

Differentiation in the European Union and beyond

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Abstract

This forum article analyzes differentiation among states in the European Union and among regions within states as a single phenomenon, an arrangement in which one or more constituent units opt out of a common policy. By examining differentiation in a variety of contexts, we seek to shed light on its basic features.

Keywords

Differentiation, differentiated integration, European Union, multilevel governance, regionalism

In this forum article, we seek to bridge two islands of theorizing: differentiation *within* states and differentiation *among* states. Each of these literatures is well developed, and while researchers in both areas may be aware of each other, they have not conversed in depth. Our premise is that these literatures have much to learn from each other. They confront the same puzzle in different contexts, and their lessons are fundamental.

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Dear Liesbet and Gary, I have now gone quickly through your forum piece. It is an excellent read and I would like to accept in the forthcoming special issue. I have marked some editorial changes in the attached copy of your manuscript. Alessia Invernizzi, the managing editor, might add some more remarks. You might want to send her a word copy of the file.

Thanks for contributing this and best regards, Gerald

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This forum article analyzes differentiation among states in the EU and among regions within states as a single phenomenon, an arrangement in which one or more constituent units opt out of a common policy. By examining differentiation in a variety of contexts, we seek to shed light on some of its basic features.

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In this forum article, we seek to bridge two islands of theorizing: differentiation *within* states and differentiation *among* states. Each of these literatures is well developed, and while researchers in both areas may be aware of each other, they have not conversed in depth. Our premise is that these literatures have much to learn from each other. They confront the same puzzle in different contexts, and their lessons are fundamental. How can a system of governance gain the benefits of scale while providing self-rule for its constituent communities?

We first set out a model of multilevel governance that can serve as a baseline for differentiation both within and among states. Next, we bring differentiation within states and within the European Union (EU) onto the agenda. The final section contrasts two logics of differentiation: “coming-together” and “holding-together”. We conclude by noting a key virtue of differentiation: By breaking open the concept of sovereignty, differentiation extends the repertoire of overarching governance.

Collective goods and self-rule

A differentiated polity is one that does not exert uniform authority within its borders, and where at least one constituent unit has a formal arrangement that allows it to opt out of a common policy (Hooghe and Marks, 2016: 53, 101; Migliorati, 2022: 1112; Schimmelfennig and Winzen, 2014: 356).¹ Conceived in this way, differentiation is a phenomenon that can arise in any system of governance. The polity in question may be a state or it may be an international regime such as the EU. The unit that opts out may be a member state of the EU or a region within a state.² This raises the possibility that there is an overarching logic of differentiation.

Both states and international organizations face a tension between the provision of collective goods and the demand for self-rule (Hooghe and Marks, 2009). An overarching polity can provide collective goods more efficiently because it can share costs across a larger population. However, one or more distinctive regions within the polity may resist central control and demand some measure of self-rule. In this model, differentiation is a negotiated response to a demand for special treatment in an overarching polity.

The benefits of scale lie at the foundation of state building and international organization (Hooghe, Lenz, Marks, 2019; Tilly, 1990; Olson, 1969). Large scale makes sense because it facilitates the provision of collective goods that make civilized life possible—security, exchange, knowledge, and insurance against disaster. These are goods that are difficult or impossible to meter and which benefit everyone living in a society whether they contribute or not. So, the larger the population, the lower the costs for each person, or conversely, for any given individual contribution, the more of the good (e.g., security) available for each person. If one individual’s consumption does not diminish the consumption of other individuals, then the more citizens who contribute, the cheaper it is for everyone. If two groups consume a public good, then the amount produced should reflect the collective benefit – not the benefit for any one group.

The logic of collective goods is arguably the chief discovery of political science, and it motivates the contributions of Thomas Hobbes (1651/2001) to the Federalist Papers (1787-88/2009), and from William Riker (1964) to Elinor Ostrom (1990). It applies both within and across states, and

underpins the idea that governance is best arranged at multiple levels where each jurisdiction is responsible for policies that affect only those people who live there. Pure public goods, such as species survival and climate sustainability, should be provided at the global level, whereas collective goods that chiefly affect people living in bounded spaces should be provided by regional international organizations, national governments, or regional and local governments within them.

Functionalist theories of multilevel governance require each jurisdiction to be responsible for collective goods that do not have externalities for those living in neighboring jurisdictions. The idea is to limit inter-jurisdictional externalities that exist when a policy or service provided in one jurisdiction has an uncompensated effect on those living in another jurisdiction.³ The result is a nested structure in which each regional and local government has authority over those policies that affect only those living in its jurisdiction. It describes a world (or thought experiment) in which government from the local to the global is designed to achieve an optimal trade-off between the benefits of scale and the benefits of local responsiveness. This is the golden principle of multilevel governance: decentralize where possible; centralize where necessary (Oates, 1972).

The benefits of scale are evident in the EU. The EU encompasses countries and their regions in a continental system of economic exchange, individual mobility, dispute resolution, fundamental research and external representation. Scale enhances efficiency in each of these endeavors because it makes sense to determine a policy for all the people affected, rather than just one group, and because the cost of a public policy is lower if it is shared across a larger number of people. EU competences are most developed precisely in fields where scale makes the EU a great power (e.g., global governance and standard setting) or where the externalities of national policies are most transparent (e.g. intra-union trade and the environment). Pressures for further integration are particularly sharp where potential benefits of scale remain under-exploited (e.g., border control, financial insurance against risk, containing climate change, research, and with increasing urgency following Russia's invasion of Ukraine, defense and military procurement).

Yet, large polities often encompass regions with distinctive cultures and ways of life. Some people living in such communities may feel that they can identify with both the polity and their homeland, while others may seek to limit or even reject overarching rule as "foreign".⁴ The struggle for self-determination is a powerful motivation in the field of politics, and it is by some measures the greatest source of political violence in the world.⁵ It has provoked most civil wars, as in Yugoslavia (1991-2001), Nigeria (1967-1970), and Sri Lanka (1983-2009); and it often underlies interstate war, as in Ukraine's resistance to Russian annexation (Cederman, Ruegger, Schvitz, 2021).

Differentiation is an effort to sustain overarching governance by allowing a constituent community to opt out of a common policy. It is a strategy to lower the temperature of conflict over self-determination by making sovereignty divisible, giving a region self-rule on a subset of policies while preserving the architecture of shared rule. There is, of course, no guarantee that this will succeed. Czechoslovakia broke up; the United Kingdom exited the EU. But by rejecting the idea that sovereignty is all or nothing, it has been possible to expand the repertoire of strategies to achieve scale in the face of difference.

A comparative view of differentiation

From a broad comparative perspective, the EU is an extreme case of differentiation, but it is not unique. Many countries have at least one constitutionally differentiated region, i.e. a region with a legal right to opt out of a national policy. Of 77 countries covered by the Regional Authority Index (RAI) in 2018, 34 contain regions with authority to legislate in a particular policy area (Shair-Rosenfield et al., 2021).

The policies that are subject to differentiation are amazingly diverse. Aceh, in Indonesia, can impose sharia law within its territory. Scotland has its own educational system. Bolivia's indigenous communities can run elections under their own rules. The Basque provinces set the rate and base of their own taxes. Quebec controls immigration into its territory. The Åland Islands, which are part of Finland, can exclude non-resident Finnish citizens from buying land. Greenland is exempt from Denmark's EU membership.

The most common feature of differentiated regions is geographical peripherality. Eighty of 107 differentiated regions (75%) are located further from the capital than the median region or are non-contiguous with other parts of their respective states. In general, the greater the time and effort required for communication between a core and a periphery, the weaker the pressure of homogenization and the greater the likelihood that a region will be culturally distinct (Shair-Rosenfield et al., 2021). Language difference is often present: 70% of differentiated regions have a majority that speaks a language different from that of the state core. A minority religion or a history of independent statehood account for most of the remaining cases (Table 1). Just three of 107 differentiated regions do not meet the criteria in Table 1 and 70.1% possess two or more.⁶

Table 1. Differentiated regions within states.

	Percent
Geographical distance	75.0
Prior statehood	39.3
Religion difference	35.6
Language difference	70.1
At least one of the above	97.2
At least two of the above	70.1

Note: n=107 differentiated regions in a total of 1768 regions in 77 countries in 2018 (6.1%). Language difference: A majority in the region speaks a different language from the core. Prior statehood: The region was an independent state for thirty years or more since AD1200 and encompasses the capital of the prior state and at least half of its territory. Religion difference: A majority in the region practices a different religion from the core. Geography difference: The region is more distant from the core capital than the median region in the country or is an island or noncontiguous territory 30km or more distant from the mainland. Source: Shair-Rosenfield et al. (2021).

From this perspective, the EU is primed for differentiation. It is composed of culturally, linguistically, and religiously diverse units with a history of independence. Yet, the incidence is not as great as one might expect by comparison with differentiation within states. Schimmelfennig and Winzen (2020: chapter 4) count 30 cases of durable constitutional differentiation in the EU among more than 3000 possible treaty opt-outs, i.e., a ratio of around 1%.⁷ They conclude that “Our data reinforce the earlier conclusion that DI [differentiated integration] mostly serves as a temporary facilitator of EU integration and is not the harbinger of ever looser union” (Schimmelfennig and Winzen, 2020: 56).

The reason for the surprising infrequency of durable differentiation in the EU takes one to the heart of the European project. The EU is a response to the following question: “How can one realize the benefits of scale while accommodating diverse communities?” The answer is to have no central language and no state religion; tax little and redistribute less; give states flexibility in implementing most laws; decide by unanimity or supermajority rather than simple majority; use soft law and benchmarking; diffuse authority, vertically and horizontally; bring national governments directly into central decision making; permit enhanced co-operation by subsets of member states; allow transitional arrangements for less advanced states; and, as a last resort, allow recalcitrant member states to opt out (Marks, 2012). Most legislation in the EU is by directive which “leaves room for member states to make their own choices, for instance, by leaving it to member states to decide on the scope of application of a specific provision or by allowing for the adoption of more stringent standards” (Benz, 2010: 220; Zbiral, Princen, and Smekal, 2023).

Yet, differentiation requires flexibility on *both* sides. It will not work if those who demand self-rule conceive sovereignty as all or nothing, as did many “Leave” campaigners in the Brexit referendum (Hix, van der Linden, Massie, 2023; Hobolt 2016; Sobolewska and Ford, 2020). Differentiation cannot satisfy intransigent nationalists who reject shared rule as rule by foreigners.

As in national states, the demand for constitutional differentiation in the EU is strongest in geographically peripheral regions. Four states located at the EU’s northern border—the United Kingdom (UK), Denmark, Sweden, and Ireland—have been responsible for most cases of constitutional differentiation including the most consequential opt-outs. The UK and Denmark alone have had 43% of opt-outs from treaty revisions, and Sweden and Ireland are responsible for 15%. The UK had opt-outs from monetary union, justice and home affairs and Schengen. Denmark has opt-outs from monetary union, justice and home affairs, defense, and free movement of capital concerning property.⁸ Sweden has opt-outs from monetary union. Ireland has opt-outs from Schengen, and justice and home affairs. By contrast, the six founding member states that form the EU’s core have not a single constitutional opt-out between them (Schimmelfennig and Winzen, 2020: 47-66).

Ireland and the UK (prior to Brexit) are the EU’s only island states with populations over one million. The UK, Denmark, and Sweden—Protestant states clustered at Europe’s northern rim—are the only EU member states where religion was tied to the formation of strong national states

in opposition to the supranational aspirations of Catholicism. The UK and Denmark maintain established churches and Sweden did so until 2000, but the rise of secularism in these countries has not dulled their particularistic sense of national distinctiveness.

Coming together or holding together?

Differentiation depends on its context. Is it part of an effort to “come together” while giving a recalcitrant region special self-rule so that the others can forge ahead, or is it part of an effort to “hold together,” to sustain an existing polity by giving a recalcitrant region special self-rule to ward off secession (Stepan, Linz, and Yadav, 2011)? Both forms of differentiation respond to the pressure of diversity in overarching governance. But it is one thing to recognize diversity in arranging a marriage and quite another to stave off divorce. Coming-together differentiation is negotiated among independent units; holding-together differentiation is negotiated between a unit and the center. The first is about contracting in or contracting out to produce a collective good; the second is about sustaining or breaking an already-existing polity.

This gives rise to contrasting politics. Coming-together differentiation is the art of negotiating overarching governance. The purpose of the enterprise is in the forefront, namely the benefit of gaining scale in the provision of a collective good. There is a wide menu of possibilities: two-speed or multi-speed differentiation, targeted policy opt-outs, Europe à la carte (Schimmelfennig, Leuffen, and De Vries, 2023). When EU citizens are quizzed on the desirability of these options, one finds quite high levels of support for pragmatic adaptation to diversity (de Blok and De Vries, 2023; Schuessler et al., 2023).

When a state does gain some special exemption from a common European policy, there is often an immediate political payoff in the form of increased EU support among its citizens (Vergiolou and Hegewald, 2023). However, the bark of coming-together differentiation is usually fiercer than the bite. In general, as Leuffen et al. (2021: 83) observe, “differentiated integration affected by significant externalities is hard to sustain” (see also Kölliker, 2006). Over time, governments tend to fall into line because the costs overwhelm the benefits. Exclusion can be damaging, as in intelligence gathering, or it may impose negative externalities, as when tighter EU police cooperation on cross-border crime induces criminals to shift operations to non-cooperative states. Genschel, Jachtenfuchs, and Migliorati (2023) find that 73% of formal opt-outs in justice and home affairs, monetary union, and foreign and defense policy are not followed through.

Consequently, coming-together differentiation is ad hoc. It is a response to a demand for an opt-out from a particular policy. This may be a temporary state of affairs, as was the Danish opt out from EU military operations, or it may lapse through non-use. Holding-together differentiation is enduring, and it is played for higher stakes. The motivation goes beyond policy to the construction of the polity itself. Negotiation takes place in the shadow of constitutional deliberation. Its roots lie deep in the social fabric. Holding-together differentiation is an effort to accommodate social, ethnic, linguistic, or cultural divisions that might otherwise pull a polity apart (Choudry, 2008; McGarry and O’Leary, 2009). Recognizing diversity through enduring

differentiation may be the only way to sustain overarching governance (Cederman, Hug, and Wucherpfennig, 2022; Lijphart, 1999; Stepan, Linz, Yadav, 2011).

Jurisdictions that gain self-rule in this way often make full use of their special status (Fessha, Kössler, Palermo, 2022). In Italy, for example, Aosta Valley and South Tyrol have used their statute to pursue linguistic and educational policies that mold “a strong culture of self-government” (Palermo, 2018). In bilateral meetings with the national government, both regions have negotiated the “transfer of new competences beyond the division of legislative and administrative powers laid down in the autonomy statute” (Alessi and Palermo, 2022: 203-204).

Whereas coming-together differentiation tends to wither over time, holding-together differentiation may intensify demands for more (Brancati, 2006; Roeder, 2007; Weller and Nobbs, 2010). Separatist movements exploit differentiation to demand further concessions. The Scottish National Party, the Catalan independence movement, Flemish nationalists, and the Brexit party conceive self-rule as a means to empower autonomous institutions, reinforce a hegemonic regional identity, and induce the center to concede full independence.

Of all things, sovereignty is the most difficult to share. However, once it is divided it is hard to recombine. It is no easier for a central state to erode holding-together differentiation than it is for a region to gain it. One central state strategy is to impose uniformity by extending the same level of self-rule to all regions (Hooghe and Marks, 2016; Requejo and Nagel, 2011). The historical communities of Basque Country, Galicia, and Catalonia have fiercely resisted the efforts of the Spanish center to do precisely this (Castella Andreu and Kölling, 2022). Alternatively, a central state may re-centralize by force. In Russia, President Putin remove governors and dismiss regional parliaments to compel regions to rescind their special statute negotiated under Yeltsin. By the end of 2005, five years into Putin’s presidency, all but one of forty-six bilateral treaties had been repealed (Chuman, 2011). Tatarstan’s bilateral treaty expired in 2017 (Heany, 2019).

Conclusion

How can communities with distinctive norms sustain overarching governance? This, we argue, is the fundamental challenge of governance and it has spawned a remarkable variety of political forms. Conventional concepts—empire, federation, state, international organization—hide almost as much as they reveal about the ways in which central rulers negotiate or suppress demands for local self-rule. There are no solutions, only fixes. Differentiation breaks open the polity by giving one or more jurisdictions the special right to make their own laws. It sacrifices uniformity of governance in an effort to produce or sustain overarching governance. The premise of this article is that differentiation can be observed both among states in the EU and among regions within states.

Postfunctionalist theory posits a tension between the benefits of scale in providing collective goods and the desire for self-rule on the part of distinct communities (Hooghe and Marks 2009). At stake is not just how to provide policy more efficiently, for example, by accepting transitional arrangements, but something far more contestable—the legitimate authority of a territorial community to determine its own laws, and correspondingly, the cohesion of the polity.

Differentiation is an adaptation to the misfit between communal self-rule and overarching governance. It is an antidote to the nationalist doctrine of symmetry between nation and state. If the national state was the only meaningful solution to the aspiration for self-rule, territorial minorities within states would be confronted with an all-or-nothing choice: submit to central control or seek to secede. The irony of secession is that most breakaway states also contain territorially concentrated minorities.

This draws one to reassess the meaning of stateness. The developments documented in this forum piece and in the special issue undermine the essentialist notion of the state. They do this by creating institutional outcomes that question the idea that a state imposes the same laws throughout its territory. In short, comparing countries as if they were coherent units tells us less and less about how populations within them rule themselves. Conventional definitions of stateness emphasizing sovereignty and a monopoly of legitimate coercion are the wrong place to begin an inquiry into governance. A one-size-fits-all approach has given way to a differentiated approach tailored to the demands and conditions of different jurisdictions within a polity. Differentiation extends the repertoire of multilevel governance by finding ways in which distinct communities can co-exist within an overarching polity.

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¹ Our concern here is with *internal* differentiation. *External* differentiation describes a situation in which one or more policies are adopted by states that are not members of the EU. There are several examples of external differentiation at the subnational level, where formal cooperation arrangements emerge among subnational authorities across national borders, including the Maas–Rhine Euroregion, which combines five subnational authorities straddling three countries (Knippenberg, 2004; Sousa, 2013; Svensson, 2021).

² Stein Rokkan viewed peripheral distinctiveness as a persistent response to political integration: “For each process of centralization there is a corresponding effort of boundary accentuation, of attempting to preserve peripheral distinctiveness: juxtaposing the process of cultural standardization, for instance, is the peripheral concern for maintaining a separate identity” (Rokkan and Urwin, 1983: 14; Rokkan et al., 1987: 51).

³ An externality exists when an agent (A) affects an agent (B) but neither compensates B for the harm to B nor receives compensation from B for any benefit to B.

⁴ The theory of externalities will not settle the conflict. Externalities are not objective facts but are subject to interpretation. Whether a policy harms those in a neighboring jurisdiction is an ethical judgment. One may feel harm when it is inflicted on others, irrespective of whether one is directly affected. In this light, a community can be defined as a moral collective in which harm and benefit are shared.

⁵ Milián et al. (2021) find that disputes over “identity and self-governance claims” are present in 59% of armed conflicts.

⁶ The three exceptions are the city-states of Callao, Pattaya, and Chandigarh. The port city Callao north of Lima (Peru), an early strategic Spanish colonial outpost, received constitutional autonomy in 1836 in exchange for supporting the Peruvian-Bolivian confederation. Pattaya in Thailand received special status in 1978 to facilitate tourism. Chandigarh has distinctive status as a Union territory since 1966, when it became the joint capital of Punjab and Haryana after the partition of greater Punjab. A solid majority of Chandigarh is Hindu and speaks Hindi, like Haryana, which sets the capital culturally apart from the Punjab where the majority speaks Punjabi and adheres to the Sikh religion.

⁷ Differentiation is defined as durable if it continues for thirteen years or more. Differentiation that is less durable is chiefly an instrumental or functional means for a new state to adjust to EU policies (Leuffen, Rittberger, Schimmelfennig, 2021; Schimmelfennig and Winzen, 2014).

⁸ In a referendum on June 1, 2022, 66.9% of Danish voters authorized their government to scrap the defense opt-out. The referendum was triggered by enhanced insecurity after Russia’s invasion of Ukraine.