions and values; they may be employed to advance any kind of interest – not least the interest of less-involved governments in maximizing the price at which they could sell their vote. In the past, “bloody minded bargaining” was to some extent impeded by the pro-European *esprit de corps* of long-serving national officials in the Committee of Permanent Representatives and the Council Secretariat. But what worked in EU12 or EU15 (Hayes-Renshaw/Wallace 2007; Lewis 2000) has in the meantime become less effective. At any rate, when consensus appears unattainable, the Commission will not even try to launch a legislative initiative. In cases where it does do so, total blockade will be less likely than extended bargaining over relative advantages and, ultimately, agreement on the lowest common denominator. In other words, on issues involving salient conflicts of interest, European legislation has never been, and is not now, an instrument of effective political action (Falkner 2011).

That is why the “bypass” of integration through law has been effective in promoting economic liberalism even in periods where a majority of member states were governed by left-of-center political parties. It is also why, when confronted with a fundamental crisis that could not be resolved through judicial action, European efforts to rescue the Monetary Union completely bypassed the Community Method in favor of asymmetric bargaining between creditor and debtor states. When those emergency measures, adopted in disregard of the Maastricht rules, were followed by institutional reforms, the new euro regime even abandoned the pretense of relying on political consensus in the Council. What has been established instead is the supranational authority of the Commission to adopt and impose discretionary policy choices on EMU member states without either parliamentary or intergovernmental political control.

In substantive terms, moreover, it hardly needs saying that the liberalizing effect of integration through law on social-market political economies is being dramatically reinforced by the euro regime, which is compelled to ensure the continuing confidence of “the markets” in the solvency of eurozone states by imposing continuous downward pressures on wages and government spending in all eurozone political economies. In short, from the perspective of pro-European and pro-social market democrats, the present combination of policy-making regimes in Europe must appear as an unmitigated failure in terms of both problem-solving effectiveness and political legitimacy.

## The EU at an impasse – waiting for the crash?

Present demands for the democratization of the EU, assuming they were politically feasible, might improve problem-solving effectiveness if they implied straightforward majority rule. But then they would be normatively unacceptable for violating fundamental requirements of democratic equality, and they might well raise political conflict to a level where the EU might disintegrate. In any case, however, all radical institutional reforms that might strengthen problem-solving effectiveness and democratic legitimacy at the same time would appear to lack political feasibility. They would have to be designed and adopted in the same veto system that is presently constraining democratic political action as well as the range of feasible policy options. Under these conditions, institutional and policy reforms would continue to depend on the agreement of all present veto players. Hence, feasible changes will at best be incremental and path-dependent and thus most likely to produce “more Europe” of the same variety – more liberalization, internal devaluation, centralization, and more technocratic-authoritarian rule.

In short, the EU seems to be at an impasse in which, according to the best of our present knowledge as political economists, political scientists, and policy researchers, politically feasible policies appear to be ineffective and illegitimate, whereas radical policy changes seem to lack political feasibility. In other words, our conclusions seem to resemble the advice the tourist received when asking an Irish farmer for the way to Tipperary: “If I were you, I wouldn’t start from here.”

We also know, however, that political-feasibility constraints depend on conditions which may change. Institutional positions may lose their veto, occupants of veto positions may be displaced, the exercise of veto power may be delegitimated, and veto players may even change their policy preferences in light of changed circumstances or changed ideas. Thus, the most likely scenario to allow major institutional and policy changes would be a crisis that is so deep and destructive that present policies could not be maintained and present veto players would be either swept away or would no longer prefer the status quo. For a moment, the international financial crisis following the collapse of the Lehman Brothers bank in the fall of 2008 seemed to provide such an opportunity because the neoliberal belief in the efficiency and stability of unregulated financial markets was badly shaken. But once stop-gap measures at taxpayers’ expense had prevented the total collapse, initiatives for regulatory reforms were slow in coming, and international agreement was soon impeded by governments defending the interests of their respective financial industries.

Perhaps that crisis was not deep enough to jolt international and European political economies out of their path-dependent tracks. What also mattered was that no existing political forces, internationally or in Europe, were prepared to exploit the crisis as an opportunity for fundamental change. Instead, we had and have brilliant analyses of what has gone wrong in Europe and the world since the end of *trentes glorieuses*. But we

did and do not have normatively and pragmatically convincing ideas of what could and should be done if the window of political opportunity for a basic overhaul of the system should open. This is regrettable, because the opportunity might arise again.

There is little assurance that the international financial system should now be more stable than it was before 2008. By all realistic accounts, the euro crisis is not yet over, and it seems that present policies may actually increase the risk of its recurrence. Should it recur, Angela Merkel's prediction of 19 May 2010 may yet be confirmed: "*Scheitert der Euro, dann scheitert Europa.*"<sup>9</sup> Should the euro indeed fail and throw Europe into an existential crisis, we must hope that the response will not again be about saving the euro. It should be about saving Europe.

Even if that extreme emergency should arise, the world would not come to an end. However, political veto positions might be shaken, and previously unthinkable options might suddenly be worth considering. I have little doubt that climatologists, when faced with the opportunity, would have programs to promote. Since almost everybody (with the possible exception of Jacques Delors and Helmut Kohl) now seems to consider the Monetary Union a mistake, one should also hope that political economists studying its deficiencies (e.g., De Grauwe/Ji 2014) would propose not just limited improvements but fundamental (and viable) alternatives to the present regime – perhaps even including the option of replacing bank money with "sovereign money" (Jackson/Dyson 2013; Huber 2014). These are perspectives which I will not pursue here.

But even the best substantive policy proposals might fail or would deepen the EU legitimacy deficit, unless they could go hand in hand with the activation of democratically legitimated capacities for political action at the European and national levels. For Europeanist policy researchers, including myself, that implies a shift in normative perspective from the critique of output legitimacy to an emphasis on input legitimacy.<sup>10</sup> This shift does not imply a belief in the prestabilized harmony between ("deliberative") democratic inputs and the common good. It responds, instead, to the suffering imposed on European non-elites through European policies defined by democratically unconstrained pro-European elites. If this is felt to have populist overtones, so be it. Democracy is meant to empower non-elites in relation to governing elites.<sup>11</sup> Since de-

9 Regierungserklärung, 19 May 2010; [https://www.bundestag.de/dokumente/textarchiv/2010/29826227\\_kw20\\_de\\_stabilisierungsmechanismus/201760](https://www.bundestag.de/dokumente/textarchiv/2010/29826227_kw20_de_stabilisierungsmechanismus/201760)

10 The point needs more reflection than I can provide here (Scharpf 2012). Before the crisis, EU legitimacy had depended on low political salience. It was ensured as much by the outputs the EU avoided (policies challenging salient citizen interests and preferences) as by the generally welcome outputs ascribed to it (e.g., Europe-wide mobility and exchanges). Under these conditions, the lack of input legitimacy was more of an academic concern than a political issue. But the crisis has changed that, and the institutional and policy reforms which will be required could not possibly succeed in the absence of input legitimacy and effective democratic accountability.

11 This is not meant to deny the basic tension between "responsive" and "responsible" government (Mair 2013). But for the tension to be resolved in the "well-understood" interest of the governed, governing elites must be made to depend on the political support of non-elites.

politicized integration through law and the depoliticized euro regime have led Europe into its present impasse, a fundamental change of direction will presuppose the politicization of policy choices under conditions of political accountability on both levels of government.

#### 4 Community and autonomy

Politicization without the possibility of autonomous policy choices is more likely to produce frustration, alienation, apathy, or rebellion, rather than democratic legitimacy. In multilevel polities, however, political autonomy is necessarily constrained on both levels. These constraints are minimized in the institutional architecture of “separation federalism” in the United States, where the federal government and the states have separate areas of legislative competence, separate tax resources, and separate administrative agencies. The European Union, however, shares some of the crucial aspects of German “joint-decision federalism,” where the federal government depends on the *Länder* for the implementation of its laws, whereas *Länder* governments participate in federal legislation (Scharpf 1988; Stepan 1999; Nicolaidis/Howse 2001). In such structures, the ideal of democratic autonomy on both levels of government is difficult to realize. If it is to be approximated in Europe, it depends on the spirit and the practices of mutual accommodation, where member states must defer to democratic majorities on the European level, while at the same time European majorities must respect the legitimate diversity of democratic member states.

##### A European *demoi-cracy*?

On the empirical level, the need to accommodate diversity is reflected in long-standing discussions and the unsystematic and quite limited practices of “differentiated integration” and “enhanced cooperation” (Holzinger/Schimmelfennig 2012; Leuffen et al. 2013). On the normative level, a growing number of contributions to the theory of a European *demoi-cracy* have come to challenge the unitary bias of standard democratic theory as well as “messianic” political beliefs (Weiler 2012a, 2012b) that treat European integration as a value that is lexicographically superior to all other concerns.<sup>12</sup> The original intent of these contributions was to defend the legitimacy of the EU against challenges asserting the lack of a common European *demos* and a “democratic deficit” because European institutions did not resemble majoritarian democracies at the national level. Treating legislation by the Community Method as paradigmatic, the theory of

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12 This literature requires and deserves a more thorough discussion. See, e.g., Nicolaidis (2003, 2012), Chevenal/Schimmelfennig (2013), Bellamy (2013), Lindseth (2014).

*demoi-cracy* denies the assumption that political legitimacy presupposes the existence of a unitary European *demos*. Instead, EU governance is assumed to be legitimated by the multiple *demoi* of its constituent polities, whose citizens are represented individually and as “states-peoples” at the level of the union. Being part of a common polity, however, these *demoi* must be aware of their increasing interdependence. Hence, they must accept not only the need for mutual accommodation among each other, but also the need for common policies to avoid negative externalities and to facilitate cooperation for common purposes. What is crucial, however, is that common policies must not undermine their own bases of legitimacy; they must respect the integrity of the multiple *demoi*. In spite of various imperfections, therefore, European legislation by the Community Method is seen as approximating the normative ideal.<sup>13</sup>

*Demoi-cracy* is attractive as a normative concept. What is problematic, however, is the implicitly affirmative interpretation of the present state of the union. By focusing on European legislation, authors tend to downplay the constraints imposed on the plural *demoi* through negative integration and the supranational euro regimes as well as the constraints imposed on effective political action at the European level through the multiple-veto system of the Community Method. In order to approximate its normative aspirations, therefore, the theory of *demoi-cracy* would require a substantial reversion of governing powers to the level of EU member states and at the same time a substantial strengthening of the capacity for European political action on problems which cannot be resolved through the horizontal self-coordination among states-peoples. What is lacking, in other words, are discussions about the ways and means through which the normative aspirations of the theory could be realized in practice.

### Ground rules for a multilevel European democracy

As a contribution to such discussions, I will suggest a set of basic decision rules for a European constitution that responds to *demoi-cratic* aspirations for member-state autonomy while at the same time facilitating political action and opportunities for politicization and democratic accountability at the European level. As will be obvious, however, such rules could not possibly be realized through path-dependent incremental reforms within the present institutional framework. Hence, they are here presented as suggestions from the perspective of the morning after the crash.

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13 In this regard, *demoi-cracy* differs from the position of Jürgen Habermas (2011: 62–69). He also asserts a dual identity of individuals as citizens of their respective states and of the union, but in his view this dualism justifies majoritarian democracy at the European level in order to break the stranglehold of intergovernmental veto players under the present rules of the Community Method. See also, Gaus (2014).

1. *Deconstitutionalization of European law*

In comparison to the present Treaty, the coverage of a European constitution should be greatly reduced. In addition to rules for the organization and procedures of European governing institutions and the allocation of legislative competences between the union and its member states, the constitution should ensure the protection of individual civic and civil rights, but it should not include rules amounting to an economic constitution. All other rules of the present Treaty and the *acquis* should remain in force but would lack constitutional status.

2. *Multiple legislative initiatives*

Not only the Commission but also qualified minorities in Parliament and Council should be able to introduce legislative initiatives.

3. *Majority rule*

Ordinary European legislation should be adopted by majority votes in Parliament and Council.

4. *Member-state opt-outs*

Individual member states should have the right to opt out from ordinary legislation.

5. *Opt-outs denied by qualified majorities*

Legislation that proposes to exclude opt-outs must be adopted by absolute majority in Parliament and by qualified majority in Council.

6. *Conditional opt-outs from the acquis*

One or more member states should be able to initiate legislation even if it contravenes parts of the *acquis*. Such initiatives must be notified to the Commission. They may be denied by joint majorities in Parliament and Council.

The rationale of the rules suggested is to enlarge the action spaces of national and European political processes and, at the same time, to reduce the constraints imposed by nonpolitical domination.

Rule (1) is an attempt to reduce the domain of constitutional law in the EU. As has often been noted, the Treaties are much more extensive than national constitutions, regulating in great detail questions which in constitutional democracies would be settled by political legislation (e.g., Grimm 2004, 2014). Under the ECJ's doctrines of "supremacy" and "direct effect," these rules and their judicial interpretation take precedence over the laws and constitutions of EU member states. By itself, this is not remarkable: federal law will override state law in federal states as well. Even if a reformed Treaty would approximate the ideal of a "lean constitution," member states and private actors would, of course, continue to be bound by the present *acquis*.

What would matter, however, is the removal of constitutional constraints on European legislation – which under the ECJ’s extensive interpretation of Treaty law is often reduced to enacting mere codifications of the case law (Martinsen 2014). Instead of being bound by petrified European law, political legislation could then remove existing legal constraints on member-state political action, and it could adopt European policies that might conflict with the “economic constitutionalism” of the present Treaties as interpreted by the Court and the Commission.

Rule (2) would eliminate the Commission’s monopoly of legislative initiatives.

Rules (3) and (4) represent the constitutional core of the proposal. The capacity for political action at the European level will increase as the stranglehold of the multiple-veto system is loosened. At the same time, rule (1) will have opened the deconstitutionalized *acquis* for political reconsideration, and rule (2) will widen the opportunity for legislative initiatives. As a consequence, one should expect a much broader range of politically more salient issues to be introduced and debated on the European agenda.<sup>14</sup> Because European politics will lose its boring character (Moravcsik 2002), media attention will probably increase and political parties and parliaments in the member states are more likely to debate the significance of European options from national and perhaps also from European perspectives. Such debates will become more salient due to the perception that politically controversial legislation is also more likely to be actually adopted at the European level, rather than bogged down in endless bargaining.

At the same time, of course, straightforward majority rule would raise the political salience of the “no-demos” and persistent-minorities issues. As a consequence, political conflict and protests might delegitimize political action at the European level. For this reason, the proposal would replace the protection of legitimate diversity, which is presently provided by the Community Method, with the possibility of national opt-outs.<sup>15</sup> It would present the national *demoi* with Albert Hirschman’s (1970) three moral options: they could mobilize political resources to influence the outcome by exercising *voice* – which also would increase their involvement in, and perhaps commitment to, political processes at the European level (and thus contribute to the eventual emergence

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14 Since a “lean constitution” would reduce the ever widening domain of the Court’s teleological interpretation of the Treaties, I am not sure how much more would be gained by additionally insisting on a range of substantively defined “reserved powers” of member states (Grimm 2014: 1057). In principle, the political dynamics of majority rule plus opt-outs could favor decentralization as well as further centralization. What would matter more, in my view, would be the possibilities of challenging the existing *acquis* (Rule 6).

15 The possibility of opt-out would eliminate the persistent-minorities problem. Whether it will also remove the “no-demos” issue (which I have not discussed here) is less certain. But if the opt-out enables decisions by a “coalition of willing *demoi*,” the “no-demos” issue may lose much of its normative salience. What would matter instead are the procedures by which national *demoi* decide about the use of opt-out options.



of a European *demos*).<sup>16</sup> If unsuccessful, they could manifest their *loyalty* by accepting the outcome of majority rule in Europe as in national politics. If the outcome should indeed violate highly salient national concerns, the possibility of an opt-out would provide them with an *exit* option that should defuse potentially explosive opposition.

Rule (5) needs some elaboration. It is meant to respond to constellations where uniform application throughout the union is considered essential. In the normative context of *demoi-cracy*, of course, the uniformity of European law as such will cease to be treated as a value by itself. It may often be desirable for reducing transaction and mobility or supervisory costs, but in cases of disagreement, proponents of change will consider these in relation to the purposes they hope to advance. These may differ significantly in their vulnerability to opt-outs, and such differences may be clarified by reference to some analytical distinctions.

On the one hand, European action may realize gains from cooperation in situations where the costs and benefits will mainly affect the participating member states – in which case there is no reason to insist on uniformity. If the benefits are generally attractive, initially hesitant collaborators may join later – as was true of the Schengen Treaty (Adler-Nissen 2011). If collaboration is not generally considered desirable, opt-outs would allow the union to accommodate legitimate diversity.

On the other hand, opt-outs become more problematic if outsiders cannot be excluded from sharing benefits whereas the costs of collaboration must be borne by participants. In that case, free-riders may reduce, but probably will not destroy, the benefits of cooperation. In still other constellations, however, noncollaborators might enjoy competitive advantages or otherwise reduce the benefits that collaborators hope to achieve. Where that is the case, the anticipation of opt-outs may well prevent potential beneficiaries from agreeing on a common rule – think of the harmonization of capital taxes.<sup>17</sup> In other words, while the possibility of opt-out should be the general rule, it should not apply everywhere.

The question of where it should or should not apply is a matter of political judgment. Rule (5) would thus allow promoters to propose legislation that will apply without exception. In that case, democratic legitimacy would also require a return to decisions by qualified majorities in Parliament and Council.<sup>18</sup> It would then be for the promoters

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16 As Hirschman noted in a later contribution, creating the possibility of exit may in fact increase the motivation to use voice (Hirschman 1986: 89).

17 That condition seems to be assumed by Martinsen/Uygur Wessel (2014) when they warn of a “spiraling of opt-outs” that might cause a far-reaching decline of integration. But these conditions do not apply everywhere, and the possible decline of integration must be seen in comparison to the gains of European action achievable through majority rule.

18 In German federalism, the basic idea of “conditional opt-outs” had been first suggested in 1977. While still controversial in the debates leading to the reforms of 2005, it was cautiously accepted for a narrow range of issues (Scharpf 2009: 130–136): Art. 84 (1) of the Basic Law allows *Län-*

to assess the trade-off between a more easily adopted rule that is potentially vulnerable to opt-outs, and the delay, compromises, and potential blockades that a generally applicable rule might face.

Rule (6), finally, addresses the fact that the “petrified” *acquis* does include more uniform European rules than would henceforth be adopted under majoritarian procedures. Rule (1) would allow existing nonconstitutional law to be corrected by legislative majorities. But given the diversity of national political economies, potential conflicts may not be sufficiently general to mobilize majorities on the European level. In that case, initiatives with high political salience in one or a few member states would still be ruled out by the existing *acquis*.<sup>19</sup>

Under these conditions, there ought to be some kind of political recourse, but unilateral opt-outs – which might violate common values or impose negative externalities on other member states – would not be the appropriate solution. Instead, it is suggested that member states should notify the Commission of legislative initiatives that would conflict with existing European law.<sup>20</sup> After being reviewed in light of the specific case, such initiatives could be denied by parallel majorities in 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,<sup>21</sup> 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.

In combination, these ground rules would have two beneficial effects. On the one hand, they would protect the autonomy of EU member states against legal constraints that are not effectively serving common European purposes in the considered political judgment of present European legislative majorities, and they would allow effective defenses for the critical interests of “persistent minorities.” On the other hand, however, they would liberate political initiatives at the European level from some of the legal con-

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*der* opt-outs from procedural regulations in federal statutes. But opt-outs may be excluded in statutes requiring an absolute majority of *Bundesrat* votes. Art. 72 (3) also introduced the possibility of exceptions for a few items of substantive federal legislation. In a recent evaluation of post-reform practices, these “world-wide unique” rules were assessed to be unequivocally successful in practice and to provide a model for the further evolution of federal–*Länder* relations (Schneider 2013: 743–749).

19 The *acquis* itself may well have been produced through “integration through law” and judicial legislation that never had political support at the European level.

20 If several states are trying to be exempted from the same European rule, this procedure might serve as a partial equivalent to the largely ineffective option of “enhanced cooperation.”

21 For cognitive reasons, *general* legislation will always over-generalize because it can never consider all potential case constellations. In federal systems, however, where it is combined with the supremacy of federal over state law, general legislation is bound to produce over-centralization if both levels of government may legislate in the same policy area (which is true in Germany and in the EU, but not generally in the United States).

straints imposed by the economic-liberties case law of the ECJ and from the political constraints imposed by the multiple-veto system of the Community Method. One might expect, therefore, that the combination of majority rule and the opt-out options would widen the potential agenda of legislative choices at both levels of government, and that it would also politicize policy choices in the European arena and in national politics. As a consequence, the level of conflict over European legislation may well rise. But it should matter that such conflicts would now have a chance to be resolved through political action. If that option is available, politically productive conflicts may actually contribute to further political integration – or so one might hope.<sup>22</sup>

These suggestions are not presented with the claim to represent a normatively validated, theoretically coherent, and empirically supported blueprint of the procedures of a viable European constitution. They are meant to suggest that it may indeed be worth our time to shift some attention from the study of what is going wrong in European affairs to controlled speculation about what might be put right if the window of political feasibility should ever open.

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22 Exploring the possibility, the preconditions and the limits of political integration through political conflict must be left for another time: See, e.g., Dahrendorf (1959), Dubiel (1992), Göhler (1992), Greven (1998, 1999), Mouffe (2000).

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