

On Democracy and “Public Interest” in the European Union

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For three decades now, Fritz Scharpf has ranked among our leading analysts of national policy-making under conditions of globalization. His writings, which have contributed much to our understanding of how interdependence creates new constraints and possibilities for national economic policy, are distinguished by three qualities.

The first is a keen sense of institutional dynamics. While most analyses of globalization focus primarily, sometimes exclusively, on the constraints markets impose on domestic redistribution and regulation, Scharpf balances the analysis of markets with a subtle understanding of the constraints and possibilities afforded by political institutions. Thus his classic critiques of German federalism and macroeconomic policy, while acknowledging the autonomous power of market forces, lay primary emphasis on the institutional incentives and constraints that restrict “problem-solving capacity” – the ability to realize optimal policy choices. For Scharpf, the particular constraints imposed by German federalism and the Bundesbank statute – as well as the ideologies and expectations that form around them – ultimately have a decisive impact on policy.¹

The second distinctive quality, related to the first, lies in Scharpf’s consistent normative commitment to a particular conception of legitimate political order. There is no mistaking his intent to offer a defense of social democracy viewed very much from the perspective of a late twentieth century advanced industrial democracy in Continental Europe – indeed, very much

1 E.g. Fritz Scharpf (1991); this focus on institutions may very well reflect the fact that Scharpf, almost alone among leading European political economists, received graduate training not primarily as an economist or public policy analyst, but as a lawyer – and, importantly, at Yale University in the United States at the apogee of American “legal realism.”

from Germany (e.g. Scharpf 1992). In the tradition of Joseph Schumpeter and Karl Polanyi, Scharpf stresses the fundamental tension between democracy and capitalism: Capitalism generates inequality, yet democracy presumes a fundamental basis of equality. Most democratically elected governments seek, therefore, to offset what Schumpeter termed the “creative destruction” of capitalism through “market correcting policies,” including social welfare provision, labor rights, and regulatory protection (Schumpeter 1942). The broader and deeper the reach of markets, the greater the need for offsetting social policies. Seen from this point of view, globalization, by extending the scope of markets further than ever in recent history, requires an appropriate institutional response (Polanyi 1994). Much of Scharpf’s work is motivated by his concern about specific threats facing the particular institutions developed in postwar Europe.

The third distinctive quality lies in Scharpf’s deep commitment to empirical analysis. Many commentators advance assertions about the impact of globalization, the (greater or lesser) potential for mobilization against it, and the desirability of various outcomes, as if each reflected philosophical truth. Scharpf remains a skeptic in the best sense of the word. Theories, he maintains in his work on social scientific method, can clarify and elaborate distinctive causal mechanisms in social life, but are rarely so crisply formulated as to provide decisive solutions to complex problems. We should remain modest, restricting ourselves to mid-level, contextually specific generalizations. Our models must be “games real actors can play” – those that are relatively simple and avoid placing unreasonable demands on the expertise and information-processing capacity of individuals and social groups (Scharpf 1997). If it is not to become circular, the tailoring of models to circumstances in turn requires rigorous and detailed empirical analysis – a quality that adds both nuance and robustness to Scharpf’s analyses.

Scharpf’s characteristic triad of theoretical subtlety, normative edge, and empirical depth is very much in evidence in his most recent work on the “democratic deficit” in the European Union (EU). The EU is an intriguing target for analysis in the tradition of Polanyi and Schumpeter. If democratic capitalism indeed rests on an explicit compromise between markets and social protection, then European integration seems the exception: The EU seeks to promote wider and deeper markets without establishing a correspondingly full range of compensating and counterbalancing social and regulatory policies. More precisely, European politics today rests on a unique division of constitutional competences between national and European authorities. National governments continue to monopolize most fiscal activities, and their

democratic pedigree rests on traditional forms of direct democratic control via elections, parliaments, and political parties. They continue to provide classic “positive” functions of civil authority: social protection, culture, infrastructure, education, and defense. EU institutions, by contrast, focus primarily on “negative” functions of government: the liberalization of product and factor markets and the creation of a level regulatory playing-field through the elimination of undesirable cross-border regulatory externalities. Their fiscal resources are few, and their democratic pedigree rests, at best, on indirect representation via officials appointed and ministers named by elected national officials, backed by direct but lackadaisical elections to a central parliament with a distinctly circumscribed role.

Perhaps the most fundamental issue of contemporary EU politics is whether this federal division of competences is pragmatically and normatively justifiable. One great virtue of Scharpf’s analysis – which finds its most detailed formulation in the already classic 1999 book *Governing in Europe: Effective and Democratic?* – is that it sets aside from the start two popular but nonetheless unpersuasive approaches to the analysis of democratic legitimacy in a uniting Europe (Scharpf 1999). One is that the EU is, or is becoming, a technocratic superstate, and that European citizens should thus fear above all else encroaching bureaucratic “despotism” (Siedentop 2000). This, Scharpf rightly notes, is a curious, even confused, claim to advance about such a weak political system as that of the EU. A system with so little autonomous power to tax, spend, coerce, or wield administrative discretion, and with procedures so fully hedged about with requirements for ongoing supermajoritarian and unanimous consent from national governments, is hardly a despotism in the making.² A second unpersuasive claim Scharpf sets aside is that the EU is democratically illegitimate because it is not an ideal parliamentary and electoral democracy, but instead involves the delegation of authority to unelected bodies. Such arguments, Scharpf notes, overlook the extensive level of normatively justified delegation found in all advanced industrial democracies, including member states of the EU – notably in areas such as constitutional adjudication, central banking, criminal prosecution, and technical administration (Scharpf 1999: 11–12).

Scharpf’s main conclusion about the legitimacy of European integration is different. It can be, and often is, stated with deceptive simplicity. Rather than resting on procedural propriety, the EU’s democratic legitimacy rests

2 Scharpf (1999: Ch. 1); for a direct critique of Siedentop, see Moravcsik (2001).

on policy outputs – or, in his language, “output legitimacy.” By this criterion, the EU would be democratically legitimate if it structured an appropriate balance of market liberalization at the European level and social protection at the national level. Yet, Scharpf maintains, such a balance is unstable because of the tendency of decentralized market competition to generate a “race to the bottom” in regulatory protection, fueled by trade, foreign investment, speculative capital flows, and immigration (Scharpf 1999: 34). The EU cannot respond to this tendency effectively because of a neoliberal bias in its constitutional structure, which favors market liberalization (“negative integration”) over social protection (“positive integration”). Both aggressive EU social policies to replace what is lost at the national level or, perhaps preferable, explicit legal norms that protect and promote domestic social welfare systems, are thereby ruled out. The resulting policy mix is suboptimal and, therefore, democratically illegitimate. The multi-level European polity lacks the “problem-solving capacity” necessary to permit actors to bargain to optimal outcomes and is likely to move into a vicious circle of welfare adaptations that will sap consensual support for existing Continental systems. In sum, European citizens find themselves in an institutional “trap” of their own construction. The existing European compromise, Scharpf concludes, should be buttressed in two ways: by granting domestic social welfare policies constitutional status in EU jurisprudence, and by permitting “differentiated integration” or “flexibility” whereby countries with high regulatory standards are permitted to legislate within the EU as a sub-group.³

This critique – presented here in a simple, even simplistic form – constitutes one of the most carefully crafted and compelling criticisms of the EU’s democratic legitimacy to date. The sophistication and stringency of its qualifications, empirical and theoretical, add to its power. It should therefore be – and is sure to become – the unavoidable point of departure for any further scholarly inquiry. Nonetheless, its empirical verification, the detailed structure of assumptions and claims on which it rests, and the derivation of its normative consequences, reveal hidden complexity and ambiguity.

In highlighting these critical tensions in Scharpf’s case against the “output legitimacy” of the EU, we proceed in three stages. First, we establish that his argument for the neoliberal bias depends on an implicit conception of the public interest – a conception which, although key to his account, is

3 Scharpf believes redistributive challenges must be “faced at the national level where European welfare states must find solutions that are compatible with, and robust against, much more intense international economic competition” (1999: 202).

not fully elaborated in *Governing in Europe*. Second, we seek to show that this omission leaves the case for output legitimacy open to a series of hypothetical objections. In particular, any such analysis must address three fundamental problems of democratic theory: the status of uninformed or inexperienced citizens in a complex world, the problem of underlying biases in democratic representation, and the issue of how to define the proper scope of majoritarian decision-making. Third, and fully in the spirit of the concerns raised in *Governing in Europe*, we offer two possible strategies for addressing these concerns and suggest some tools for rethinking output legitimacy and its relation both to the “public interest” and to participatory procedures. As scholars and social scientists explore these lines of analysis, the research agenda on democratic legitimacy in Europe implicitly sketched by Scharpf is likely to be a lively one for some time to come.

1 What Is the “Public Interest”?

Scharpf launches *Governing in Europe* by presenting two conceptions of legitimacy. The first is “input legitimacy.” For Scharpf, input legitimacy or “government by the people” requires that collective decisions “reflect the general will” as articulated in widely participatory procedures. Starting from a justification of majority rule, the central obstacle confronting any “input-based” argument is to explain why the minority should accept the decision of a majority, given that everyone’s interests must be given equal consideration. Empirically, Scharpf continues, input legitimacy therefore requires that there must be a high level of civic trust and solidarity, which, if generally recognized, will provide assurance to everyone that their interests are being taken into account. This will make it more likely that minorities will not only acquiesce (out of fear, for example) but also accept that the majority has the legitimate authority to enact their program in the form of generally binding law. Scharpf does not explore this notion in greater detail, but rather appears to follow Joseph Weiler and others in assuming that acceptance of majority opinion must rest on a deep normative sense of identity and that, in general, such trust is provided by a shared common conception of history, fate, memory, constitution, and nation.⁴ Where political argu-

4 Scharpf (1999: 7–10). It is worth noting here that this restrictive conception of “input” legitimacy, which links closely with thick identity, is hardly unproblematic. There are a

ments are based on such a shared identity, majority rule can be considered to represent the “will of the people” as a whole.

The second conception of legitimacy, “output legitimacy,” as Scharpf presents it, does not require a common *identity* but only common *interests*. Output legitimacy is “government *for* the people,” government oriented to the public interest rather than to the “general will”. Here the emphasis is on the satisfaction of wider classes of “problem-solving concerns” which can be shared by members of various, nested or overlapping groups. While output legitimacy also requires the existence of an identifiable (and therefore bounded) constituency, it does not require the same reliance on trust and “thick” identity as does input legitimacy. The general presumption is that the base of legitimacy upon which output arguments rely, lacking the strong solidarity typical of common identities, is more precarious and less far-reaching than its counterpart.⁵ The main normative question raised by output arguments is: Who benefits? If the distributional pattern promoted by policy is in the “public interest”, then its output is legitimate whatever the procedures used to achieve it. The value of “effectiveness” and “representation” is more consonant with output-based arguments, where “participation” is for input ones. For Scharpf, Rousseau is primarily an input theorist, Madison and Schumpeter primarily output theorists.

Given that Europe at the moment lacks the collective identity required for input legitimacy, Scharpf argues that the EU must be legitimized primarily in output terms. Output legitimacy requires in turn an appropriate balance of market liberalization (at the European level) and social protection (at the national level). To do so, it must be able to re-establish at the European level any national regulations it dismantles. And there’s the rub. The EU is, according to Scharpf, quite effective in producing “negative integration” (primarily market-making regulation) but only partially effective in encouraging “positive integration” (primarily although not exclusively market-correcting regulation). As a result of a series of “powerful institutional mechanisms” (primarily related to the Commission’s agenda-setting power

number of alternative motivations for accepting redistribution by majority rule. One is that citizens, despite deep and pervasive political disagreement, hold broadly liberal conceptions about procedure. Another might be a deep sense of what Robert Keohane has termed “diffuse reciprocity” – the need to structure complex exchanges and linkages across time and issues – that can motivate concessions on redistributive issues (Keohane 1986: 1–27).

5 This, too, is questionable. One might argue that bonds of interest involve greater “sunk costs” and long-term investments than bonds of cultural identity, at least at the international level. See, for example, Andrew Moravcsik (1999: 178–179).

and the ECJ's "stealth"), the EU's main supranational organs "undermine and change the negotiation positions of national governments." As a result, the Commission and Court have been able to push negative integration "as it were behind the back of politically legitimized actors" (Scharpf 1999: 70–71). At the same time, even if member states were to agree that competences over social policy should be transferred and protected at a European level, fundamental conflicts of interest among member states – produced by different modes of financing, running, and organizing the welfare state – make positive integration in employment, industrial relations, and social policy all but impossible. Distorted by the unintended institutional dynamics of supranational policy-making, the empty rhetoric of EU elites, and the recalcitrant interests of other member states, the EU has succeeded in thwarting the public interest in favor of a less popular neoliberal agenda. As a result, the EU suffers from an illegitimate neoliberal bias.

Scharpf's general empirical argument for the neoliberal bias must therefore stand or fall with his argument for what the public interest ultimately *is*. If he is right that the public interest is less well served by the ECJ's enforcement of anti-regulatory-competition law than by national politics on their own (independently or via the Council), then he has shown that, by "output standards" the EU is, as currently organized, illegitimate. If, on the other hand, the public interest is better served by liberalization, then, assuming for the moment that there is in fact a neoliberal *tendency* promoted by the EU, there is no neoliberal *bias*.

Some may object at this point that Scharpf's analysis does not in fact require a substantive conception of the public interest, as we have just implied it does.⁶ The aim of his reforms, one might argue, is simply to relax constraints by restoring lost "problem-solving capacities" to governments and their constituents. On this objection, national publics should be allowed to decide for themselves the particular balance of social protection and market liberalization that they prefer, which they are unable to do under conditions of globalization and integration. According to Scharpf,

... legitimacy is reduced when policy areas that were previously the object of authentic and effective political choices in democratically constituted polities are pre-empted either by newly arising necessities or by coming under the control of politically non-accountable authorities. (Scharpf 1999: 16)

6 We are indebted to Gary Marks for proposing this potential objection.

Yet it is, in fact, not open to him to presume that his reforms merely allow states greater latitude of choice *whatever it is that they want to choose*. After all, one of the main normative arguments for delegation to “non-majoritarian” institutions such as independent courts, central banks, and regulatory agencies – which Scharpf endorses in principle – is precisely that, although they take decisions out of the hands of parliaments, such institutional delegations are justified by their consequences. In these cases, it might be argued, loss of democratic control *enhances* the ability of political systems to produce outcomes in the public interest. Fewer constraints are not always better, especially on a conception of legitimacy that depends only on outputs.⁷ This is, after all, one of Scharpf’s own arguments for policing, via delegation to Commission and Court, those state decisions over social policy that are directly affected by regulatory competition (Scharpf 1999: 190 ff.). Greater freedom of choice must always be justified within a complex relationship to other important constitutional constraints – for example, human rights, boundaries, incentive structures and constitutive rules. Any output legitimacy argument must therefore justify the conception of the “public interest” on which it necessarily rests.

Scharpf’s reliance on an underlying conception of the “public interest” is explicitly articulated in his premise that Europeans have

at the very minimum ... come to expect that that democratic state should be able to prevent mass unemployment that would exclude large parts of the working-age population from active participation in the processes of social production; to prevent extreme poverty that would force persons to live below socially acceptable levels of income and access to life chances; and to assure a fair sharing of benefits and tax burdens. (Scharpf 1999: 121)

Despite its centrality, this general formulation is as close as Scharpf gets in *Governing in Europe* to a definitive statement of the underlying “public interest” that his proposals are designed to defend.

At this level of generality, this statement of the “public interest” would find few critics. Fairness, social inclusion, and high growth and employment are unquestionably desirable policy outcomes. The difficulty emerges when one tries to specify more concretely what tradeoffs and considerations are admissible in *applying* this standard to actual cases. Faced with real-world

7 There are many similar arguments in the normative literature, for example, Stephen Holmes (1995), Jon Elster (2000); and for an argument against, see Jeremy Waldron (1999: Ch. 3). For an application to the EU, see Andrew Moravcsik (2002a; 2002b).

distributional conflicts, limited information, and a constrained range of policy options, how do we know under what conditions policy outcomes are in the “public interest” and hence output legitimate? What counts, for example, as a “fair sharing of burdens,” “social exclusion,” or “acceptable levels of income and access”? When used to defend real-world policy reforms, with all their tradeoffs and limitations, is Scharpf’s conception of the public interest really as uncontroversial – i.e., “consensual” – as he assumes?

2 The Foundations of Output Legitimacy

Satisfactory answers to such fundamental constitutional inquiries, we submit, require greater attention to the deeper premises underlying the equation of output legitimacy and social protection. These premises are far from uncontroversial, and in this section we consider three hypothetical objections to Scharpf’s argument for the neoliberal bias. While highlighting a series of “real-world” empirical concerns, each objection rests on a fundamental constraint on simple majoritarianism derived from foundational democratic theory. The first constraint is imposed by the limited information and expertise of publics and elites, the second by underlying biases in societal and domestic preference aggregation, and the third by ambiguities in the geographical scope of majorities.

2.1 The Problem of Information and Expertise: Is the EU Actually Biased?

Is the European polity biased against the provision of social welfare, as Scharpf argues? There is no question, of course, that the constitutional order of the EU contains more explicit provisions and more permissive procedures for liberalization and deregulation than it does for common social welfare legislation or for the recognition of national social welfare systems. Moreover, many citizens and elites perceive the EU as being inimical to social welfare provision, and have made this aspect of integration a matter for public controversy. Yet if we look more closely – and, in particular, if we consider the “multi-level” system of European governance as a whole – it is unclear whether these formal characteristics add up to evidence of a net bias in European policy-making.

Whereas it might be tempting to assert, as many do, that the EU excels at “negative” integration but not “positive” integration, this is an empirically untenable position, as Scharpf himself notes. In fact the level of social protection provided by the EU varies greatly across issue areas. Alongside the effective implementation of the single market (including the constitutionalization of competition policy, trade, agriculture, and telecoms and the establishment of the “four freedoms”), the EU has provided consistently high social protection in matters of environmental, health, safety, competition, banking, gender and insurance policy. Yet, Scharpf rightly points out, this tendency toward European “re-regulation” has not always extended to social, tax, industrial relations, and employment policy. To show that there is an “output illegitimate” neoliberal *bias* in EU rule-making, rather than simply an “output legitimate” neoliberal *trend*, Scharpf must in fact demonstrate that the public interest is only *partially* realized in the mix of social policies re-regulated at the EU level.

In recent EU decision-making, Scharpf seeks to demonstrate such a bias by focusing on the narrower area of EU public service regulation. To a certain extent, he is right to do so. There are indeed a limited number of cases – notably in telecommunications and certain transport functions – in which the Commission or Court has employed EU directives or suits to undermine coherent national systems of public service provision, but even here Scharpf (with admirable empirical honesty and precision) suggests that they did so in response to strong technological imperatives, backed by widespread national government support, and generally with adequate regulatory protection. For the most part – and restricting ourselves only to the sensitive sectors of social regulation discussed in Scharpf’s work – the Commission and Court have explicitly backed away from breaking down many legitimate national regulations in the area of social and process regulations, including Swedish alcohol regulations, German indirect subsidies for renewable energy, and telecommunications subsidies. Scharpf devotes a chapter to distilling lessons from the relatively successful Dutch welfare reforms, which took place without benefit of the EU reforms Scharpf proposes (Scharpf 1999: 121–156).

And why have national governments been able to hold the line in critical cases? According to Scharpf it appears to be, above all, because of “the political commitment of national governments to social-policy purposes and by the political resistance of groups that would suffer from deregulation.”⁸

8 Scharpf (1999: 101); see also Fritz W. Scharpf (forthcoming). Scharpf’s balanced and honest empirical treatment is an admirable exception in the literature. Generally episodes

Thus what appears to be most striking about EU policy-making taken as a whole is not the potential for a “race to the bottom” but, to the contrary, the consistently high levels of regulation found where national governments or citizens unambiguously desire it, even where no clear legal requirement or market compulsion exists.⁹ In any case, there appears to be little evidence of a powerful bias toward undesired deregulation within the EU system.

Even if it could be shown that the EU exerts significant downward pressure on social protection, moreover, there is reason to believe that such pressure is redundant. The true binding constraints on national social policies – increasing constraints on the willingness of Europeans to be taxed, an accelerating demographic shift toward an older population, a shift to service-sector production, and rising costs of specialized service provision – may well be largely independent of market integration and European law. Overall levels of social spending have remained stagnant in the past fifteen years and most European societies are finding it impossible to maintain current levels of *per recipient* spending and regulatory protection. These trends will continue regardless of EU policy – even if the immediate constraint takes the form of declining external competitiveness or adverse financial flows.¹⁰

Scharpf, it should be noted in this regard, concedes that national systems are in need of significant restructuring and reform. Indeed, one reading of his own proposals is that they do not democratize EU decision-making *per se* (or even promise to sustain current patterns of spending) as much as they redirect the insulated institutions of the EU to the task of promoting more

of independent supranational activity – e.g. ephemeral financial discretion wielded by the Commission in structural policy funding, the Commission’s use of Article 90 to liberalize telecommunications, and the ECJ’s assertion of the supremacy of European law – receive scholarly attention out of proportion to their potential import or generalizability, thus biasing our overall understanding of European integration. The great majority of policies – from external trade policy to agricultural policy to standardization policy – continue to track a consensus of national preferences relatively closely.

- 9 The most plausible theoretical account of this appears to be a classically intergovernmental one, whereby supermajoritarian (sometimes unanimous) voting rules and myriad means of informal control consistently permit national majorities to protect their intense interests at the European level.
- 10 Three examples must suffice: Ferrera/Hemerijck/Rhodes (2000); Iversen/Wren (1998); Pierson (2001). It is true, however, that the costs of social welfare benefits are born increasingly by the recipients of those benefits, rather than by the wealthy – a point Scharpf rightly highlights. As a result, systems as a whole are redistributing less than they might otherwise. Some attribute this to interdependence, but there are many other explanations, cf. Dani Rodrik (1997).

sustainable national social welfare systems, just as EU institutions have been used in the past to protect and promote healthier and fairer national market regulation (e.g. Scharpf 2002: 659ff.; 1999: 153). Scharpf is relatively sanguine about the prospects, because he believes European welfare systems are generally stable if only perverse tax incentives in lower brackets are reformed to create greater incentives for job creation and if support for taxation remains high. National governments, he hints, would implement such reforms if only they are not prevented from doing so by EU regulations, by pressures for international competitiveness, or by the false belief that international competitiveness would be endangered.¹¹ Yet one need not be an uncompromising Hayekian to entertain the possibility that national political systems are more likely to enact the necessary reforms if external economic and legal pressure is sustained, as market liberals advocate, rather than if the EU shields overall levels of social spending from competitive pressures, as social democrats prefer.

If the counterarguments we have just sketched are valid – for the moment we remain agnostic, stating only that the case against the existence of bias is at least as strong as the case for it – they call into question the normative importance of public and elite concern about the EU’s democratic legitimacy. From the perspective of democratic theory, the point is fundamental: One common reason to question a straightforward equation between short-term democratic preferences and the “public interest” is that public attitudes may be based on questionable information or assumptions about cause and effect.¹² From a policy perspective, similarly, the need for more reliable (i.e. more informed, consistent and expert) opinion in complex matters is one common reason why various regulatory functions are insulated from direct political contestation and majoritarian decision-making (Krehbiel 1991). In sum, if the EU does not have the effects Scharpf attributes to it – or those

11 On the viability of existing systems, see Fritz W. Scharpf and Vivien A. Schmidt (2000). Scharpf and Schmidt argue that declining support for high taxation could endanger this social compromise, but Scharpf himself appears to attribute the lack of popular or national support for a stronger and more coherent European social policy to ideological distortions – spurious “killer arguments” about competitiveness and unfortunate “framing” of issues in terms of European integration – and diverse institutional legacies of national systems, though none of these are assessed in sufficient empirical detail to reach a definitive conclusion. Both the ability of some systems (e.g. the Dutch) and the inability of others (e.g. the German) to reform could be cited as evidence on each side.

12 This is Stephen Lukes’ “third face” of power (Lukes 1974).

effects are modest enough to be outweighed by the benefits – then the EU may not in fact exhibit an alarming neoliberal bias.

2.2 The Problem of Underlying Bias: Does the EU Offset Prior Domestic Misrepresentation?

Let us now assume, the preceding counterarguments notwithstanding, that Scharpf's basic diagnosis of EU policy is correct – namely that it imparts a strong net neoliberal bias beyond the constraints already imposed by demographic, fiscal and other structural trends. The question still arises whether most Europeans actually favor the trade-offs needed to sustain existing social regulation, or whether they in fact favor the more neoliberal policy mix currently provided by the EU – and, if the latter, whether their views are themselves philosophically justified. It might be argued – at times by Scharpf, among others – that European social welfare systems entrench powerful special interests at the expense of the longer-term interests of a more diffuse citizenry. If this is so, EU policy might best be analyzed in the context of a multi-level governance system. From that perspective, it is not a policy designed to be neutral, but a policy designed to counteract pre-existing biases in national policy.¹³ If we consider its function as providing a forum to offset the national underrepresentation of diffuse interests, a neoliberal EU may in fact be output *legitimate*.

It is hardly controversial to observe – as does Scharpf himself – that existing European systems of social protection tend to perpetuate a number of inequitable policies. The current structure of welfare systems increasingly reflects the special and immediate interests of distinct groups of recipients – a mix of the elderly, the employed, and the unhealthy that varies somewhat across countries – as against the larger and somewhat longer-term interests of the young, the unemployed, and the healthy. A forced rebalancing of the priorities of that spending, as well as perhaps a net reduction in taxation and a controlled decline in social welfare spending, may well serve the broad “public interest” (Schmitter 2000).

An additional impediment to reform of existing welfare systems lies in their bias toward recipients as against taxpayers. Existing systems create

13 This view has affinities not just with Scharpf's own work on multi-level governance, but with Joseph Weiler's attractive vision of the EU as a body designed primarily to curb the most egotistical features of modern nation-states; see Weiler (1999).

obligations and entitlements that tend to expand automatically, and have arguably developed beyond the willingness of individuals to support and finance them. This is true not just in an abstract sense (a larger but diffuse group of individuals are paying for an influential minority) but in a concrete sense (a reduction in the state sector reflects the current trend in popular preferences toward greater support for conservative policies). Giandomenico Majone argues, for example, that “advocates of a European welfare state must face the fact that in several countries even *national* redistribution in favor of poorer communities is increasingly challenged in the name of fiscal federalism and regional autonomy.” He continues, “these being the preferences of the national electorates, we can only conclude that the democratic deficit, in the literal sense, is democratically justified” (Majone 1998: 14). Insofar as such efforts at domestic reform have failed – and most have – the obstruction arguably owed as much to the protests and single-issue votes of powerful and concentrated groups of privileged recipients as to broad popular opposition.

Finally, established welfare systems favor current interests over longer-term commitments. Even if one were to concede that giving “the people what they want” *currently* requires greater protection for services threatened by EU liberalization, insulating future groups against future cuts – in accordance with Scharpf’s proposed “reflexive European law” – might be illegitimate. If in years past it was wrong to constitutionalize a bias toward liberalization, then might it not be wrong today to constitutionalize social democratic commitments made in the sixties and seventies – indeed, just at the moment when they are being questioned?

Scharpf, as we have seen, concedes the powerful role of special interests in national welfare states and the corresponding need to rebalance national systems. The primary purpose of EU social policy, in his view, should be to create the political space in which to enact the needed reforms by eliminating spurious law and rhetoric that encourages efforts to slash it. It might equally be argued that in this context the EU might contribute to the empowerment of diffuse interests in welfare reform – as has occurred for more progressive purposes in generating relatively high environmental, occupational safety, gender equality, consumer policy and biotechnology standards – by enforcing a floor of social welfare benefits.¹⁴ The practical policy question is, as we noted above, whether Scharpf’s permissive social wel-

14 Paul Pierson and Stefan Leibfried (1995). On this general function of the EU, see Moravcsik (1994).

fare regime would encourage the mobilization of this reformist coalition more effectively than the current combination of EU market and legal pressures are doing. Scharpf offers scant evidence one way or another.

From the perspective of normative democratic theory, this raises another fundamental concern undermining the unproblematic equation of short-term preferences and legitimate “public interest.” This concern arises when existing democratic procedures distort preference aggregation and generate unrepresentative outcomes – as do all systems of representation. In particular it is common for the open expression of attitudes to reflect special interests rather than broader but more diffuse majorities.¹⁵ If a majority of Europeans favor a reduction or restructuring of national welfare spending, as they appear to be doing now and may well do in the future, then Scharpf’s proposals for defending the *status quo* cannot be justified by invoking public views *per se*.

If this is so, then the current high level of social welfare protection in Europe is perhaps best defended not as the most representative policy, but as something akin to a fundamental human right – that is, as an entitlement essentially constitutive of human dignity or of some very deep normative consensus among Europeans (Klausen 1998). This is an eminently defensible, even admirable, position – one with which we have great sympathy. But its defense requires substantive moral argument, since the proper balance between minority rights and majority opinion cannot itself be readily ascertained by everyday majoritarian means. Only a deeper notion of either output or input legitimacy can reconcile the sort of increasingly intense domestic and transnational trade-offs and conflicts that would arise. This leads us to the final hypothetical criticism.

2.3 The Problem of Scope: Where Are the Proper Boundaries?

A third reason to question the straightforward equation of short-term preferences and the “public interest” arises when the scope of preference aggregation is unclear or contested. What if disagreements arise among majorities (and thus between minorities) at different levels of government? Scharpf’s proposed reforms privilege national interests – and within Europe, *particular* national interests – rather than transnational ones.

¹⁵ In a sense this simply deepens the analysis under the preceding point, since one force undermining European social welfare systems is, of course, special interest pressure.

As with most empirical notions of democratic legitimacy that rest on an underlying consensus, Scharpf’s initial specification of output legitimacy requires a “bounded constituency” in the minimal sense required to identify “common problem-solving concerns” and “common interests.” Scharpf’s claim is that a consensus among Europeans supports the principle of social welfare provision and that his practical plan for enforcing it – a multi-tiered system of harmonized spending on welfare backed ultimately by the threat that sub-groups of richer countries will create their own arrangements – follows directly from it. Yet there is much heterogeneity across European publics, which renders it unclear what the relevant scope of problem-solving is or ought to be in the case of European social policy. How is it that this particular solution is preferred to either transnational redistribution or default to purely national welfare provision?

The proper answer to this question depends – as E.E. Schattschneider observed of politics more generally – on the scope of the polity (Schattschneider 1960). It might seem that the most natural “constituency” would be composed of all European citizens taken *as* European citizens, rather than as members of national publics. In this view, European social policy must be justified by the existence of a clear *transnational* majority in Europe in favor of social democratic values. Yet this is problematic. We cannot consistently appeal to transnational majorities when justifying the enforcement of social democratic values against liberal states, while simultaneously arguing that social democracy should only be applied nationally. If all Europeans are citizens of a common polity committed to social democratic principles, then why does Scharpf not favor a European system of social protection that transfers resources from the richest to the poorest countries, rather than one designed primarily to preserve the current welfare benefits of those in more wealthy countries? Or, although perhaps second-best, why not an enhanced version of current arrangements – continued market integration backed by fiscal transfers to poorer countries, without corresponding increases in benefits for displaced workers in richer countries?

Scharpf’s position here is ambivalent. On the one hand he invokes cross-national differences in popular preferences for taxes and transfers as the primary reason – as he recognizes under the rubric of conflicting “constellations of interest” – to rule out a common social policy (Scharpf 1999). At the same time, he clearly believes it would be a mistake to take seriously only those interests that all Europeans actually share across member states – which would appear to rule out consensual adoption of the rules he proposes. The consensus of existing views, or even a plausible qualified major-

ity position, would at best lead to precisely the level and scope of re-regulation that Scharpf thinks is illegitimate. Hence he favors granting subgroups of the full EU membership the right to move forward in concert.¹⁶

It follows that if domestic welfare transfers are to claim weight in our considerations at least equal to, if not greater than, transnational transfers, then output legitimacy must be defined in terms of service to the interests and preferences cast up by the (input legitimate) processes of *national* states and *national* publics. On this view, the EU should help member states achieve their *own* public interest, defined in terms of the preferences and interests that actually exist *within* national publics. Scharpf seems to be arguing that the public interest that Europeans have in common is limited to nationally-bound allegiance to principles of *internal* redistribution negatively constrained only by a “Kantian” regard for the attempts of other states to achieve their own aims without undue interference (see Scharpf 1999: Conclusion). German society, for example, has only minimal obligations of “social cohesion” toward Portuguese workers in Portugal as compared with its obligations to German workers within Germany.

If this is so, however, then Scharpf’s output legitimacy argument is rather heavily reliant on a particular, and rather strongly held, view of input legitimacy – one that restricts the scope of our cosmopolitan sentiments in favor of national solidarity. And if this is indeed to be our working understanding of input legitimacy, we face a grave difficulty stemming from the fact that member countries of the EU differ not just in their level of development but in their political ideology. The critical question is why the “public interest” of more social democratic polities should prevail over the “public interest” of more liberal polities. What may appear a neoliberal bias within one member state may not within another. These boundaries are often deep, as Scharpf notes, following classic work by Esping-Andersen and others:

Of even greater importance than these operational differences, however, are differences in taken-for-granted normative assumptions regarding the demarcation line separating the functions the welfare state is expected to perform from those

16 The opposition of EU governments to strong European social regulation with the same intensity as liberalizing policies has been a constant of European integration over fifty years. It is hardly plausible to assert that it is an unintended or chance consequence of previous decisions for other purposes. We cannot defend this point in full detail here, but generally see Moravcsik (1998). Even if it were indisputable that the EU’s liberalizing agenda was unintended by member states, moreover, this would not be enough to establish Scharpf’s position. We would still need to know that *states*, in opposing this agenda, are promoting the public interest, not just to the interests of powerful particularistic interests.

that ought to be left to private provision, either within the family or by the market. (Scharpf 2002: 650–651)

From the current, say, British or Spanish perspective, for example, does the EU unjustifiably bias outcomes in a neoliberal direction?

We cannot argue in favor of Scharpf’s proposals that they simply permit the British to opt out, since the existence of flexible collaboration within subgroups would create the possibility for collaboration and possibly harm the interests of those British firms facing industries in foreign countries, like Germany and Sweden, which would be shielded by (now more legitimate) subsidies and special derogations that have the effect of non-tariff barriers. Similar arguments could be advanced from the point of view of the poorer accession countries of Eastern and Central Europe. If the social policy proposals do not command the unanimous consent of the member states, as the current liberal order did, one might ask why the views of a current EU majority should be permitted to trump the outcome of future domestic and transnational deliberation and decision-making in an increasingly controversial matter of public concern? Answers to these questions are, we hope to have shown by now, difficult to formulate within an output legitimacy analysis that equates observed national preferences with the public interest.

3 Two Paths Forward: Social Science and Political Philosophy

So far, we have placed significant weight on the specification of the public interest, arguing that it functions as a linchpin to the rest of an “output legitimacy” argument. We have pointed to three hypothetical objections to Scharpf’s *prima facie* case for the partial illegitimacy of the EU – without thereby concluding he is incorrect. We insist only that such a case requires a firmer understanding of how to cope with basic normative issues, such as the status of ignorant or inexperienced publics, the proper allowance for underlying biases in preference aggregation, the weight given social rights, and the resolution of tensions between alternative scopes of jurisdiction.

In responding to these difficulties, we might adopt one or both of two general strategies, which correspond respectively to two different but complementary directions in which scholars might extend Scharpf’s insights. The first is a broadly empirical strategy, in which one uses macro-level

public opinion analysis to determine “what the people really want.” The second strategy is a more explicitly normative one, in which one engages directly with the moral-political values and traditions of specific political communities to determine which interests, preferences, and principles should be considered relevant in constructing a standard of the public interest and at what level of aggregation they should be considered. In this section, we will demonstrate that although normative work is silent prologue to any more robustly empirical account of output legitimacy, there are still two distinguishable ways of pursuing output legitimacy, the first of which still retains a distinctly empirical edge.¹⁷ At stake is the future research agenda on the democratic legitimacy of the EU.

3.1 The Role of Empirical Analysis

It might be thought that output legitimacy theorists can avoid the thrust of the three hypothetical objections canvassed above by deepening the empirical analysis. If Scharpf has offered an essentially empirical analysis of EU citizens’ disaffection with regards to European integration, whereby individuals by and large gauge their support for European integration based on the perceived congruence between outcomes and the public interest *as they see it*, then *Governing in Europe* could be bolstered by an even deeper analysis of European public opinion and a recommendation to EU actors about how best to increase general support for the EU. On this view, all reference to the public interest would be *internal* to citizens’ beliefs, and hence not “imposed” by the observer or by contingent circumstances. There would be no need to give an account of the public interest beyond what people think it is. There is some textual support for such an interpretation of Scharpf’s intent – even though he never systematically refers to public opinion in *Governing in Europe*.¹⁸

In this view, the key to evaluating the output legitimacy of the EU is to find out “what the people really want” by conducting empirical analyses of public opinion. Use of the highly imperfect *Eurobarometer* data for this purpose, albeit with quite variable degrees of rigor, has become a common-

17 This distinction is borrowed from Ronald Dworkin (1986: 90). He employs the categories in a somewhat different context.

18 See Scharpf (1999: 22). Here Scharpf seems to equate “output-oriented legitimacy” with general support.

place of Brussels policy discourse. Ideally, however, better data and analysis might be used as an external and unbiased standard to measure the legitimacy of EU outcomes. There need be nothing necessarily “normative” about such an enterprise: just as we need not deploy normative apparatus to understand natural persons’ intentions, preferences, and interests, we need not deploy such an apparatus to understand a collective actor like a national public.

What procedure do we use to glean this understanding of the public interest from the array of opinions and beliefs in a population? The advocate of this approach might point out that while there is no *single* and determinate procedure for producing the public’s ideal point, we can determine with some degree of certainty the general policy mood in a nation, namely the public’s general preference for moving either farther to the right or to the left of the policy status quo. A policy mood, for example, can be constructed empirically out of a composite of public opinion indicators (Stimson 1999).¹⁹ By measuring the impact of domestic policy moods on the outcomes directly affected by EU policymaking and regulatory activity, we could determine how responsive EU policy was to underlying “national moods.” If the outcomes over time were systematically more responsive to shifts of the domestic policy mood to the right than the left, then we would know that there was indeed a neoliberal policy bias; if not, then we might conclude that Scharpf was incorrect.²⁰ Such techniques might well be able to capture underlying political values. “What the people want” would no longer be stated as a speculative list of general principles but inductively derived as a general preference for future policy movements along a single dimension. If indeed it could be shown that public attitudes contain only one relevant dimension – that is, that all further principles could themselves be placed on the scale and thus ranked and ordered in a coherent way – there would be little threat from other substantive conceptions of the public interest.²¹

19 There is no need to think of this “individual” as a “real” person with a metaphysical existence. The analogy would rather be to an entity like a corporation, to which we can assign intentions, goals, and of course, liabilities without metaphysical embarrassment. On this transformation, see Benjamin Page and Robert Shapiro (1992).

20 Building on statistical methods developed to measure “dynamic representation” in the context of American politics, we could then use this information to test Scharpf’s argument for the neoliberal bias; see Robert S. Erikson (2002).

21 Simon Hix, Gary Marks, Mark Pollack and others have argued that this may be a reasonable approximation in many areas of EU policy-making.

In this way, one could avoid the third hypothetical objection by treating a national public as a plausible unit of analysis based on the “no-demos thesis”: the commonly recognized fact that the vast majority of Europeans still think of themselves first as national citizens, and only second as European citizens. The first and second objections – concerns about policy consequences and misrepresentation – would also lose some of their bite. The first objection could be parried by pointing to the fact that the public opinion model requires very little knowledge of cause and effect. The only information citizens would be asked to evaluate would be whether they want the policy mix promoted by the EU and member states to move farther to the right or to the left. No information about specific policies or their effects would be needed. In turn, the public opinion model would offer a clear test for the claims of the second objection, namely whether the particular balance of liberalization and representation of diffuse interests produced by the EU “fits” with the underlying policy mood. If the policy mood in different member states clearly indicates a preference for movement toward the left, then the second objection would be hard-pressed to show that Scharpf’s left-leaning policy reforms would entrench special interests or be otherwise unrepresentative.

This sort of empirical approach has the significant advantage of bearing, it seems, a minimum of normative or philosophical “baggage”. It travels light. It may well be satisfactory in the end. Yet its lightness is also its main disadvantage. What considerations might push us toward a more philosophical approach to output legitimacy?

3.2 The Role of Normative Analysis

There is reason to doubt whether any empirical analysis of “output legitimacy” can in practice overcome the three hypothetical objections to Scharpf’s analysis. To ask what individuals would favor if they knew more, what precise conception of legitimate majorities obtains, how the trade-off between individual rights and majoritarian opinion should be structured, and what scope for deliberation in a multi-level polity is to pose a series of questions that are highly resistant to rigorous individual- or macro-level empirical inquiry.

Even assuming that the practical difficulties of polling European citizens could be overcome, the public opinion model has only moved the issue one step further back. When the public opinion model invokes the “no-demos”

thesis in responding to the objection from scope, for example, we may always ask: Why is the “no-demos thesis” a relevant consideration for considering only the results of *national* public opinion polls? Similarly, in responding to the objection regarding biased preference aggregation, we may ask: Is short-term public opinion arrayed on a left–right continuum a valid indicator of relevant “interests”? Once again, simply pointing to the results of our public opinion research would be unhelpful. Finally, in responding to the objection regarding public error, we may ask: How should trade-offs between competing goals – or goals that cannot be ordered on a left–right continuum – be assessed? Do citizens have meaningful preferences over systems for aggregating preferences and, if so, how should they be taken into account? Answering any of these questions by claiming that this is what the people “want”, “believe”, or “take to be relevant” would beg the question. Not only do we require some independent criterion of how to derive a social preference, belief, or concern from a heterogeneous distribution of underlying attitudes, but we also require some account of the conditions under which it would be reasonable to trump the short-term attitudes of actual majorities in favor of competing claims – i.e. to absolute moral imperatives, minority and individual rights, technical efficiency, rational coherence and consistency given certain reasonable starting points, predicted preference change due to adequate deliberation, and long-term sustainability. Public opinion polls – no matter how sophisticated – cannot help us here.

It is unlikely that any of these concerns can be addressed without normative theory. But what kind of normative theory? For example, in constructing an account of the “public interest” designed to make evaluations of output legitimacy, could one merely argue for an ideal *summum bonum* toward which all political outcomes should be oriented regardless of what citizens in that polity think or believe? Despite its commitment to social democracy, Scharpf’s implicit account of output legitimacy is not instrumentalist in this sense, but aims rather to be broadly responsive. But responsive *in what way*? On one hand, as we have seen, our model of the public interest cannot merely be derived, in an unproblematic way, from what a public “wants” or “believes” without some normative account of the range, scope, and decision rule used to aggregate or otherwise decide among the heterogeneity of interests, preferences, and judgments in a population. On the other hand, we cannot merely abstract from these underlying attitudes in favor of ideal conceptions of the justice or the good without sacrificing the democratic insistence on responsiveness, necessary for any reasonable conception of representative government (see Pitkin 1967). Where else to turn?

One method consistent with Scharpf's own scholarly predilections would be to invoke the tools of social choice theory. On this interpretation, we could deploy an independently justified function mapping individual utility functions into a general social preference. Variations on this theme might propose different ways of construing the decision function, as well as different restrictions on its input utility functions. Any such analysis would of course have to be supplemented with normative arguments justifying the range, scope, and comparability of the utility functions admitted into the calculation, as well as the decision rule used to aggregate them. While potentially plausible, such a social choice approach has to surmount Arrow's Impossibility Theorem, which calls into question the stability and coherence of *any* non-dictatorial decision rule (given certain uncontroversial starting points) that one might use to generate a single social preference to use as a standard for evaluating policy outcomes. It is for this reason, for example, that many leading social choice theorists deny any attribution of intentionality to the outcomes of majoritarian decision procedures, as for example in legislatures.²² It is hard to believe that we would be much better off in applying such decision rules to public opinion writ large, especially in view of its much more complex and indeterminate pattern of attitudes.²³

Instead we may be forced to adopt a "constructivist" attitude toward such calculations – approaching it more like a painting than like a puzzle.²⁴ For the constructivist, there can be no function directly aggregating individual utility functions into a societal ordering: For the same reason as it would be nonsensical to interpret the meaning of a painting by applying a mechanical function to the arrangement of lines, figures, and shapes, it would be meaningless to do so with a public. Constructive interpretation requires, in the case of art, the imposition of a scheme of aesthetic values and principles – composed of conceptions of harmony, beauty, innovation and so on – to make sense of the painting. The same is true, according to the constructivist,

22 Kenneth Shepsle (1992). Others avoid Arrow by using highly counterfactual utility functions which have only a distant relation to "real-world" preferences and beliefs. This is broadly speaking the approach of John Rawls (1971), in which the social decision problem is reduced to that of a single individual, and John Roemer (1996), in which different restrictions on the informational constraints and domain of utility functions is used to generate coherent principles of justice. In both cases, they are quite explicit that they are trying to model philosophical intuitions regarding rationality, impartiality, desert, and so on, rather than actual behavior.

23 But see Page/Shapiro (1992).

24 The idea of constructive interpretation is adapted from Ronald Dworkin (1986: ch. 2/3); see also H.G. Gadamer (1993).

of our evaluative disagreements regarding the public interest: In making sense of the vast array of individuals’ interests, preferences, and judgments, we need to “impose” some scheme of moral-political values and principles – put together, for example, from conceptions of justice, fairness, and right. Only in this way, so goes the argument, can we derive and defend conceptions of the public interest.

Perhaps unexpectedly, the constructivist approach, we believe, has much more in common with the tone of Scharpf’s general argument throughout *Governing in Europe*, especially where he refers to the “postwar social contract,” than does the social choice approach (e.g. Scharpf 1999: 121). On a constructivist reading, Scharpf’s implicit argument is that principles of “social inclusion”, “acceptable levels of income”, and “fair sharing of taxes and burdens” represent the public interest not because the people believe they do or because this is what the people currently “want.” The principles also represent something worth defending, something that has value because they express important constitutional commitments taken by citizens to one another. The postwar social contract, the constructivist defense of Scharpf would continue, is worth defending because it represents the best in postwar European history, born of decades of struggle and destitution.²⁵ In response to the objection from scope, a constructivist reading would not argue that nationally bounded welfare states are justified because public opinion polls demonstrate that people wish to defend redistribution within national boundaries or are unwilling to support redistribution across boundaries. Public opinion polls can provide some information about macro-trends and general beliefs, but they cannot tell us which beliefs and which trends are worth defending. What makes national citizens responsible to one another is their belonging to a shared history and community, which has independent value.²⁶ A fuller constructivist account would of course have to say more; here we have provided merely several examples of what an “interpretation” of the public interest might entail.

25 In this light, there may be other principles accepted by perhaps even wide majorities of Europeans – for example, principles regarding zero-immigration policies – which we imagine Scharpf would not conceive to be in the public interest. A constructivist argument would show why this restriction is justified, while still remaining “responsive.”

26 Along these lines, see the debates on “liberal nationalism”, e.g., Samuel Scheffler (2001), David Miller (1995), and Yael Tamir (1993).

4 Conclusion: Beyond Input and Output Legitimacy

We are left, therefore, with an irony. The construction of a normatively appealing argument about the “output legitimacy” of the EU rests, and must rest, on important and controversial claims about “input legitimacy”. Of course Scharpf could, and does, defend his focus on “output legitimacy” in pragmatic terms: Output legitimacy is the only feasible basis for bolstering real-world consensus in Europe today. But, as we have seen, this empirical claim is questionable at best. The force of Scharpf’s argument for most readers lies in their sympathy not with his conception of output legitimacy, which is the contingent result of social scientific analysis, but his commitment to a particular conception of input legitimacy. Making these underlying claims explicit may help to recast the democratic deficit debate in new terms – terms that move beyond a purely empirical understanding of the European “democratic deficit,” thanks largely to Scharpf’s path-breaking work.

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