Chapter 13

Sovereignty and Solidarity: EU and US

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I. Some Stylized Facts About the EU's Democratic Vocation

In a world that still venerates democracy's principles but regularly despairs of its practice, the nascent political order of the European Union (EU) is a crucial test case. Can the ideal of self-government be extended to this new setting, with its welter of problem-solving committees, processes, and reflection groups that appear to lie beyond the reach of popular direction and accountability? What does the prospect of this extension tell us about the possibilities of popular sovereignty and redistributive solidarity when politics extends beyond current national political boundaries? And what does it tell us about the possibilities of democracy itself?

To address these questions, we begin with a stylized description of the EU. Although the elements of the description are not completely, uncontentious, they command sufficient agreement that they must be respected by any theoretical characterization of what the EU is and what it might become.

Judged simply by its ability to survive, the EU is a success. 'Unity impossible, collapse improbable', is the grudging acknowledgment of a British observer inclined to euro-scepticism (Garton Ash 2001: 60-7). In a dynamic environment, where the basic terms of collaboration remain uncertain but paralysis would soon lead to breakdown, existence itself is an achievement. In particular the EU is managing to reconcile two tasks, each of which is extremely demanding even without the constraints imposed by pursuit of the other. Thus it is achieving an integrated market by eliminating obstacles to internal trade—in particular by mutual recognition of norms of commercial exchange (as urged by the European Court of Justice),[1] and by their harmonization through other means—while also protecting public health and safety, avoiding regulatory races to the bottom and possibly initiating some races to the top. To be sure, outcomes differ by policy area, with greater harmonization, and at a higher level, in safety devices for machines than in highway or railroad transport, and more in transport than in taxation. But areas that seemed intractable ten years ago—such as transport, education, immigration and asylum—are no longer so. And areas such as taxation—that seemed indissolubly linked to the traditions and practices of individual Member States, and natural instruments of competitive conflict—now seem at least in principle possible arenas of harmonization.[2] Whatever the precise extent of regulation, dark predictions of a new laissez-

faire order, established beyond the reach of existing national regulatory regimes, have been overturned by events.

Moving from policy to process, the EU is producing the regulatory setting for the integrated market through new forms of rule-making issuing in open-ended rules. One well-studied example is *comitology*. This system of expert committees, appointed by the Member States, works with the Commission and drafts regulatory proposals for areas such as telecommunications equipment, foodstuffs, cosmetics, or pressure vessels. In principle decision-making in these committees is by qualified majority vote. In practice they operate through deliberation — (self-) reflective debate by which participants reason about proposals and are open to changing their own initial preferences — aimed at consensus. Committee deliberations are driven by the comparison of differences among current regulatory systems in the Member States. Such comparisons permit identification of best practices that serve as the starting point for a detailed, harmonized regime. Because the Commission is formally implementing decisions of the Council, and the committees are formally assisting the Commission, comitology preserves, though just barely, the appearance that a sovereign lawgiver — the EU in the guise of the Commission and the Council—is setting the rules (Joerges et al. (eds.) 1997; Joerges and Vos (eds.) 1999; Van Schendelen 1998; Christiansen and Kirchner (eds.) 2001).

A more recent and encompassing version of this kind of regulatory device — a decentralized specification of standards, disciplined by systematic comparison — is the Open Method of Coordination (OMC). In the OMC Member States agree to formulate national action plans to further, say, employment promotion. These plans integrate, and adjust their policies in related, but typically distinct areas such as training, the operation of the labor market, taxation, and aspects of social security. The plans are periodically criticized by a panel of expert officials from other Member States in light of other plans, and each country's performance is judged against its own goals, the performance of the others, and its response to earlier rounds of criticism. The exact mechanisms by which the OMC is applied differ between policy areas, especially with regard to the thoroughness of peer review and the sanctions for lax response by Member States. These (sometimes significant) differences aside, the goal here too is mutual correction, not uniformity, and here too peak-level consultation among experts grows out of and reflects back upon a broader process of consultation. The extent to which that consultation ramifies into the larger society—the extent to which deliberation by policymakers is connected to broader democratic debate and practice— is an open question.[3]

The OMC formalizes and makes manifest a form of policy making that the EU has applied to encourage an integrated approach to economic development regionally and to social inclusion — as a response to grinding poverty — locally. With regard to social inclusion, for

example, the EU typically funds at the municipal level a public-private partnership whose members are drawn from NGOs and the relevant statutory authorities (the welfare department, the training service, and so on). Organized as a not-for-profit corporation, this partnership solicits proposals to combat social exclusion from local groups, which may themselves be public-private partnerships organized as non-profits. The most promising proposals are selected and reviewed periodically in the light of their ability to achieve their goals, and the achievements of other projects in the parent company's jurisdiction. In addition to monies provided by the EU, funding for projects often includes resources formally allocated to the statutory agencies and placed at the disposition of the local partnership by board members with the approval of their home department. The performance of the parent company is, ideally, evaluated by comparison of its projects to those of its peers nationally and within the EU. But practice and ideal typically have only a nodding acquaintance in this regard. As in the case of the OMC, integrated programs that reflect the peculiarities of their contexts emerge through iterated, critical comparison of local initiative (Sabel 1996; Geddes and Benington (eds.) 2001).

The European Court of Justice (ECJ) has tolerated these innovations in regulatory process, despite their tenuous connection to the constitutional structure, such as it is, of the EU (or any other advanced democracy, for that matter). In particular, the ECJ has not substantially limited the cascading delegation of authority by the EU or Member States to experts or to public-

private partnerships, and from them to actors in civil society. Instead, the ECJ has from time to time sought to regularize, if not 'constitutionalize' them. Thus the ECJ requires that comitological deliberations be generally transparent to the public, respect the full range of reasonable argument, and strictly apply certain other rules of procedure.[4] The ECJ has arguably itself encouraged a roughly analogous form of rule making by occasionally using its case law jurisprudence to articulate frameworks within which the parties, after extensive collaboration with affected interests, must construct concrete solutions. Is this de facto collaboration between the ECJ and the Commission a marriage of convenience, an expression of judicial deference or defeat, or an intimation of an emerging (if imperfectly grasped) understanding of a new form of democratic constitutionalism?[5]

So the EU is having some success in reconciling market integration and protection of public health and safety, creating integrative actors regionally and locally, and fostering deliberative policy-making in the regulatory surround of the single market. Moreover, the Commission and the ECJ (a de facto constitutional court) are amicably cohabitating. Nevertheless, the EU manifestly suffers from a 'democratic deficit'.

Most notably, it has failed to engage the attention of a European electorate. Turnout for elections to the European Parliament has declined steadily from some 60 per cent of the eligible voters a decade ago to some 50 per cent today, and would decline further still were it not for

compulsory voting laws. Neither has it fomented, beyond the formalities of elections, the creation of an engaged European public sphere or a European demos, debating the future of a European polity.

Indeed, the EU has failed to give its political institutions even the gross outward trappings of constitutionality. It is unclear, for example, whether the EU legislature is the Council, comprising representatives of the Member States, or the European Parliament, with its represented deputies. More exactly, it is clear that whenever the co-decision procedure applies — and it is the most common option — Council and Parliament are co-equal in the legislative process (see article 251 EC). A further complication arises from the Commission's agenda-setting powers. Is it an administrative or executive organ of government? It is commonly and correctly remarked that the EU would not admit itself to membership, because it lacks the conventional features of representative democracy required of applicant countries.[6]

But — and now the stylization gets more complicated and for that reason more interesting — while the EU faces a democratic deficit, it is not entirely unaccountable, and not only because national level accountability is inherited at the EU level. In the 1990s the Member States have convened themselves in a nearly continuous series of 'intergovernmental' conferences (IGCs) and semi-annual European Council sessions, supplemented by the periodic formation of high-level reflection groups. These overlapping meetings would be called an

extended constitutional convention if the result — or aim? — had been to establish a document with the foundational character of a constitution (Smith 2002). Instead the main results have been, by traditional standards, meta-constitutional on the one hand and sub-constitutional, verging on the operational, on the other. Meta-constitutionally the IGCs and their offspring have explicitly authorized the EU to extend its competence to areas such as health, education, and protection against discrimination not contemplated in the treaties establishing the EU. Through the (non-binding) Charter of Fundamental Rights they have taken a step towards eventually founding or conditioning the law of the EU treaties and the ECJ on a jurisprudence of human rights, including such of these as begin to give substance to the idea of 'social Europe'. Sub-constitutionally, or, if you like, extra-constitutionally, they have produced innovations such as the OMC (Craig and de Búrca 1999/2003). Is it political blockage or insight into the limits of the traditional notions of the separation of powers that hinders efforts at the intermediate level? Why the continuing oversight of the Member States has not issued in constitutionally conventional (re)form is, in any case, another open question.

The traditional social partners—labor unions and employers associations—can also be said to be actively acquiescing in, and in some measure validating, the new EU order. This claim seems of course absurd from the vantage point of German, British, or French experience. In these large countries the EU, and globalization more generally, is seen as shaking the

foundations of the labor movement. But in the small countries, such as Ireland, Portugal, the Netherlands, or Denmark, labor participates in various social pacts that make it, with capital, a partner in national adjustment to the new, EU context. Whether these pacts are durable, and whether they create 'new actors' in the sense of the EU regions and localities noted above, or rejuvenate traditional, neo-corporatist arrangements, are also open questions.[7]

These limits on the size of the democratic deficit notwithstanding, EU governance in general, and the success of its innovative rule making in particular, depend on the participation of experts who are not accountable by the familiar methods of legislative oversight or judicial review. Technical experts are crucial to the committees of comitology, and to the OMC. But these technical experts play a novel role. Efforts to integrate discrete solutions in new regional and local institutions and in the OMC explicitly obligate participating experts to revisit their assumptions in the light of the experience of peers in related disciplines. Comitology teaches a similar lesson about the ambiguity and insufficiency of disciplinary knowledge by exposing experts to disparate solutions that an apparently homogeneous body of professional knowledge — their home field — warrants. Whether this opening by experts to outsiders in processes of practical deliberation extends to inclusion of laypersons — even as knowledgeable 'clients' or 'expert users' — in the circle of decision making is an open question. Whether such inclusion,

assuming it exists, is extensive enough to influence our understanding of democratic participation and accountability is more open still.

Despairing of the see-saw character and sheer opacity of the debate about the EU's democratic accountability, moved by concern for popular control, or simply anxious to forestall 'populist' rejection of globalization in one region, the EU's elites have, finally, convened a constitutional convention in Brussels. Its current focus of attention on conventional proposals and its compulsive sideways glances at the EU's own unconventional practices together capture the yearning for normalcy and the thrall of experimentation that grips the Union today.

For now debate in the convention focuses on normalizing the EU by endowing it with the two classic elements of democratic constitutions dating to the French and American Revolutions: a statement of inalienable rights (enumerated recently in the Charter of Fundamental Rights of the European Union) and a *Kompetenzkatalog* delimiting the powers and privileges of the various branches and levels of government. The most salient such catalog is the German proposal to restructure the EU on the model of the Bundesrepublik, with a bicameral legislature consisting of a parliament of Euro deputies elected by direct vote of the citizens and a senate with members appointed by the governments of the Member States.[8]

But off stage there is acknowledgement and discussion of the two de facto abnormal efforts at constitutional reform noted above: the IGC and the OMCs. Both are constitutional

insofar as they plainly allow the Member States, as masters of the EU's founding treaties, to extend the competence and transform the decision making processes of the EU in ways not currently authorized by treaty provisions. Both, but most especially the OMCs, are constitutionally anomalous in that they foster integration across levels of government and between branches of government: they connect what the *Kompetenzkatalog* would sunder. More worrisome still, from the traditional perspective, the OMCs might come to shape the more detailed understanding of rights, rather than merely 'implementing' them: subject to international treaty provisions, the right to asylum in the EU could be shaped as much by the interpretation of practice through the OMC as by decisions of the EJC.

The connections between the traditional debate and consideration of the abnormal constitutional projects are more intimate than appears. The experienced politicians attending the Convention are well aware that even cosmetic democratization of the formal relations among EU institutions could easily limit the effectiveness of current methods of decision-making. Allowing the European Parliament to enhance its control of the Commission by electing some proportion of Commissioners, for example, would likely set off strategic games in both institutions that could undermine the Commission's crucial role as a convening 'neutral' in comitological and other regulatory processes. More generally, and unintended or higher-order consequences aside, political operatives know that cosmetic solutions face a deep problem. A fundamental

constitutional defect of the EU, from the traditional point of view, is the delegation or dispersion of state authority from formal organs of government to non-state actors. Reforms of gross constitutional framework that leave this 'defect' untouched will change only appearances. But the 'defect' also appears to be the source of regulatory success. So really eliminating it—by turning current regulatory arrangements into the administrative agencies of a newly constitutionalized Eurostate—may buy gains in conventional democracy at the cost of problem-solving efficacy.[9] In any case, given the dangers of inadvertently subverting problem solving by cosmetic reform, and the persistence of traditional differences regarding how to accomplish even the latter—the French are famously allergic to the word 'federalism' when sounded with a Germanic accent[10] — the convention is much more likely to produce constitutional rectification than a constitution.

So what is the EU? We suggest four answers, each based on a reading of the stylized description considered thus far: the EU as technocracy, as association of associations, as Eurodemocracy founded on a transnational public sphere, and as deliberative polyarchy. Each provides a different way to understand the relationship between arenas of deliberative problem-solving and democratic possibilities. Each draws on a distinctive idea of sovereignty in relation to solidarity. This relation in turn suggests a characteristic understanding of regulation and redistribution and the connection between them. Each pairs with a distinct concept of

democracy. Finally, each reading of the EU also suggests a corresponding reading of US experience. In presenting the views we will be at pains to put the best face on each without disguising our preference for the fourth polyarchic understanding. As you might expect, the first three readings run afoul of the stylized facts, while the last—and in particular, its democratic potential—is hostage to the eventual answers to the open questions.

II. No Sovereignty, No Solidarity: The EU as Technocracy

The technocratic view currently dominates European discussion of the EU, at least among the intellectuals, and quite probably among Eurocrats as well. It assumes that there can be no democratic sovereignty in the EU because democracy requires a demos; and there is, as the Bundesverfassungsgericht has famously determined, no European demos.[11] The demos is a precondition for popular sovereignty in this view because unless the citizens are as one, united by language, history, and sentiment, they lack the coherence of judgment and will needed to personify themselves in the legislature. As it is the people's will, reposed in the legislature and providing the democratic substitute for the will of the monarch, which gives substance and

validity to the law, there can be no democracy without a people, and—on this first reading—no people without distinctive bonds of history and sentiment.

As with democracy, so with solidarity.[12] Underlying the technocratic view is the idea that we are capable of sympathy only with others who are substantially like ourselves. A demos is founded on a solidarity of sentiment, an identification of citizens with each other and sense of common belonging, which allows the sharing of material things precisely because such sharing is not selfless—in the limit, not a self-sacrifice for others, but an expression of a larger sense of self. The demos is thus the precondition not only of the nation but of the welfare state; without the demos, conversely, we let the market take the hindmost.

On these assumptions the successes and failures of the EU are the marks of technocracy at work. Regulation succeeds where it does—in setting rules for machinery safeguards which protect workers from accidents, not machine-tool makers from imports—because rules make orderly markets, and orderly markets advance the interests of citizens as producers and consumers. Regulation is less possible—in certain areas of pollution prevention, for instance—when it threatens the competitive advantage of producers in a position to oppose it without providing benefits to citizens, which might move to overcome the opposition. (When, as noted earlier, efforts to regulate succeed despite the apparent logic of interests, this is because political forces at the national and EU levels can accidentally align to favor outcomes that the parties

would not have reached in institutional settings of their own choosing.) Redistribution, understood as the correction of market outcomes, and thus wholly distinct from market-defining regulation, can occur by accident. Rule systems may have redistributive consequences, even without redistributive aims — for example, as a result of political bargains, in the form of side payments to particular groups to induce compliance with rules whose enforcement they can disrupt and whose costs they fear. But redistribution is never systematic, the expression of solidarity and sharing, or a sense of fairness or justice that transcends minimal entitlements to personal liberty and security. Hence 'social Europe' will always remain a meta-constitutional aspiration, not a reality.

In this world the master skill is expertise in effective rule making in the specialized domains requiring regulation; and power flows as a result to the technocrats who possess it. Comitology and the OMC are effective not because they compel comparisons of difference but rather because they subtract decision-making from the public and entrust cloistered experts to sort through intramural disputes that are circumscribed by a technical consensus that excludes real alternatives (if those exist at all). The collaboration of Commission and ECJ assures the dominance of market-making regulation over redistribution, occasional political (mis-) alignments notwithstanding.[13] The new regionalism and the policies to combat social exclusion are payoff to a potentially disruptive periphery dressed up as policy innovations. The social

partners, labor unions in particular, 'acquiesce' in all this, when they do, because there is a gun (the threat of capital flight) to their head.

All of this is not necessarily undemocratic, because technocracy exercised to the benefit of those whose lives it governs, and recognized as beneficial by its beneficiaries, can be thought of as achieving the democratic value of government for the people. Moreover, the Europe as technocracy view goes together with a minimalist, principal-agent understanding of representative democracy. In this view a polity is a democracy just in case its principal-citizens can vote out their agent-officials whenever they judge the performance of the latter to be unsatisfactory. If, having this recourse, the principals nonetheless allow crucial aspects of their lives to be governed by technocrats — perhaps because the technocrats are having some regulatory success — the outcome is properly seen not as usurpation by an elite, but rather as an expression of democracy's recognition of what it can efficiently manage by its own methods (Moravcsik 2002; 2001). When European commentators fret that EU citizens need to be more visibly in control of their agents, American commentators may take the relative calm of EU politics as a sign that all is in a possibly precarious equilibrium, which might be perturbed by further discussion of democracy, even the minimalist, principal-agent kind.

The US figures in this account principally as a model for organizing the administrative state on a continental scale, under conditions of diversity. The success of the New Deal

administrative agencies such as the Securities and Exchange Commission show in this view that it is possible and, broadly speaking, profitable to entrust market making to insulated technicians (Majone 2000).

The most conspicuous shortcoming of this view is that it systematically under-predicts the scope and level of regulation in general, and social regulation in particular, of which the EU is capable. The articulation of emergent standards for employment promotion and even the reform of the welfare state through OMC are at odds with an understanding of the EU as a market-making technocracy. Explaining away such anomalies as the outcome of unusual political alignments looks more like a compensating fallacy — correcting one erroneous assertion with another — than a fruitful elaboration of the original view. Indeed the idea that there would be at least some efforts at market correction and redistribution accompanying the creation of a single market should have come as no surprise. After all, the idea that the orderly functioning of society requires political efforts to correct market imbalances antedates in Western Europe the practice of democracy — and the relatively homogeneous peoples now associated with nation states. And if it is surprising because of the assumption that such correction requires strong national solidarities, so much the worse for that assumption.

In addition to mischaracterizing the scope of regulation, the technocratic reading mischaracterizes the character of EU regulation. It is now a commonplace of progressive legal

criticism to unmask the politics underneath allegedly technocratic regulation. But the political character of EU regulation is openly acknowledged by the participants. The differences in beliefs and values that make recourse to comitology and OMC necessary undercut any clear distinction between political and technical considerations, and *a fortiori* any idea that regulation is about finding and imposing a single, technically correct solution. (Indeed we will want to argue later that the political character of OMC and comitology — that they are not simply means for implementing legislatively fixed values and goals — invites consideration of how to craft a new form of democracy, integrated closely with these regulatory processes.)

Apart from underpredicting 'social regulation' and mischaracterizing EU regulation as technocratic, this first reading is founded on a wildly optimistic and empirically unfounded faith in the power of technocracy. Here the references to the New Deal and the US administrative state — the goal towards which, in this first reading, the EU, *faute de mieux*, is tending and should be striving — are particularly revealing. In American eyes the state of that state is sorry, certainly nothing to emulate. US administrative process is almost invariably described as 'ossified': agencies simply can't make new rules, even where there is near universal agreement of the need to do so. Commentators are happy to apportion to blame among all the actors: the courts made it easier for affected interests to have a say in administrative proceedings in the 1960s and 1970s, thereby turning the agencies into mini-legislatures. Congress passed highly

detailed statutes — the Clean Air and Water Acts — that deprived agencies of the flexibility needed to adjust to changing circumstance. The executive imposed review requirements — cost-benefit analysis — that made it easy for private actors and dissidents with government itself to frustrate administrative action, and so.[14] Thus from the US point of view, at least as we understand it, emulation of the US, conventionally taken as the paragon of technocracy, will make things better for the EU only by accident. A theory that suggests otherwise diverts attention from just what, on the basis of US experience and the 'facts' listed above, needs to be explained: that the EU is succeeding at regulatory tasks, at least as well as others, by use of novel means — the method of benchmarking comparisons in comitology and OMC — which do not seem to respect the distinction between market-making and social-protection policies.

Given these objections we pass on the reading of the EU as a technocracy, and consider the Union as an:

III. Association of Associations

The second, associative reading of the 'facts' is much more resolutely European than the first in the sense of seeing the EU as the extension or generalization of distinctively (though not

uniquely) European ideas of political conviviality and democracy. It takes its inspiration on the one hand from such 'complex' nations as Switzerland or Belgium. In these consociational democracies diverse ethnic groups agree a common citizenship on condition that each obtains, as a group, the right veto powers that protect it against predation by the others.[15] On the other it is inspired by systems of neo-corporatism, in which peak organizations representing, say, labor and capital, bargain within a framework created by the state to reconcile the interests of their members in a way consistent with the common good (Schmitter (ed.) 1977).

The associative view inherits from its consociational and neo-corporatist inspirations the idea of sovereignty as plural. Unity of judgement and will is not found at the level of the demos, but in quasi-natural or, perhaps, primordial groups — ethnic, religious, occupational, gender-based, political, and so on. Within each group members identify with each other as do citizens of the demotic nation. Groups are bound to each other, and thus drawn into encompassing political formations, by a solidarity of complementarity: Labor and capital are mutually dependent, even if they compete in trying to capture the gains of their cooperation. The Swiss cantons are divided by language and faith, but historically united in resisting intruders in the name of a common freedom that none can secure alone. The solidarity of complementarity that results is too calculating to count as selfless, but too constitutive of the actors, too central to their being, to be purely self-serving.

Regulation and redistribution collapse, at the limit, into each other in this view. The rules of conduct and the rules of sharing are decided together, simultaneously or nearly so, in the continuing bargaining between the plurally sovereign groups. Indeed the state acknowledges and validates the sovereign character of the groups, and the limits on its own pretensions to (unitary) sovereignty, precisely by lending its legitimacy to the bargaining regime that in effect constitutionalizes private groups, allowing them to make rules and redistribute wealth in the public's name. Or, looked at from the perspective of the groups themselves, the state is the association of associations, their coordinating instrument, not their sovereign master.

Democracy in this conception is social democracy: the view that democracy can only be an effective form of self rule by openly taking as much account of what differentiates citizens as members of different social groups as of what they share as members of the same polity. But the more the legislature enacts the program of social democracy, passing powers to social groups, the less central it remains to law making. Carl Schmitt, no friend of democracy in any form, took particular delight in contrasting the pretense of parliamentary sovereignty in the Weimar Republic with the reality of corridor deals among the parties of Weimar social democracy (Schmitt 1985).

From the point of view of this Euro-centric argument the US is a contrast pole or antipode. Capitalism in Europe in this view is organized by bargaining among peak associations.

The market prevails in the US, with employers and employees essentially bargaining as individuals. European politics acknowledges enduring difference by granting groups veto rights over fundamental decisions and enfranchising minorities through proportional voting. The US favors first-past-the-post elections where the majority winner takes all, and the US Supreme Court debates incessantly whether the mention of minorities, even with the express intention of protecting them from discrimination, violates constitutional guarantees to equal respect for all citizens.[16] Where the first reading treats the New Deal as the advent of the administrative state, the second scarcely acknowledges that it occurred at all, the (neo-corporatist) Wagner Act notwithstanding. (Whether this historical omission is relevant to the understanding of the current situation, or the larger juxtaposition of organized and unorganized capitalism is, of course, a nice question. Just as ossification is the centerpiece of discussion of the administrative process in the US, so the demise of the Wagner Act is central to discussion of the labor law regime (Barenberg 1994).

As applied to the reading of the EU, the associative thesis suggests that no demos is not necessarily a problem. If Switzerland, Austria, the Netherlands, and (on good days) Belgium can manage nationhood in the sense of full participation in the world order without benefit of traditional nationality, why can't the EU manage the same? The argument applies a fortiori if devolution of British sovereignty to Scotland, Wales and Northern Ireland is a harbinger of a

general return to the pre-Westphalian heritage of a complexly national Europe. Dropping the demos as a precondition of political will or self-government broadly speaking in turn opens the way to thinking of the EU as a Europe *à géométrie variable*: an association of (the associations of) monetary Europe, security Europe, the Europe of the regions, social Europe, and others to come, whose respective Member States overlap without ever fully coinciding. The EU on this reading is not a political accident but a congeries of potentially meshing political projects that can succeed separately and together precisely because they are not all of a piece.

This reading, moreover, begins to make sense of 'facts' that the first treats as spurious. Why has a decade or more of constitutional convening not produced a constitution? Because the Member States were working through the rules of 'functional representation' for the many Europes of the EU, not aiming to constitute a (supranational) nation on the model of the French and American revolutions. What is the meaning of the resurgence of social partnership among the small nations? The EU, having disrupted organized capitalism by substituting one central bank for many, is now sufficiently stable so that the social partners can reorganize themselves again.

But the interpretative possibilities that this reading opens by relaxing the grip of the no-demos assumption and admitting the feasibility of a polycentric EU it obstructs again by the assumptions it makes regarding the sovereign character of the social actors that count. The

'functional representatives' are presumed to (almost) already exist with something like the internal cohesion and well-ordered capacity for self-determination of an occupational group. The problem for politics is, as suggested a moment ago, creating a regime that identifies and legitimates them, typically by authorizing and stabilizing bargaining relations among complementary groups.

The second reading thus shifts attention to the creation and conditions of legitimacy of the bargaining regime — the social pact as the real key to political democracy — and away from what might be thought of as the inputs and outputs of the latter: the formation of the actors and the complex of rights, regulations and redistributive rules that they may agree. This is why one of the most interesting associative accounts of the EU, Schmitter's (2000) *How to Democratize the European Union*, devotes only a paragraph to regulatory outcomes, including 'equal treatment of women and part-time workers, better consumer and environmental protection, emergency medical care and legal help when traveling within the European Union, fair competitive practices between firms, uniform conditions for company formation, minimal health and safety standards'. These 'aspects of "market membership"', moreover, 'have only a limited impact on the quality of "political citizenship"', which depends on the public's control of the formation of the bargaining regime itself (*ibid*.: 33-4).

But what if the actors and the regime that connects them are both in some sense the product of the rule-making or regulatory process, rather than being preconditions for it. Then the associative reading would be confusing cause and effect, along the way trivializing outcomes — rules and rights — that have profound effects on everyday life and form the starting point in turn for the (re)-elaboration of what might amount to or take the place of constitutional regimes. Put another way, it would be to look for mono-directional causality where we should be searching for reciprocal influence. The OMC seems to work by such a process, and comitology and the new social pacts may do so as well. And what if such a 'processual' regime led to actors whose membership was too open to revision to be consistent with the notion of an occupational group or a 'functional' sovereign'? There is more than a hint of such openness in the social inclusion partnerships, the OMC, and, again, perhaps comitology and social compacting.

These troubles with the stylized facts suggest that the associative view has stopped in mid-stream. Dropping the idea of unitary sovereignty, of the people personified as the starting point for political will and accountability, allows us to make sense of the EU as an open political project rather than the plaything of technocrats. But making the protagonists of the many Europes of the EU sovereign lords of their little realms makes it hard to come to grips with their most innovative achievements, in both regulation and political construction.

The difficulties with the first two readings suggest two possibilities. The first is to preserve a unitary democratic sovereignty, drop the assumption that democracy requires a substantive demos, and connect democracy instead with a public sphere founded on open discussion among equal persons — a discussion freed from overriding group solidarities and everyday practical entanglements, about the broad purposes to which collective power should be devoted. Put otherwise, the idea would be to achieve a form of old-style democracy, but on more cosmopolitan terms. The second is to drop the assumption of singular sovereignty as well as the assumption of a substantive demos, and to imagine a world where sovereignty is plural, and politics is not founded on the kind of cohesion we associate with the nation or the occupation: that is, to achieve a new form of democracy that frees cosmopolitanism itself from its traditional and self-defeating disengagement from practical problems. We consider these readings in turn.

IV. The EU as Emerging Eurodemocracy

A third reading of the EU as an emerging Europolity is animated by a more ambitious idea of democracy than the first two. In this view, democracy is neither reduced to minimal electoral control of distant officials, as in the technocratic conception, nor limited to a fair arrangement for group bargaining, as in the associative interpretation. Instead current developments are seen as the intimating both the need for and the possibility of a new public sphere: and agora for our day

that both comprises and transforms the public spheres of existing states so as to provide communicative direction to a new Eurodemocracy.[17] Put another way, the creation of the Europolity promises to restore the unitary sovereignty of the traditional state (the goal of the first view) while restoring effective democratic power to society itself (the goal of the second), and to do both without delivering the citizens into the power of bureaucrats or interest groups.

At the core of the Europolity view is the assumption that the increasing complexity and diversity of the EU drive public debate to focus more on the matters of principle governing life among free and equal citizens, and less on situations of fact. As new market and regulatory arrangements take hold across existing political boundaries, and individuals and groups see the fateful import of these arrangements, the public-sphere view expects a corresponding shift in the public debate about the exercise of collective power. Given a background of assured rights of participation, communication, and association, deliberation between and among equal citizens — and the parties, movements, and groups they form — will concentrate more on the Europolity and less on national politics. Moreover, as the Europolity shifts from a collection of functionally specific problem-solving agencies to a genuine polity, deliberation will focus more on the guiding principles and values for the polity, and less on concrete policy.[18] The more cautious advocates of the enlarged public sphere may doubt that the new, transnational solidarities will displace traditional national attachments or prove robust enough to create anything approaching a

free-standing polity. But whether they see the new public sphere as a complement or substitute for current loyalties, proponents of this view expect more cosmopolitan solidarities to emerge as surely from the newly encompassing political institutions as, historically, nations emerged as creations of states, rather than as their prior subjects.

In the most boldly idealized form of a new Eurodemocracy, popular sovereignty does not reside in a substantively-defined demos. Sovereignty emerges rather in the dispersed process of informal discussion about broad principles and programs. The values formed in this procedurally defined sovereignty become authoritative in laws enacted by an empowered European Parliament that translates values into laws. These laws are then implemented by agencies under the Parliament's watchful eye. European courts protect the rights of democratic process required for the formation of the people's will, and ensure that agencies faithfully carry out the legal expression of the results of the results of discussion as expressed through elections.

Regulation and redistribution depend on this view not on technical necessity or bargaining, but rather on the implications of the communicative principles informing the new public sphere. Commitment to unconstrained deliberation among equals is said to entail commitment to providing citizens with the capacities actually needed to deliberate. So construction of the new public sphere will grow from and contribute to the realization that citizens require a whole range of resources — from schools to new mass media—in order to

participate in the public life that guides their collective endeavors. If there is any historical precedent for this ideal, it is the early nineteenth century US, with its famously boisterous civil society and its simple, limited machinery of state (Habermas 2001).

As this historical reference suggests (and its self-consciously radical understanding of democracy notwithstanding), this public sphere interpretation is surprisingly conventional, even nostalgic in its understanding of politics. This nostalgia is particularly ill-suited to the novel facts about regulatory policy and process sketched in our stylized facts. Because the difficulties will be familiar from the technocratic view, we pass them quickly in review.

First and foremost, the public-sphere interpretation shares an implausible conception of the administrative state with the technocratic view. Both draw a sharp division between an arena of public deliberation that confines its attention to and fixes the content of broad goals and priorities, and administrative agencies that, in the ideal case, faithfully implement those goals by choosing effective means to their achievement. Both assume a sharp distinction between setting goals and choosing means. On both views, the regulatory state can be made consistent with democracy by ensuring that elected officials, acting behalf of citizens, present clear rules and standards to agencies, and that those agencies confine their activity to the efficient implementation of those rules and standards, subject to external monitoring.

Quite apart from the EU setting, this conception of a depoliticized administration of standards set out ex ante is widely discredited. 'Agency' problems are the notorious weak link in the minimalist views of democracy that accept any duly elected legislative authority as a legitimate 'principal'. In aiming to realize both a greater articulation of the public will, and a tighter connection between that will and technical decision making, the project of a new public sphere theory can only increase the gap between what is expected of the technicians and what they deliver. More concretely, with EU political deliberation now so concentrated in regulatory processes that involve substantial elements of delegation and thus lie beyond the reach of conventional legislative oversight, the public sphere conception is so far removed from evolving practice that it cannot serve as a guide to reform.

Indeed, it may be that awareness of this impracticability explains the distinctive vacillations of proponents of this view. Born aloft by hopeful expectation of a cosmopolitan democracy, they soon sink in despair of fulfilling that expectation, only to be propelled upward again by enthusiasm for experiments in deliberation whose disconnection from practice, routine or emerging, is seen as a precondition of their success.

What, then, of the possibility of a practical cosmopolitanism that does not sacrifice its dedication to democratic principle by actually engaging in problem solving?

V. Europe as Deliberative Polyarchy

Consider now a world in which sovereignty — legitimate political authorship — is neither unitary nor personified, and politics is about addressing practical problems and not simply about principles, much less performance or identity. In this world, public is simply an open group of actors, nominally private or public, which constitutes itself as such in coming to address a common problem, and reconstitutes itself as efforts at problem solving redefine the task at hand. The polity is the public formed of these publics: this encompassing public is not limited to a list of functional tasks (police powers) enumerated in advance, but understands its role as empowering members to address such issues as need their combined attention.[20]

Solidarity here rests neither on a sentiment of identity nor on a complementarity rooted in the division of labor. Rather it is both moral and practical. Moral, in that individuals recognize one another as moral agents entitled to be treated as equals; practical, in that they are bound to each other by the recognition that each is better able to learn what he or she needs to master problems through collaboration with the others whose experiences, orientations and even most general goals differ from his or her own—a recognition that both expresses and reinforces a

sense of human commonality that extends beyond existing solidarities. Such practical attachment is fostered by a pervasively uncertain world, where even the strongest have reason favor a division of investigative labor to incurring the risks of choosing and executing a solution alone. In such a world the practical benefits that flow from constant testing and reexamination of assumptions and practices that defines a public provides a powerful motive to participate in collaborative problem solving on equal terms. Conversely, the cultural homogeneity and intellectual closure of the demos and occupational group obstruct cooperation in this setting as much as they enabled it in more stable ones. Solidarity in the sense of mutual capacitating by equals can not be placed on the spectrum reaching from selfish calculation to selfless abandon because actors' preferences and identities change in the course of their joint reasoning. And its deliberation is practical — about solving problems — rather than dispassionate, senatorial reflection on clashes among deep principles, as in the traditions of civic republicanism or the upper reaches of Madisonian democracy.

When sovereignty resides in a public that comprises practical publics and solidarity is capacitating, rule making is open — the creation of frameworks within which actors are encouraged to experiment with local solutions, on condition they pool what they learn with others—and redistribution follows rule making. If actors could devise precise rules, or even confidently delegate responsibility for doing so, they might well band with their likes or

complements as the case might be and spare themselves the evident inconvenience of deliberating about difference. But the world is not with them. So the best they can do is authorize the search for best practices — promising solutions — by those in a position to judge their promise and domain of applicability, and periodically revise the general framework of investigation as results warrant.

If rule making is principally about empowering publics to explore and test solutions, so, too, is redistribution. The most promising way of avoiding unacceptable market outcomes is to explore collaboratively the sources of the risks and reduce them by re-ordering markets accordingly. This kind of risk reduction flows into regulation and becomes nearly indistinguishable from it when the latter is taken as market making subject to the protection of public health and safety broadly understood. The web of connections resulting from this kind of regulation might (indeed very probably does) redistribute resources from one group to another. But such redistribution would be the consequence of a solution adopted first and foremost to address common problems — above all, the problem of maintaining the ability to address together, as equals, unforeseen problems — not correct specific social or economic imbalances: Standards requiring that citizens be provided with ‘adequate’ or ‘current state of the art’ environmental protection, employment policies, workplace health and safety, and education and

vocational training — where the understanding of ‘adequate’ and ‘current’ is redefined in the light of experience in the respective areas — would have this result.

The OMC as applied to the development of a European Employment Strategy (EES) shows how the formation of a public relies on, but continuously perturbs and reshapes public entities and groups in civil society. It suggests as well the general architecture of the background institutions that make possible the generation of publics.

To see the relation between the activity of forming a public and the actors thus formed consider the EES that has emerged from the Amsterdam Treaty and from the ‘jobs summit’ in Luxembourg in November 1997 as a flow chart. Initial Employment Guidelines are proposed by the Commission acting chiefly through the Employment Committee (EMCO), an advisory body composed of two officials from each member state and two Commission officials. In formulating its proposals EMCO consults the European social partners — the peak associations of labor and capital — the European Parliament, the Economic and Social Committee, and the Committee of the Regions. The Commission then forwards the proposed guidelines to the Council, which must approve them by a qualified majority. Member States respond to the guidelines by elaborating annual National Action Plans on employment (NAPs). Ideally, these NAPs integrate and correct policies in such disparate areas as vocational training and continuing education, taxation, the collection of statistics, and so on. The Commission compares and

reviews the NAPs, while the Member States, acting through EMCO subject their actual labor market performance to a peer review. A Joint Report on Employment, prepared by Commission and the Council, benchmarks the employment policies of the Member States and identifies best practices. The Council can, by qualified majority vote make recommend that Member States that show badly in these comparisons conform their policies to the to the guidelines. The guidelines themselves are revised every year, and the process as a whole is reviewed every four to five years in light of experience.

One predictable outcome of the EES is attempts by the interests it threatens to manipulate the process itself. Member states and their ministers do not typically relish criticism by their peers, especially not when such criticism may provoke unrest among their domestic constituents and collaborators. A process as formal as the EES offers numerous occasions for self-protective interventions: the formulation of guidelines and the choice of peer reviewers are obvious opportunities. Early returns of reviews of the EES in action suggest that anxious members do sometimes seek shelter this way.

But another predictable outcome of the formulation of general guidelines and national actions plans, and revision of each in the light of the other, is unpredictability: obligated to explain their choices and performance, and exposed to the justifications and achievements of others in like circumstances, the actors must expect to find their constitution — their relation to

their key constituents, to each other, and to the policies they pursue — open to challenge from within and without. Some of these challenges will arise as routine response to EES questions: How does a member state's continuing and vocational education programs comport with its tax structure and pension system? What should be done about a mismatch? Some of the challenges will emerge as higher order effects of the process itself? How does participation in the formulation and revision of the NAP affect trade union federations at the national level and influence labor's understanding of the social welfare state? What are its effects on the strategies of trade unions at the local level, and their relation to the national federation?

It is next to certain that reactions will differ within and across nations. Try to imagine a mechanism that could ensure uniformity in the current, volatile environment. It is also likely that some of these reactions will cohere into alternatives to familiar models of social partnership and interest-group representation. In the new Irish social pacts, for example, the central labor and employers' federations are less focused on questions of wages and hours than before. Instead they aim to provide information and services to local branches participating in the continuing reorganization of firms, helping members manage careers on local labor markets, or participating in local programs of social inclusion — all of which entails new political combinations that potentially reshape the identity of 'labor' (O'Donnell and O'Reardon 2000)

The EES does not, of course, ensure this outcome or any other. But it makes it easier for those who want such changes to identify and learn from each other, and harder for those who oppose them for reasons that them or their current organization, rather than the public, to succeed in their obstinacy. Or that at least is the result that will come to light if publics and public actors are forming on the lines suggested by the third reading.

The EES depends on turn on an organizational infrastructure whose general architecture was anticipated above in the descriptions of comitology and social inclusion programs: local, or, more exactly, lower level actors (nation-states or national peak organizations of various kinds within the EU; regions, provinces or sub-national associations within these, and so on down to whatever neighborhood is relevant to the problem at hand) are given autonomy to experiment with their own solutions to broadly defined problems of public policy. In return they furnish higher-level units with rich information regarding their goals as well as the progress they are making towards achieving them. They agree as well to respect the framework rights of democratic procedure and substance as these are elaborated in the course of experimentation itself. The periodic pooling of results reveals the defects of parochial solutions, and allows the elaboration of standards for comparing local achievements, exposing poor performers to criticism from within and without, and making of good ones (temporary) models for emulation.

It is the pervasiveness of this new architecture in the EU, as well as its dependence on a center — though a 'center' that has nothing to do with the apex of a hierarchy — that causes us to speak of a directly deliberative polyarchy, rather than, say, a new form of anarchy. In anarchy the alignment of interests and incentives among the actors results in spontaneous coordination without the need for a center to compel provision of information, to facilitate the pooling of the information provided or discipline those who abuse the grant of autonomy to victimize some within their own jurisdiction, or take advantage of outsiders acting in good faith. Traditional examples are the market of the neo-classical textbook or the Proudhonian federation, in which '*les industries sont sœurs'* (Proudhon 1863: 113). Contemporary versions are found in the social law of George Gurvitch, which descends directly from Proudhon (Gurvitch 1932), and certain versions of systems theory, in which the 'sub-systems' of law and economics mutually 'irritate' each other, causing an adjustment without need for mutual understanding between the adjusting parts (Teubner 2000).

In deliberative polyarchy, problem solving depends not on harmony and spontaneous coordination, but on the permanent disequilibrium of incentives and interests imperfectly aligned, and on the disciplined, collaborative exploration of the resulting differences. As both the exploration and the sanctioning depend on mutual checking by decentralized actors

facilitated by the central provision of the relevant infrastructure — think of the process by which NAPs are criticized—we term the EU's practical deliberations polyarchic.

But what democracy, if any, might this be or become? Democracy is deliberative when collective decisions are founded not on a simple aggregation of interests, but on arguments from and to those governed by the decision, or their representatives. But deliberation, understood as reasoning about how best to address a practical problem, is not intrinsically democratic: it can be conducted within cloistered bodies that make fateful choices, but are inattentive to the views or the interests of large numbers of affected parties—without being connected to open public debate and practice. So deliberative polyarchy can be democratic only if the deliberation is democratized. But what might it be to democratize a deliberative polyarchy?

The question is hard to answer because so much conventional thinking about democracy — whether deliberative or aggregative, minimalist and electoralist or founded on more demanding idea of a public sphere — assumes a central authority that operates over a territory, monopolizes the legitimate use of force in that territory, and has a wide range of policy competences — employment, environment, health, product safety, domestic security, research/development, and so forth. In this setting, we have democracy when policy-makers are held accountable to citizens through regular competitive elections, against a background of basic liberties of speech and association, in which citizens debate issues and choose representatives,

and representatives make policies and hold officials accountable for the articulation and implementation of those policies. The political architecture of deliberative polyarchy is different, and its democratization must take a correspondingly unconventional form.

Stepping back, then, from familiar forms of democratic polity, then, we have a democratic form of deliberative polyarchy when its dispersed and coordinated deliberative decision-making is subjected to what Frank Michelman calls the 'full blast' of diverse opinions and interests in society (Michelman 1999). Meeting the full-blast condition requires open-ended, informed discussion about the decisions taken by separate units and the coordinating center. But what makes for democracy is not simply the fact of discussion, but that those discussions shape subsequent decisions. To meet these full-blast requirements, then, a deliberative polyarchy must be located in surroundings that meet five conditions. Thus, full-blast political discussion requires assured protections of basic rights of speech, association, and participation. Moreover, deliberation and decision must proceed under a norm of transparency that invites and informs wider public participation in policy argument. Furthermore, that public discussion must have the right content and focus, which means that it must be attentive to coordination across units as well as decisions by the separate units; in the case of OMC, this means EU level policy coordination, as well as national policies. So the full-blast condition is not satisfied simply by the fact of separate discussions about national policy, together with administrative coordination across

jurisdictions. In addition, the democratic form of deliberative polyarchy requires mechanisms of accountability that connect deliberative decisions in particular policy areas with wider public discussion about those areas. And, to ensure that such accountability respects the equality of those subject to the decisions, a democratic background of deliberative polyarchy includes a individual right to contest decisions.

A deliberative polyarchy that meets these full-blast conditions not only achieves the democratic ideal of accountability and responsiveness to those who are subject to its decisions; it is also more plausibly an epistemic or learning democracy than the principal-agent view of the first reading, the corporatist understanding of the second, and the deliberation-about-principles of the third. Recall that the defining feature of the EU on the deliberative, polyarchic reading is to transform diversity and difference from an obstacle to cooperative investigation of possibilities into a means for accelerating and widening such enquiry. Comparison of different projects by publics that are themselves diverse in their composition (peer evaluators, standard-setting bodies and so on, down to localities and neighborhoods) makes it possible to examine each concept both in the mirror of the others and from the varying angles presented by differing points of view. This kind of examination has been shown in many settings to bring to light deep flaws in individual projects that remain long undetected when they are pursued in isolation, and to reveal novel possibilities that are missed when many projects are pursued simultaneously but in willful

indifference to each other. Although deliberative polyarchy is not intrinsically democratic, when it is focused on practicality it seems tailor-made to encouraging the exploration of diversity in a way that exposes decision makers to its 'full blast'.

Seen as a method of revising designs in the light of their realization, moreover, it is clear why deliberative polyarchy is especially well suited to this task. Assume that ends and means are mutually defining: that understanding the content of ends requires inquiring into means, and that understanding the content of means requires inquiring into ends. Deliberative polyarchy revises (sets of) ends in the light of (sets of) means and vice versa. It provides a general, and, judging by our two examples, broadly applicable and inclusive model for realizing the epistemic promise of deliberative democracy.

But how broad? How inclusive? Surely neither all-encompassing with respect to domain of application, nor all inclusive — fully engaging all potentially affected interests — within any domain. Deliberative democracy is often suspected, rightly, of being exclusive, or outright elitist: and when deliberation is the province of a professional problem-solving elite (of legislators, administrators, or judges) it is frankly exclusive. Distrust of deliberation is thus distrust of the exclusionary power of professionals, certified or not. It seems justified in that the very source of professional autonomy — the professional's ability to bring expertise to bear on

complex, singular cases — does seem tied to an unaccountable aloofness from clients, let alone the public.

Thus in professions, as in crafts, learners acquire skill by applying familiar techniques to well understood problems under the supervision of accomplished masters. The real teaching of law or medicine is done not in the classroom, but in the clinic—the analogue to the apprentices' shop — or in the early years — as resident or associate — on the job. When the routine is second nature, the learner takes on novel problems, achieving mastery herself when these can be solved without supervision. The knowledge of problem solving techniques acquired this way is tacit: professionals, like craftspersons, can make refined judgments about the quality of work, yet not be able to say with precision how it is done. Indeed, because professional dignity is tied to autonomy, and autonomy to freedom from supervision, inquiry into what a professional does can easily appear a veiled accusation of incompetence or worse. Thus the professional's autonomy — the ability to solve complex problems without the support, and free of the limits of hierarchy — goes hand in hand with distance from clients, other kinds of professionals, and even one's own colleagues.

Through the use of comparisons of performance and the formulation of various responses to the problems such comparisons reveal, deliberative polyarchy potentially transforms the professions: it reduces their technocratic pretence, and reveals the dependence of expert

judgment on assessments of ends as well as means. By making tacit knowledge of problem solving explicit, or explicable, in a way that disrupts the traditional hierarchy of skill within each, it may open the boundaries that separate it from the others and the larger public.

But this is, of course, speculative. The facts of the democratic vocation of deliberative polyarchy are inconclusive and equivocal, if not contradictory. One fundamental fact is that the extent to which deliberative polyarchy ramifies past the technical elite into civil society is an open question. Another is that the regulatory successes of the EU have gone hand in hand with the spread of parallel governments. So the democratization of deliberative polyarchy remains a project, whose precise institutional commitments have not yet been fixed. To be so in the sense of the 'full-blast' conditions it must be broadly inclusive, both in the scope of its deliberations and in the arrangements of public accountability. It must also be officialized, openly acknowledged as part of the legitimate process by which a self-governing people make their laws.

A concomitant of — perhaps, indeed, a condition for — the democratization of deliberative polyarchy is an understanding of constitutionalism as the continuing activity of assessing a polity's practices in the light of its deep commitments, and vice versa. Constitutionalism in this sense begets not a constitution of enumerated powers and rights, but more activity like itself: constitutionalism. Indeed, insofar as this kind of constitutionalism

respects the constraint of the joint determination of means and ends, it is by conventional standards anti-constitutional. Thus the separation of powers among the branches and levels of government and allocation of authority as between, say, the federal and state levels cannot be fixed in advance. Doing so would be to choose procedural means without attention to substantive ends. Neither can the content of the system of rights be fully fixed in advance. Doing so would fix ends without attention to the means for realizing them. Can this kind of constitutionalism possibly secure the accountability of government? The efficacy of rights?

The problem of accountability seems fairly tractable, at least in comparison to the task of making sense of experimentalist rights. Deliberative polyarchy makes official actors transparent and answerable to each other and the public in ways that severely limit unaccountability. Our Madisonian constitution takes the branches and levels of government to be natural units, and makes their rivalry for power the source of our protection against the self-aggrandizement of government. Deliberative, polyarchical constitutionalism might be called neo-Madisonian in that it uses the polyarchical competition of purpose-built and re-configurable problem-solving units to the same end.

If accountability is not an insurmountable problem, can polyarchic constitutionalism make assertion of constitutional values definite enough to bound behavior, yet open enough to admit of re-elaboration by, literally, the means of practice? More generally, on the full-blast

view, the exploration of democracy itself emerges from the elaboration of starting commitments under the pressure of the full blast of social diversity. So on that view it must be true that the particular rights, or clusters of these, that inform and define democracy as a whole are shaped the same way. In other words, the precise content of rights is, in the full blast view, emergent: without free expression, there is no democracy; but the elaboration of the content of that right in light of alternative specifications is part of democracy's work.

Consider again the OMC. Think of this as constitutionalism without, or instead of a constitution. OMC-style re-elaborations of employment, welfare, and education and tax policies are what the EU's Member States are doing instead of creating a constitution on the French or American models. Taken together, these policies are at the heart of what a state does. Perhaps this benchmarking all the way up is a novel path to a constitution, or at least a way of making justiciable the elaborate charter of the rights securing democracy. Or it may be that benchmarking all the way up just keeps going, and the forms of practical deliberation it engages become at one and the same time a form of problem solving and new method of articulating constitutional values. This fourth reading of EU constitutionalism is, if you like, it not simply a theory about what has been happening, but an interpretation with a practical intent: it suggests the kinds of participation we ought to be looking for, where we might find it, and how to think about making participation officially accountable if and when it is found.

Finally, the fourth reading calls attention to aspects of US experience that also link fluid problem solving and new forms of accountability in strikingly similar ways. We presented deliberative polyarchy as a kind of construct, a way of reading the stylized facts that makes sense of a pattern that confounds conventional interpretations even in raising troubling questions of its own. We might as well have said that it constitutes the accidental discovery of a promising response to a broad class of current situations in which inaction is unacceptable but omnibus solutions are plainly unworkable. There are many such situations in the US as well, and many responses that recall the essentials of the EU read as a deliberative polyarchy.

Consider developments in education first and foremost, but also the reorganization of police departments, social services and others besides: the areas at the core of the broad, now apparently humbled movement for general institutional reform that Chayes three decades ago called public law (Chayes 1976; 1982).

The differences between public law and what we will call, mindful of a family resemblance, the new public law parallel those between the familiar constitutionalism of the administrative state and the continuing constitutionalism of the OMC. Public-law courts aimed to establish the acceptable minimum standards of institutional performance — the wattage of bulbs in prison cells, to take an extreme but not exceptional case. New public law judges today declare their commitment to the vindication of broad, open-ended constitutional values or

legislative mandates. Thus the supreme courts of Texas and Kentucky, referring to their respective state constitutions, insist that schools provide an 'adequate' education for all children, even if virtually every school, school district and the state department of education be restructured to meet the adequacy standard.[20] In cases of police abuse, courts, referring to recent federal legislation, make it the responsibility of police departments themselves to detect and correct a 'pattern or practice' of abusive behavior.[21]

This commitment to open-ended, expansive values becomes an effective discipline for broad reform because it is accompanied by a shift in the responsibility for and the focus of the monitoring of institutional performance. In public law the court convened an ad hoc group, drawn from parties and outside experts, to monitor periodically the reforming institution. The monitors' report, addressed to the judge, comprehensively evaluated the institution's compliance with the minimal standards. Today monitoring is continuous, not episodic. This routine monitoring is a continuing responsibility of the reforming institution itself, not an exceptional engagement by the court and its adjuncts. The monitoring focuses on key indicators of the reforming institutions' overall performance, particularly with respect to constitutionally aggrieved groups, not on a comprehensive evaluation of the progress of reform. And the monitoring results are addressed at least as much to the staff and clients of the reforming institution, and often to the public at large, as to the judge.

For example, it is the responsibility of the Texas Education Agency (TEA) to report regularly on the performance of public school children in grades 3 to 10 on certain standardized tests of proficiency in reading and mathematics. Disaggregated by school and by ethnic and socio-economic groups within schools, and organized to permit comparisons of each school to the 39 others in the state that it most resembles on these dimensions, these results are reported publicly. In still more finely disaggregated form they are reported to school and district officials, and by the latter to teachers. Parents, administrators at the school, district and state levels can monitor the progress of individual schools and districts. The Supreme Court of Texas can as well determine whether the TEA, and beyond it the state legislature, are meeting their obligations both to monitor the performance of individual schools and to respond in case poorly performing ones fail to improve at an acceptable rate.

Thus, despite their commitment to open-ended values and their disinclination to limit the scope of reform, the courts today are much less involved in the management of institutional reorganization than their public-law predecessors. Where public law invited courts to in effect create ad hoc public agencies to set standards and provide designs for meeting them, courts today leave the substantive elaboration of the constitutional standards, and the means for satisfying them, to the primary actors. In this sense the new reform movements, unlike public law, are not court-centric. In imposing on the primary actors a continuing obligation to monitor themselves,

the courts induce novel forms of self-critical cooperation between these latter and other public and private parties. Designs for reform arise from this vigilant cooperation, and the courts' ability to evaluate it. It is this new division of labor among the branches of government and between them and civil society — a new separation of powers — that makes judicial affirmation of need-based claims to something so vague and so fundamental as an adequate education into a an effective, justiciable right to disentrench current practices and seek, accountably, for better ones.

Or, put in a way that closes the circle of our argument, US courts are creating the equivalent of a constitutional OMC. Deliberative polyarchy as a serious possibility on both sides of the Atlantic? This fourth reading, you may say, abuses the license to speculate provided by the open questions. But then democracy, history shows, is a kind of collective license to answer, by means that affirm our values and our obligations to each other, questions we never imagined being asked.

Notes

[1] Case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) (1979) ECR 649; Case C-212/97 Centros Ltd. v Erhvervs-og Selkskabssttryrelsen (1999) ECR I-1459.

[2] For an overview and references to detailed studies of developments in these policy areas see Héritier (1999).

[3] See the introduction and the chapters by Trubek and Mosher and Goetschy, this volume.

[4] Case T-188/97 Rothmans International BV v Commission [1999] ECR II-02463; see for a more recent and ambitious effort to 'constitutionalize' EU regulatory processes, the opinion of advocate General Jacobs C-50/00P, Union de Pequeňos Agricoltores v. Council of the European Union, delivered March 21, 2002.

[5] For an excellent anthology of current research on the ECJ, see de Búrca and Weiler (eds.) (2001).

[6] On the complexity of the institutional relations see, for example the review of literature by Scully (2001) and Tsebelis and Garrett (2001).

[7] For an account emphasizing the influence of monetary constraints on bargaining structures see Iversen et al. (2000). For explanations focusing on new roles for the social actors as agents of welfare state reform see Green-Pedersen, van Kersbergen, and Hemerijck (2001).

[8] The speech of the German foreign minister, Joschka Fischer, in Berlin on May 12, 2000, that opened the current constitutional debate, refers to the goal of a 'European Federation' in the first sentence.

[9] A good statement of the mismatch between the innovative thrust of EU governance and efforts to democratize the EU on the model of classic administrative state is Dehousse (2002*a*).

[10] In replying to Fischer's speech before the Bundestag on June 27 of 2001 the French President, Jacques Chirac uses the word 'federal' only in pronouncing the official title of one of his hosts, the Bundespräsident. For the texts of the speeches see Dehousse (ed.) (2002*b*).

[11] Maastricht decision of the Bundesverfassungsgericht, Judgement of October 12, 1993, 89 BverGE 155.

[12] The following views are most ably developed by Fritz Scharpf. See for example Scharpf (1999).

[13] For a clear formulation of the desirability of this distinction, see Majone (1998).

[14] The consensus has recently been summarized in Kagan (2001).

[15] For the historical background, see Te Brake (1998). For the experience of US and EU federalism viewed against this historical backdrop, see Goldstein (2001).

[16] For these distinctions from the vantage point of political science, see Lijphart (1999). For the distinction as viewed from political economy, see Hall and Soskice (2001).

[17] For background, see Habermas (1989). And for a more recent application of these ideas to the EU, see Habermas (1996).

[18] See Weiler (1999), pp. 324-357; idem (2001).

[19] On this conception of the public see Dewey (1927). This section develops arguments advanced in Cohen and Sabel (1997); Dorf and Sabel (1998); and Gerstenberg and Sabel (2002).

[20] See on the movement from 'equity' to 'adequacy' claims in school-reform litigation, and generally for the developments in Texas reported below, Liebman and Sabel (forthcoming 2003).

[21] For a review of the relevant literature see Garrett (2001).

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