EU legitimacy revisited: the normative foundations of a multilevel polity

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ABSTRACT   This paper reconceptualizes the challenge of legitimate governance in the European Union (EU) as a multilevel polity. Legitimacy is defined as one possible motivation for accepting political rule; it roots in citizens' affiliation with a balanced set of core values and their structural realization. This article argues that any attempt to legitimize the EU faces two distinct challenges. First, owing to the co-existence of states and individuals as political subjects, national legitimacy standards – defined by their balance of negative freedom, political equality and welfare – cannot be reproduced. Second, the legitimacy of both the Union and its member states depends upon the compatibility of values across levels. Empirically, legitimacy is hard to disentangle from other motivations behind acceptance, such as self-interest or fear of sanctions. By analysing the EU's constitutional evolution as a 'structural proxy' for its underlying values, we capture shifts in the supranational value configuration and identify potential incompatibilities with established national balances. Such incompatibilities, we argue, are a hitherto neglected challenge to the normative justifiability of both the EU and its member states.

KEY WORDS   European integration; institutional reform; legitimacy; multilevel polity; values.

INTRODUCTION

Governance beyond the nation state has increased dramatically during the last decades in both European and international politics. This increase has triggered a vivid debate about the normative foundations of transnational rule-making among International Relations and European Union (EU) scholars alike (e.g., Bellamy and Castiglione 2004; Hurd 1999; Hurrelmann 2007; Majone 1998, 2006; Moravcsik 2002; Reus-Smit 2007; Scharpf 1999, 2007, 2009). Given the remit and intensity of supranational governance, the question of how to legitimize the EU has attracted particular attention. At the same time, the pre-conditions for legitimate supranational governance seem to be favourable: EU member states and their peoples largely share the fundamental values underlying their respective political orders, in striking contrast to, for instance, the United Nations, whose members range from liberal democracies to authoritarian regimes, with a common denominator of 'legitimate rule' therefore much harder to identify.

The normative perspective on supranational governance suggested in this article deviates from the dominant view on EU legitimacy in two ways. First, we argue that wide parts of the EU-specific literature tend to be at the same time too narrow and too broad. They are too narrow where scholars restrict their discussions to *democratic* legitimacy; they are too broad where legitimacy is equated with 'acceptance', understood as the latent or manifest support for a political order. Acceptance can, indeed, result from a multiplicity of motivations reaching from self-interest and fear of sanctions to procedural fairness. Drawing on Beetham (1991), we define legitimacy as one particular motivation for the acceptance of political rule. Legitimacy roots in citizens' affiliation with a balanced set of core values and their structural realization in a polity's institutions, processes and rights; such an affiliation is based on the polity's normative or moral – rather than utilitarian – justifiability. Second, following Scharpf (2007, 2009), we argue that any theorization of supranational legitimacy must account for the EU's character as a multilevel polity, i.e., for the interplay between supranational and national political orders (see also Hurrelmann and DeBardeleben 2009; Nicolaïdis 2003; Schmidt 2007).

In combination, the conceptualization of legitimacy and the focus on the EU as a multilevel polity presents us with the following normative challenge. All EU member states need to balance fundamental values and they do so differently, as is expressed in their different structures, processes and rights. Like its member states, the EU, too, needs to find an acceptable balance of the societal values underlying its structures. Yet, the EU faces two additional and distinct challenges: first, the co-existence of states and individuals as normative reference points; second, the (in)compatibility of value configurations across levels in the European polity.

First, political subjectivity varies with regime type, and normative reference points and legitimacy standards vary accordingly. In international organizations, states, not individuals, bear rights (Ferry 2000: 90–1). States join international organizations, based on the assumption that their sovereignty – and with it their domestic legitimacy – will remain fundamentally unchallenged (Seabrooke 2007: 253, 263–5). By contrast, in liberal democracies, rights are primarily assigned to individual citizens. The EU is neither an international organization nor a democratic state: it is a multilevel polity, where states and individuals co-exist as political subjects and compete for political rights (see also Nicolaïdis 2003). In contrast to its member states, the EU therefore not only needs to balance values; it first needs to decide who should carry which value at what level. Second, where legitimacy feeds on citizens' affiliation with a balanced set of values, and where this balance varies across member states, the EU's normative justifiability cannot hinge upon the *reproduction* of national structures but requires the *compatibility* of value configurations across levels of governance.

Against this backdrop, our article shifts the normative debate about supranational governance from the pre-conditions of democracy to the pre-conditions of legitimacy. Our argument is developed in three steps. The first section discusses different sources for accepting political rule and presents our concept

of legitimacy as one such source. We then outline a basic 'legitimacy challenge' faced by liberal democracies: the need to balance three types of fundamental values, namely negative freedom, political equality and welfare. The second section introduces the challenge of legitimizing the EU as a multilevel system, which has moved from a predominantly intergovernmental order to a polity that centres increasingly, yet not exclusively, on the individual as political subject. We discuss the tensions between fundamental values, political subjects and levels of governance, and we argue that it is the compatibility of value configurations across levels that is at the core of EU legitimacy. The third section illustrates our argument by analysing the EU's constitutional evolution from the 1950s to the Lisbon Treaty as a 'structural proxy'; we identify the chances and challenges for value compatibility, and we gauge the repercussions for the EU's normative justifiability. We conclude by outlining the impact of our argument for the further analytical study of Europe's acceptance crisis and for the prospects of political and institutional reform.

EU LEGITIMACY REVISITED: DEMOCRACY AND BEYOND

Motivations for accepting political rule

In the normative debate about European integration it has been widely recognized that national standards of democratic legitimacy are problematic to apply; this is because the EU lacks the pre-conditions for fully fledged democracy: a communicative space and a shared identity that generates sufficient solidarity among citizens to accept majority rule (see Grimm 1995; Kielmansegg 1996; Scharpf 1997; Weiler 1991). In response, a number of scholars have proposed alternative ways of legitimizing supranational governance (e.g., Héritier 1999; Majone 1998; Vibert 2007); they all emphasize that legitimacy need not rely on democracy only and separate the two concepts accordingly (but see Lord and Beetham 2001). Indeed, the normative justifiability of political rule or, put differently, the rightful exercise of power, is, in principle, unrelated to one specific type of order. Even in liberal nation states, where democratic rule is always the core normative standard, the acceptance of political authority can draw on additional sources. A growing number of non-majoritarian institutions, for instance, can be accountable and generate legitimate decisions (Majone 2006; Vibert 2007), and the tension between democratic rule and constitutionalism has been widely discussed (Bellamy 2007; Dworkin 1995; Habermas 2001).

In this article, we suggest refocusing analytical attention from the preconditions of EU democracy to the pre-conditions of EU legitimacy, and we do so in three ways. First, we argue that the discussion of the EU's normative justifiability has so far neglected one particular motivation for the acceptance of political rule: citizens' affiliation with a balanced set of core values and their structural realization. Second, we contend that such an affiliation can be a 'buffer' in political systems where democratic input is wanting, where

policy output is stagnating and where pre-political motivations for support are lacking. Third, we argue that both the challenges of and chances for EU legitimacy must be assessed in view of its multilevel nature, and that it is no longer the *reproduction* of national structures that matters, but the *relationship* between national and supranational configurations across levels.

Our argument starts from David Beetham's conceptualization of legitimacy (1991).

First, we analytically de-couple the *acceptance of political rule*, understood as active or passive obedience or support, from the *motivations for acceptance*, understood as a 'complex of reasons, moral as well as prudential, normative as well as self-interested' (Beetham 1991: 27, 6–13). In short, we distinguish the behavioural expression of support from the reasons for granting support (Easton 1965: 159–64).

Second, within the complex of reasons for support, legitimacy relates to 'the moral or normative aspect of power relationships' (Beetham 1991: 25). As such, legitimacy is one possible motivation for the acceptance of political rule, and it is distinct from other motivations such as incentives, appealing to self-interest or sanctions, appealing to prudence (Beetham 1991: 27). In a similar vein, David Easton distinguishes between diffuse (or non-calculative) and specific (calculative) support for a political system, with 'support' denoting a behavioural expression that can range from passive acceptance to active consent (1965: 159–64). Legitimacy is one of three stimuli that can generate diffuse or non-calculative support on the behavioural level; the other two are the belief in a common interest and a sense of political community (Easton 1965: 273–6). In short, citizens relate to their rulers as moral agents and as self-interested actors. Both aspects are relevant to explain acceptance, but the concept of legitimacy refers to the moral or normative dimension of this relationship only (see also Reus-Smit 2007).

Third, David Beetham identifies three conditions for legitimate political rule: 'conformity to established rules; the justifiability of the rules by reference to shared beliefs; the express consent of the subordinate' (1991: 19, 15–25). Yet, legality, justifiability and consent only constitute a general framework whose specific content has to be 'filled in' by 'historical societies' (Beetham 1991: 21). As demonstrated below, this combination of leeway (with regard to specific rules) and limits (with regard to the congruence of rules and beliefs) makes Beetham's framework ideally suited to analyse legitimacy in the EU as a multilevel polity. This analysis will focus on the second condition for legitimacy, namely the justifiability of political rule. It is based on the argument that every political system expresses a set of underlying values through its institutional structure. The institutional structure can reflect the values internalized by the respective society, or it can contradict what a society considers to be the rightful way to exercise power. Where institutional structure and societal values correspond, both the access to and the exercise of power can be considered justifiable or normatively legitimate; where they diverge strongly, a legitimacy problem may arise (Beetham 1991: 7; see also Bellamy and

Table 1   Different sources of acceptance

Source of acceptance	Nature of cognitive process	Behavioural expression of support
Incentives	Calculative (Self-Interest)	
Sanctions	Calculative (Prudence)	Ranging from passive obedience and 'permissive consensus' to actively articulated consent
Legitimacy	Non-calculative (Moral)	
1. Legal validity		
2. Justifiability		
3. Express consent		

Source: Based on Beetham (1991).

Castiglione 2004). Measuring legitimacy empirically is challenging because a 'mismatch' between institutional structures and societal values need not produce immediate behavioural effects – as long as the mismatch is not excessive, and as long as the system can still rely on alternative motivations for acceptance, e.g., through its performance or output.

In sum, when analysing the normative foundations of the European polity, we will look at legitimacy as *one of several* stimuli for the acceptance of political rule. More specifically, we will focus on normative justifiability, based on the congruence between societal values and their structural realization. This deliberately narrow conceptualization is warranted for two reasons. First, in the debate about EU legitimacy, legal validity is uncontested while express consent is at the heart of the literature on the democratic deficit. Justifiability, by contrast, opens up a novel route to study Europe's normative foundations by highlighting one hitherto neglected source of acceptance. Second, the concept allows us to look at a non-calculative rather than utilitarian or 'output'-driven motivation for acceptance, yet this motivation is 'thinner' than political community and broader than democratic 'input' (Scharpf 1999). By focusing on the justifiability of political rule across levels in the European polity, we will thus be able to distil one specific and hitherto understudied challenge to EU legitimacy.

Configuring fundamental values: negative freedom, political equality and welfare

EU member states typically balance elements of three core values: negative freedom; political equality; and welfare. These values underlie the widely accepted triad of civil, political and social rights that has been identified as essential for the historical development of citizenship in liberal democracies

(Marshall 1992 [1950]). They are also related to the justifiability of political rule, because they can bridge institutional structures and societal beliefs in three ways: first, by defining the authoritative source for political power; second, by limiting political power; third, by facilitating 'the pursuit of a *general interest*, particularly in respect to those purposes that the state is expected to fulfil' (Beetham 1991: 127, 126–50, italics in the original). We do not claim that the 'mix' of values is either static or identical across EU member states; on the contrary, variation is expressed in the diversity of national political institutions and rights regimes (see Table 2). Yet, we do argue that these three values are the most basic components of liberal democracies; that their structural realization is tied to the normative justifiability of political systems; and that an accepted mix of guaranteed civil, political and social rights is essential for compliance with political rule.

The first core value, *negative freedom* or 'freedom from' refers to 'the area within which the subject – person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons' (Berlin 1969: 121–2). In liberal democracies, this value is closely linked to freedom from coercion or from state power and to 'limited government' as guaranteed through civil rights. Constitutionalism (Walker 2003) is one prominent structural expression of negative freedom that limits the legitimate exercise of power (by guaranteeing a sphere politics may not enter) and assures a certain quality of authoritative decisions (for instance, through human rights).

However, liberal democracies have to balance negative freedom with a second core value: *political equality* (Bellamy 2007; see also Scharpf 2009: 3–5; Weiler 1999: 106). Political equality here refers to the equal distribution of citizens' rights to determine, control and sanction government via free elections; as such, it 'involves not collective self-rule so much as an equal say in choosing our rulers' (Bellamy 2009: 9; see also Beetham 1994: 7; Weale 1999: 14).[1] Political equality is the fundamental value that underlies those rights and structures that define access to political power through participation.[2] For their effective realization, both negative freedom and political equality require political subjects to be *formally equal*, in terms of access to constitutional rights and political voice.

Third, liberal democracies will choose the role of *welfare* in their configuration; this value entails elements of equality of opportunity on the one hand and of material resource allocation on the other. Structurally, the value of welfare is most prominently expressed in the social citizenship rights of

Table 2 Fundamental values and their realization

Fundamental value	Corresponding right	Institutional realization
Negative freedom	Civil rights	e.g., Bill of Rights
Political equality	Political rights	e.g., Majority rule
Welfare	Social rights	e.g., Universal health care

20th-century democracies (Marshall 1992 [1950]: 27–43). Yet, the degree of government intervention and of redistribution in pursuit of citizens' social rights differs across the EU and in an Organization for Economic Co-operation and Development (OECD) context more widely. This variance can be explained, not least, by the tension between the core values of welfare and negative freedom; the realization of social rights demands redistribution of resources between individuals – and, thus, a strong element of interference.

So far, we have made two arguments. First, individuals do not engage in cost–benefit analysis when assessing whether to grant a system legitimacy; legitimacy is a non-calculative or diffuse motivation for support. This explains why legitimacy deficits – in contrast to performance problems – can remain latent for considerable periods, and why they do not necessarily provoke an explicit withdrawal of acceptance. While citizens can easily identify a system's failure to produce outputs, a mismatch of values and structures is less evident. Hence, it is problematic to think about legitimacy as if the public were permanently engaged in the conscious evaluation of the system's normative foundations, or as if the public applied clear-cut moral criteria once legitimacy becomes explicitly contested. As Hurd emphasizes, acceptance of a system – and compliance with its rules – is largely habitual; it is *non-compliance* that requires conscious choice (1999: 388). Such choice is crucial for a latent legitimacy deficit to become visible at the behavioural level (Reus-Smit 2007: 169). Yet, more often than not, citizens convey legitimacy *in dubio pro reo* and more willingly than the debate about the EU's democratic deficit would hold (Hurrelmann 2007; Moravcsik 2002).

Second, as liberal democracies, all EU member states configure elements of negative freedom, political equality and welfare; they choose how to balance the inherent frictions between these values; and they justify why and how a particular value may be compromised. Across the European polity, legitimate value configurations co-exist, which is a chance and a challenge for EU legitimacy: it is a chance because citizens will agree on the core 'components' of negative freedom, political equality and welfare; it is a challenge because they may disagree about how these values should be balanced. As national systems are themselves part of the European polity, EU legitimacy – as one motivation for accepting political rule – therefore hinges upon the compatibility of value configurations across levels of governance. Our article does not analyse how values are configured across EU member states; it only identifies a challenge to EU legitimacy which has been insufficiently addressed so far.

LEGITIMIZING THE EU POLITY: CHALLENGES AND OPPORTUNITIES

The compatibility of value configurations across levels

The tension between core values at the national level, the diverse structural realizations of these values across national polities, the argument that legitimacy

is assigned *in dubio pro reo*, and the understanding of legitimacy as only one of several sources for acceptance can all explain why élites have had considerable leeway to integrate Europe without asking for citizens' explicit consent (Hurrelmann 2007). According to Scharpf, acceptance is further increased by Europe's multilevel nature. Traditionally, he argues, the EU has been shielded altogether 'from the behavioral responses of the governed', because its rules are implemented via the member states (2007: 8). An acceptance crisis will therefore only erupt if supranational governance explicitly challenges the legitimacy of – and compliance with – both domestic and EU rule.

The possibility of EU legitimacy is thus defined – and constrained – by the EU's multilevel nature: legitimate rule-making *beyond* the state must not undermine legitimate rule-making *within* the state (Bellamy 2009; Scharpf 2007, 2009; Schmidt 2007). Any leeway in adding a supranational value configuration thus knows one limit: it must be compatible with national configurations, and such compatibility must be recognizable. Compatibility can be brought about by realizing a specific value at only one level, be this national or supranational. This decreases the tension between political subjects at the same level, for instance in the sphere of political equality. Alternatively, the EU level can configure values in a way that undermines core choices at the national level. If this is the case, sufficient normative continuity must be maintained between levels in terms of *substantive values* without aiming to replicate *democratic structures*.

In assuring compatibility across levels, the EU – like national democracies – must balance the tension between negative freedom, political equality and welfare. Yet, the supranational level confronts two additional challenges: the co-existence of states and individuals as normative reference points, and the nature of EU constitutionalism.

Indeed, in the EU two political subjects – states and individuals – co-exist and compete in 'claiming' negative freedom, political equality and welfare. This is challenging for the compatibility of value configurations across levels, both structurally and cognitively. In classic liberal thought, the individual is the normative reference point when it comes to realizing values through rights. In the EU, however, states need to carry some rights that are individual at the national level: absent the pre-conditions for EU-wide political participation and social solidarity, the state acts as political subject 'on behalf of' its domestic political community (Ferry 2000: 90). In so doing, the state can protect both, the realization of individual values at the national level and domestic compliance with EU rule. Yet, the co-existence of normative reference points also contributes to challenging the compatibility of configurations, in turn a pre-condition for EU legitimacy. For instance, empowering the individual through political participation rights at the supranational level may deprive a state of political rights and, at the same time, undermine individual political rights at the national level. Similarly, seeking to tilt the supranational configuration towards individual social rights will limit member states' domestic freedom from interference. Any supranational reconfiguration, most generally, therefore risks challenging the balance of negative freedom, political equality

and welfare within states, and may undermine individual civil, political and social rights in the process. The European polity thus not only faces the familiar challenge of finding an accepted balance in the structural realization of fundamental values; it also needs to decide who should carry which value at what level. The structural and cognitive challenge to value compatibility across levels is therefore acute.[3]

The co-existence of political subjects itself is not unique: a number of EU member states are multilevel systems themselves – constitutionally federal or decentralized. In these systems, too, the individual citizen and the constituent government unit compete. Both demand equal status, and federal systems, too, have to balance the democratic and the federal principle. National multilevel systems can solve the tensions between political subjects in one of two ways: through democratic procedures that privilege the individual; or through a constitutional hierarchy of levels and competences. In stable federations, where national solidarity is sufficiently strong, we find a hierarchy of the democratic over the federal principle.[4] The EU, originally, privileged the federal – or intergovernmental – over the democratic principle, but it has gradually given individuals greater democratic rights. The tension between the EU's two political subjects is thus unresolved and likely to remain unresolved in the foreseeable future: prioritizing the democratic principle would require fully fledged statehood (Majone 2006); prioritizing the federal principle would require the unanimous constitutional choice to roll back existing democratic procedures, and/ or to introduce a hierarchy of levels and competences.

All three are unlikely options in the current political climate, and they are further complicated by the nature of EU constitutionalism (Shaw 1999; Tully 2002). Indeed, the supranational level not only lacks the pre-conditions for fully fledged democracy; an engrained hierarchy of levels and competences would also be at odds with its non-teleological constitutionalization. Moreover, although the EU is a polity, it is a polity with the restricted functional purpose of economic integration, and its 'market constitution' (Maduro 1998) further challenges value compatibility across levels. Functional restriction prevents adding some values that are core components of national configurations to the EU 'mix'; redistributive social policies are the obvious example. This leaves the supranational level with a necessarily unbalanced configuration. Furthermore, absent a constitutionally defined hierarchy of levels and competences, this imbalanced configuration risks to undermine core national choice – a functional market constitution may, in fact, make such a challenge both necessary and unavoidable. In sum, the EU faces challenges that are similar to those of national multilevel polities, but it lacks the equivalent constitutional pre-requisites to respond.

Methodological implications

Following Beetham (1991), we have argued that a system's fundamental values are expressed in its structures, and that legitimacy pre-supposes congruence

between values and structures. To assess the pre-conditions for legitimate supranational governance, the following section therefore uses the EU's constitutional evolution as a 'structural proxy'; its aim is to identify potential incompatibilities between the EU and national value configurations. Indeed, once we accept that a system's support draws on multiple sources, and once we are interested in legitimacy as one such source, measuring citizens' *overall support* for the EU (e.g., through *Eurobarometer*) does not lead us very far (see also Hurd 1999: 390). Therefore, we engage in the more preliminary discussion of how the EU's constitutional framework has evolved over time.[5] To illustrate our main argument – the compatibility of value configurations across levels is key for EU legitimacy – we look at which values have been realized on the national and supranational level respectively, and at who carries the ensuing rights. This allows us to identify potential tensions that result from realizing the same value at different levels simultaneously, but with different political subjects. Moreover, we point to how the realization of values at the supranational level potentially affects both the realization and the configuration of values in national democracies. Distinguishing between *structural 'phenotype'* (the EU's constitutional order) and *ideational 'genotype'* (the values underlying this order) (Kielmansegg 1971) we first distil the underlying configuration of negative freedom, political equality and welfare that has contributed to (or risked undermining) the EU's normative justifiability; second, we discuss how these values have been reconfigured in the course of European integration; and third, we show that this reconfiguration has decreased rather than increased the potential of compatibility across levels. Such an analysis is crucial to assess whether the pre-conditions for EU legitimacy are given.

Our analysis starts from a deliberately narrow conceptualization of legitimacy, which allows us to study a non-calculative motivation for supporting the EU without drawing on either 'thick' pre-conditions such as political community, or on state analogies such as fully fledged democracy. As such, our analysis is both restricted and indirect. It is restricted, because we cannot – and do not intend to – capture the entire range of motivations for accepting supranational rule; it is indirect, because we focus on values as expressed in structures rather than on values *per se*. Such an analysis can contribute to our understanding of the EU's normative foundations in a number of ways. It allows us to identify major challenges of the Union's moral – rather than utilitarian or habitual – justifiability; once entered in the public 'consciousness' these challenges may contribute to a withdrawal of support. It also provides a basis for future assessments of whether and how structural reforms would bolster (or weaken) legitimacy in the European polity as a whole. At the same time, we point to the limits of 'fixing' legitimacy through structural reforms, given that they would only tackle one source of non-acceptance. Finally, analysing the structural manifestation of values in this indirect way reduces the risk of merely capturing legitimacy *ex post*, given that behavioural support is withdrawn in extreme situations only (Bartolini 2005: 165–6).

THE EU'S VALUE CONFIGURATION: LONG-TERM AND RECENT DEVELOPMENTS

The early balance: an implicit configuration

When looking at European integration in a long-term perspective, a delicate balance dominated initially, yet it got gradually broadened, challenged and hollowed out: the negative freedom of the market citizen, combined with the political equality of the EU member state. This balance seemed relatively clear-cut. Freedom from interference was reserved for the individual, and the free movement of goods, workers and capital, the free provision of services, non-discrimination on the grounds of nationality, and free competition were (and still are) at the heart of the EU's market constitution. These individual freedoms required a dimension of formal equality before Community law and legally guaranteed rights. For the individual, such formal equality came through a series of European Court of Justice (ECJ) judgments that interpreted the Treaties so as to introduce 'controls on the exercise of public power . . . similar in nature to those found in the nation state' (Craig 2001: 126). Political equality, on the other hand, was the domain of member states (or, to be more precise, of national governments); the use of unanimity as a decision-rule bolstered states' formal equality in status and access to decision-power.

The early Community accurately reflected this value configuration in its institutions, competences and rights. The substantive focus was on economic integration; since 1965, a dominant intergovernmental Council of Ministers *de facto* decided unanimously; a strong and proactive Court protected the 'four freedoms'; and the weak European Parliament (EP) was composed of national parliamentarians. In short, at the individual level, negative freedom through market liberties trumped political equality through democratic participation. Such a configuration was unlikely to draw the affective affiliation of citizens socialized into liberal democracies where the individual, not the state, is the subject of political equality (Ferry 2000: 87–92). Although the doctrine of supremacy pitched the individual's negative freedom at the supranational level against the state's negative freedom at the domestic level (de Búrca 2003), the potential to upset national value configurations was limited.

The balance turned: Single European Act and 1992 programme

Following the Single European Act (SEA) and the 1992 Programme, this initial matrix – negative freedom for the individual; political equality for the state; formal equality in legal-economic terms for the citizen; formal equality in terms of political opportunity for the state – changed in several directions. Yet, both at the horizontal and vertical level, change was unsystematic and asymmetrical. The negative freedom of the trading individual continued to be at the centre of the Single Market Programme. At the same time, however, the individual became an increasingly important addressee of political equality at the supranational level – beyond, and in addition to, state guarantees of 'voice'

(Weiler 1999). This development kicked in fully with the Maastricht Treaty, with the empowerment of a directly elected Parliament and the extension of majority voting in the Council as structural corollaries.

The evolving EU polity thus entered a paradoxical and problematic phase. The value configurations of the Union and its member states became increasingly alike, and institutional reform strengthened citizens' political equality. Yet, the attempt at structural analogy through parliamentarization was not preceded by the conscious reflection of whether such reform corresponded to underlying societal values, or of how reform at the supranational level would impact upon national configurations and, thus, upon domestic legitimacy. In terms of 'ends', market freedom still dominated at the supranational level, while welfare – the counter-weight to negative freedom at the national level – was not part of the EU 'mix'. At the same time, the state's political equality was increasingly eroded, both through the EP's empowerment and through qualified majority voting – two developments which, in turn, risked undermining citizens' political equality at the national level. The early configuration had a limited impact on domestic choice; the novel configuration challenged such accepted choice, and with it legitimacy as one non-calculative motivation for accepting political rule.

The Union thus went through an idiosyncratic development: for the individual, negative freedom and formal equality before the law remained 'intact'; for the state, political and formal equality were challenged. This move towards citizens' political equality – at the expense of the political equality granted to their states – did not account for the need of cross-level compatibility and risked to create a mismatch between the 'genotype' of national value configuration, and the 'phenotype' of EU-level structure. Indeed, in a multilevel polity, granting an individual right at the supranational level may challenge the same right at the domestic level (Bellamy 2009). The well-known national challenge – having to balance the individual's rights to democratic rule and to non-interference – was thus further complicated at and by the supranational level. It was unclear who was to carry political equality where claims competed, and at what level the individual's political equality was, ultimately, to be guaranteed.

The EU post-Maastricht: towards an ends-based (im)balance?

Post-Maastricht, the EU's implicit value configuration changed again. The individual was further empowered in the sphere of political equality, with the more long-standing concern about the voice of each voter's state now complemented by the concern about each voter's voice's weight (Weiler 1999: 82, fn 189). At the same time, the welfare component in the supranational 'mix' changed. Welfare had first been balanced in the EU's value configuration with the commitment to economic and social cohesion and the creation of structural funds in the late 1980s; member states were its undisputed addressees. The Social Protocol, followed in 2000 by the European Charter of Fundamental Rights, now gave the individual – highly contested – social rights in addition to civil liberties.

Balancing negative freedom and welfare is a neuralgic issue at the national level already, aggravated at the EU level by its functionally restricted constitutionalism and the dual nature of political subjectivity. Furthermore, not only does the EU lack social solidarity, 'supranational welfare' also encroaches upon political rule within states (Bellamy 2009). Formal equality (such as equal access to legal protection) can be implemented at different levels without creating incompatibility, but redistribution demands a degree of solidarity that can be problematic even within state boundaries. Not least for this reason, the negative freedom of the market citizen had been centre-stage from the outset of integration, while political equality had been a state-privilege. With deepening integration, political equality became increasingly 'individualized' through structural reform. This happened without prior concern about the congruence of societal values and institutional structures, and without consideration of whether the individual as political subject at the EU level would challenge the ability of the state – rights carrier 'on behalf of' its political community – to protect individual values at the national level. Hence, political equality started to be eroded on all fronts, while adding welfare to the supranational 'value mix' had the potential to encroach upon national political rule.

The EU thus ended up with a value configuration that was normatively challenging in two ways: it risked incongruence between supranational structures and national societal values (a pre-condition for legitimacy at the national level); and it risked the compatibility between national and supranational configurations (a pre-condition for legitimacy in the European polity). Congruence was further challenged, because citizens themselves competed with the state as political subject at EU level. Structurally, the EU moved into domains similar to those of the state, thus risking overlap and competition between, rather than compatibility across, levels. Given its functional and non-teleological constitutionalism, the EU could not respond by realizing values at one level only, by prioritizing a political subject so as to leave national choices intact, or by ensuring compatibility.

The *problématique* in the light of Lisbon

Between 2000 and 2005, the EU went through the most far-reaching attempt at reforming its 'phenotype'; between 2005 and 2008, the EU faced its most pronounced acceptance crisis yet, following the failed referenda on the Constitutional Treaty in France and the Netherlands, and the first Irish 'no' to the Lisbon Treaty (LT). Given this explicit withdrawal of support, and given our previous diagnosis of incongruence and incompatibility, we next assess the LT's potential to provide a 'legitimacy buffer' in the event of a future acceptance crisis. In a nutshell, we argue that Lisbon has not eased the normative challenge, because the Treaty fails to relieve the core tensions identified: those between political subjects, and those between solutions based on the reproduction of national structures and solutions based on compatibility across levels.

First, with regard to cross-level compatibility, the LT makes the choice of the EU's fundamental values more explicit: Art. 2 of the Treaty on European Union (TEU) describes the values 'common to the Member States', and states that the EU is founded on 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. Furthermore, the Charter of Fundamental Rights lists the whole range of human, political and economic rights that apply to EU citizens and thus realize fundamental values structurally. By including a section on social rights (albeit very prudently drafted) in addition to civil and economic freedoms, the Charter also opens the possibility of a supranational balancing process akin to national constitutional reality. Yet, while the Charter, drawing on national traditions and the European Convention on Human Rights, expresses a political compromise on the values to be realized, it gives little guidance on how these – partly incompatible but equally ultimate – values should be balanced, and at what level they are to be realized structurally. The Charter's incorporation thus risks to further increase competition between national and supranational standards. From this perspective, the Charter's much-criticized limited application to domestic laws and practices may be a welcome safeguard. Finally, the newly enshrined 'principle of conferral' (Art. 4 TEU) as well as the Treaty on the Functioning of the European Union (TFEU)'s Title I on 'Categories and Areas of Union Competences' both add clarity about which level realizes what value structurally, but they still fall short of a genuine *Kompetenzkatalog* or hierarchy of levels.

Second, Lisbon continues the tension between individuals and states as normative reference points. For the individual, the negative freedom of the market citizen not only remains unchallenged but is further strengthened through the Charter. Citizens' formal equality is still essentially juridical and is further bolstered through easier access to the Court. Politically, citizens continue to compete with states and remain formally unequal, given degressively proportional parliamentary representation. Two novel provisions, however, have the potential to shore up citizens' political equality at the supranational *and* national level. Transparency is strengthened in Art. 16.8 TEU, stipulating that the Council shall meet in public 'when it deliberates and votes on a draft legislative act'; more generally, Art. 1 TEU demands that the EU's decisions are to be taken 'as openly as possible'. In addition, the Treaty gives a greater role to national parliaments; according to Art. 12 TEU and the 'Protocol on the Role of National Parliaments' they are to be more fully informed about the EU legislative process and gain more rights in controlling subsidiarity. Equal access to information, combined with stronger control by national parliaments, can potentially shore up the political equality of both political subjects – by increasing the role of states (rather than national governments only), and by bolstering domestic democratic institutions.

When it comes to the state's negative freedom and political equality, Art. 4 TEU explicitly recognizes 'the equality of Member States before the Treaties'. At the same time, formal equality in the political sense is weakened in everyday decision-making through the introduction of the double majority system in the

Council as well as the extension of majority voting. By contrast, the European Council (the institution still dominated by the consensus of formally equal governments) is strengthened, especially in constitutional reform outside Inter-governmental Conferences, and this reform can be read as an exercise of states reclaiming voice.

Overall, the Lisbon Treaty missed an opportunity to clarify (a) the configur-ation of accepted societal values behind its structural reforms; (b) what level can best realize negative freedom, political equality and welfare and why; and (c) whether states or individuals are privileged in the domain of political equality and at what cost for the other subject. Post-Lisbon, we are still left with an insti-tutional 'phenotype' from which citizens need to deduce a substantive 'geno-type' – a situation hardly fit to make citizens recognize the EU's value configuration, let alone to affiliate with the congruence between these values and their structural realization. Post-Lisbon, the EU does not become more similar to a national multilevel polity, privileging the individual in democratic terms or establishing a clear hierarchy of levels and competences. Yet neither does the EU backlash into an international organization where the state is the uncontested carrier of rights. Instead, the 'muddled' trend continues, and with it the challenges for the congruence of values and structures, and for value compatibility across levels of governance. This may be unavoidable, given the non-teleological nature and functional restriction of EU constitution-alism. However, if it is true – as we claim – that citizens' non-calculative affilia-tion with a balanced configuration of negative freedom, political equality and welfare and with their structural realization is at the heart of legitimacy, then the EU has deprived itself of yet another chance to bolster this particular source of support. In so doing, the EU runs two risks. First, in times of crisis citizens may begin to reflect consciously on the (in)compatibility between their national value configurations and the EU's. Second, in the event of such reflection, the withdrawal of support is unlikely to be mitigated by another non-calculative motivation for accepting supranational rule. In the current set-up, diffuse support would need to come from fully fledged democratic input or from pre-political community – and the EU lacks both.

CONCLUSION

This article pursued two aims: first, to identify the particular challenge of legit-imizing the EU as a multilevel polity; second, to assess how legitimacy – as one motivation for the support of political rule – can aggravate or alleviate an accep-tance crisis in this polity. We therefore refocused the normative debate about supranational governance from the pre-conditions of EU democracy to the pre-conditions of EU legitimacy. Legitimacy was identified as one diffuse motiv-ation for accepting political rule; as such, legitimacy stands next to calculative motivations such as self-interest or fear of sanctions. More specifically, we addressed the justifiability of political rule, based on citizens' non-calculative affiliation with a set of fundamental values as realized in a political system's

structures and rights; we focused on the three fundamental values balanced in liberal democracies: negative freedom; political equality; and welfare. Conceptualizing legitimacy narrowly, rather than equating it with 'acceptance' or 'support' more broadly, allowed us to disentangle different sources behind the acceptance of political rule; focusing on the congruence between values and structures allowed us to capture two hitherto neglected challenges for EU legitimacy: the co-existence of individuals and states as normative reference points; and the need to assure compatible value configurations across the European polity.

By analysing the EU's constitutional evolution as a 'structural proxy', we then distilled the underlying value configuration, and we assessed whether this evolving configuration and structural realization strengthened or weakened the preconditions for EU legitimacy. Our analysis uncovered two normative challenges. First, the EU lacks accepted choices (a) of how the societal values behind structural reform should be balanced; (b) of the appropriate level to realize (elements of) negative freedom, political equality and welfare; and (c) of political subjects as normative reference points. If we assume that a polity's structures need to reflect socially accepted values, and if we argue that a legitimacy crisis can spring from a mismatch between structures and values, then such a lack of choice is problematic. Second, our analysis revealed increasing incompatibility between the national and supranational configurations, and with it a threat to legitimacy at the supranational and the domestic level alike. In order to make the configurations of negative freedom, political equality and welfare compatible across levels, further supranational reform must therefore pay attention to this 'triple balancing act' – between values, between political subjects, and between distinct but overlapping levels of governance.

Our narrow conceptualization of legitimacy also allowed us to pinpoint the legitimacy-enhancing potential of structural reforms. In times of a wider acceptance crisis, such reforms may be crucial to enhance citizens' non-calculative affiliation with the political order. Yet, it is also important to recognize that – in contrast to what the democratic deficit debate suggests – structural reforms can only do so much. As Beetham (1991), Easton (1965) and Scharpf (1999) teach us, legitimacy is only one of several pieces in the puzzle that is citizens' support, and there can be trade-offs between motivations for behavioural support. Institutional reform can, therefore, have contradictory effects; as Hurrelmann (2007) argues, while trying to enhance one motivation, we might involuntarily undermine the foundation of another. Our article attempted to contribute to this debate by conceptualizing the tensions and trade-offs between fundamental values, between political subjects and between levels of governance – to make them fruitful for the future theoretical and empirical study of EU legitimacy, and to identify a hitherto neglected challenge for the normative justifiability of the EU as a multilevel polity.

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NOTES

1 Bellamy has recently introduced this 'association of modern citizenship with "political equality" rather than "self-rule"' to the study of the EU, drawing on Benjamin Constant's distinction between ancient and modern liberty (2009: 9, 3–10).
2 In the nation state, political rule can be equated with democracy; when discussing supranational governance we use political rule as a more neutral term.
3 A similar argument has been made by Bellamy (2009: 18–20) and Scharpf (2009: 21–5). The former analyses how social judgments by the ECJ can undermine domestic democratic choice; the latter points to the ensuing challenge for legitimacy at the national level – which, as member states have to ensure compliance with supranational law, risks to further erode EU legitimacy.
4 The hierarchy of the democratic over the federal principle is more widely accepted in homogeneous federations such as Austria or Germany than in multinational federations such as Belgium, Canada or Spain, where the central and regional governments compete for citizens' loyalty. Yet, in homogeneous federations a similar tension surfaces in the discussion about regional representation in second chambers: should each government be represented equally or according to population size?
5 For an early analysis of the EU's constitutional evolution across levels see Weiler (1999: 10–101).

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