

Directly-Deliberative Polyarchy An Institutional Ideal for Europe?

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I. Introduction

The continuing effort to harmonize the laws of the member states of the European Union and the prospect of extending membership in the Union to new states intensifies the debate already underway in the Atlantic political community about the connections between democracy and the nation-state as we know it since the time of the French and American Revolutions. Attention focuses on three concerns.

The first, particularly acute among European social democrats, is that the heterogeneous polity of the new Europe will undermine the political basis for a new European welfare state, even as the dominance of market making (the negative integration that removes barriers to trade) over market correcting (the positive integration of policies and regulations that protect citizens against market outcomes which might otherwise overwhelm them) destroys the basis of the existing national ones. Put another way, the creation of a common market leads to a loss of national boundary control, while the political decisions at the European

level that might compensate are easily frustrated because of differences of interest or institutional obstacles.

The second concern regards a tension between the problem-solving capacities of and the possibilities for democratic participation in the system of multilevel governance emerging (MLGS) in the formal and informal interplay of member states, European Commission, European Parliament, Council of Ministers and European Court of Justice (ECJ). The worry is that the sheer complexity of this MLGS, and especially its reliance on technocratic deliberation, renders implausible even the most modest assumption of effective political oversight by an informed citizenry . Excluded from politics, the best citizens can get from their democracy—the reward as it were for their acquiescence in decisions they can scarcely influence— is a responsive administration or "good governance."

The third concern, less salient to citizens, more to constitutional theorists, is captured in the question, Why does the "higher," but "weakly legitimated," European law in fact increasingly trump the "strongly legitimated" law of the nation states? On the one hand, political authority in the MLGS remains based on international treaties, which rest in turn on the sovereignty of the Member States. On the other hand, however, there is within the MLGS de facto an accretion of substantial authority by supranational institutions such as the ECJ and Commission. The EU is no thus

no longer merely an instrument of the will of the Member States.¹ On the contrary: European law has a certain primacy over the law of the several Member States, and is also directly applicable to their citizens. Indeed the doctrine of direct effect makes citizens in many circumstances the addressees of binding and coercive law, tenuously, if at all, authorised, by the (democratically elected) national governments, rather than originating from the united citizens of Europe themselves.

These three concerns, and the accompanying sense of narrowing political possibilities, are European in their cadences and references. But they reflect a deeper antinomy within contemporary democratic and constitutional theory between two lines of thought we will call the personificationist thesis and the non-demos or reasonable-pluralism thesis. The personificationist thesis, associated with authors as different as Habermas and Dworkin, holds that any egalitarian notion of democracy, including especially those built on some combination of solidaristic redistribution and the requirement that law be justified by reasons acceptable to all as free and equal citizens, depends in principle on the existence of a demos or "political community personified," capable of harnessing preexisting commonalities for the creation of a collective identity above the level of primary groups. In practice this political community is the nation state, with its self-evident identity, arising from the spontaneous mutuality and transparency of its citizens, and its insistence on the distinction between between

¹ "The community constitutes a new legal order ... for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member

members and non-members of the relevant collectivity for purposes of defining whose welfare is to be counted in the distributive process.

The non-demos or reasonable-pluralism thesis asserts that under conditions of modernity actual political communities do not have the demotic characteristics that the personificationist thesis requires of them. In the European legal disputes this thesis has been reduced to a syllogism by the *Bundesverfassungsgericht*. Only a demos meeting the conditions of self-evidence and mutual transparency that mark a personified citizenry can make law for itself; Europe, being a composite of nations, has no such European demos; there can be no general European law with the legitimacy of national, demotic law.

Among constitutionalists on both sides of the Atlantic the same concern with the heterogeneity of the modern polity is expressed as recognition of the fact of "reasonable pluralism:" Citizens of the same polity view the world, or the good life, in fundamentally different ways despite continuing, good-faith efforts to arrive at common understandings. These differences undermine the legitimacy of the higher, constitutional law as an expression of just such commonalities, and so limit its power to protect minorities against the predations of bigoted or selfish minorities.

The clash of the personificationist and reasonable-pluralism theses produces a new appreciation, bordering on nostalgia, for the nation state as necessary to the political expression of solidarity.

States but also their nationals."

The reaction is all the more poignant in just those quarters that traditionally regarded the Romantic identification of the citizens as a people bound together by ties of language and history as, at best, a latent threat to the ideal of an inclusive polity, at worst, a standing invitation to war.

This essay argues that the opening boundaries of the modern polity, the undeniable increase in heterogeneity that follows, and the manifold institutional responses that these changes in turn provoke are better seen as creating the occasion for, indeed in part anticipating, a radical re-definition of our democratic and constitutional ideals, rather than as signs of a democratic declension. Our core claim is that the exploration of difference, as it may occur in choosing among diverse solutions to the pressing problems of everyday life (the task of harmonization most broadly conceived) can provide the basis for protections for the economically vulnerable and the politically disdained that may become as effective under emerging conditions as the policies of redistribution and judicial determination of rights were in the world that is passing.

The institutional armature of this new principle of differential, democratic problem solving we will call experimentalism or directly deliberative polyarchy. In a deliberative polyarchy 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 the level of whatever kind of neighbourhood the problem in question makes relevant) are granted autonomy to experiment with solutions of

their own devising within broadly defined areas of public policy. In return they furnish central or higher-level units with rich information regarding their goals as well as the progress they are making towards achieving them, and agree to respect in their actions 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. We call this system directly deliberative because it depends crucially on the exploration of possibilities, and the discovery of unsuspected ones, that occur when actors come to grips with their differences in the course of solving common problems that none can resolve alone. The contrast is with the notion common to theories of civic republicanism and other discursive ideas of democracy of deliberation at a distance, by an administrative or political elite that defines the public good in abstraction from everyday immediacies. We call the emergent form of democracy polyarchic to emphasize the permanent disequilibrium created by the grant of substantial powers of initiative to lower-level units: No sooner do promising solutions emerge in one place than they are being re-elaborated through adaptation to different circumstances elsewhere.

We assume as a background condition a world of radical indeterminacy or complexity, in which actors at all levels cannot solve their own problems without continuing collaboration with others whose experiences, orientations and even most general

goals will differ from their own. The need for such connections can arise from any of several causes: because the each actor's solutions require complementary ones that can not be identified precisely in advance of actually undertaking the project; or because each solution generates externalities that can only be detected and mitigated with the co-operation of others. Put another way, in a world of radical indeterminacy, or because the costs of exploring the most promising potential solutions would overburden the most capable actor, and therefore even the strongest favor some division of investigative labor to incurring the risks of choosing and executing a solution alone. In such a world—to whose verisimilitude the creation and continuing elaboration of the EU bears witness—the constant testing and reexamination of assumptions and practices that results from permanent, polyarchic dis-equilibrium will itself provide a powerful motive for jurisdictions of many kinds of participate in the problem solving and information pooling that experimentalism requires. Insofar as homogeneity is more nearly a curse than a blessing in such a world, and openness to difference, paradoxically, a precondition for preservation of identity we can think of de-nationalization or the end of the Romantic identity of people and state as a precondition and consequence of directly deliberative polyarchy.

To respond fully to the most pressing fears of the social democrats and constitutionalists we would have to extend this sparest sketch of directly deliberative polyarchy in two directions, and show the empirical plausibility of both extensions. We would have to show, first, how, beginning with engagement with currently pressing problems such as, for example, the harmonization of the laws of

EU member states, the emergent regime could reasonably be expected to provide a web of protective rules and related services that together afforded citizens of the Union protections against untrammelled market operations arguably equivalent to those enjoyed under the welfare state. A starting point for this argument would be the idea of radical indeterminacy itself, and in particular its implication that, in a complex world, “strong” actors can not rule out the possibility that they will come to depend on solutions discovered by “weak” ones. Then we would have to demonstrate how this link or entanglement leads not to the recognition of a solidarity of sentiment, but to an institutional acknowledgement and commitment to sustain a commonality of capabilities—especially the ability to engage, as citizens, in common forms of problem solving that underpin, and render mutually intelligible, the efforts dedicated to separate projects. The resulting web of connections might (indeed very probably would) have the consequence of redistributing resources from one group to another; but redistribution would be the consequence of a solution adopted first and foremost to address broad common problems (above all, the problem of maintaining the ability to address together, as a democracy, unforeseen problems), not correct social or economic imbalances: Standards requiring that citizens be provided with “adequate “ environmental protection, employment policies, workplace health and safety, and education and vocational training, where “adequate” is continuously redefined in the light of experimental advances in the respective areas, would have this result.

We would have to show, second, how, using the information about intentions and results provided as a matter of course in these experimental efforts courts could frame background rules of constitutional order precise enough to provide the securities of citizenship to even disadvantaged groups, yet open enough to permit—indeed require—citizens, using the possibilities for directly deliberative elaboration of norms afforded by the new architecture of democracy, to actively explore and redefine the meanings of constitutional norms in everyday life. Agreement on constitutional essentials might, indeed very probably would result from this collaborative interpretation. Such agreement would resemble in its texture, though not the degree of its entrenchment, more the open-ended and self-questioning results of (sub-constitutional) legal or regulatory harmonization than the strictures of constitutional law that are displayed today as the tenants of a people's integrity or the purified postulates of justice itself. We will see how the Bossman and other (?) decisions of the ECJ, as well as developments in the harmonization of EU contract law, provide models for how this shift from a vertical conception of constitutional jurisprudence might be accomplished.

Judged with respect to these goals, this essay, conceived as the exploratory opening of a larger program of enquiry, pursues more modest ambitions. Though we will be mindful throughout of the large burdens that our claims regarding the potential of a directly deliberative alternative to representative democracy impose, we concentrate here on tracing the often paradoxical origins of the constitutionalists' and social democrats' fears; showing that these fears are empirically unfounded; and that the evidence against

them, together with other circumstances, strongly suggest that the emerging legal integrity of the contemporary Europe is the outcome and expression of the new architecture for democracy.

Part 2 shows how, confronted with the fact of reasonable pluralism, constitutional theory in the US and Europe discovered itself to be founded not on principle but on *patria*. In part 3 we observe a related set of debates played out among social democrats and economic liberals: Both agree that the fundamental dichotomies are those of market and politics, egoism and visceral solidarity. They agree further that the globalization of markets undermines the nation-state foundations of politics. Hence the social democrats' nostalgia for the nation and the liberals jubilation at the prospect of a world economy without politics.

In Part 4 we argue that the circle of discussion is wider, and the horizon of possibilities it reveals broader and more promising than the initial survey suggests. Two overlapping lines of research and discussion are especially important correctives to the constitutionalist and social-democratic views. The first is a series of careful investigations of the progress and outcome of efforts to harmonize EU regulations in areas such as consumer protection against dangerous products, workplace safety, environmental protection, financial regulation, and transportation policy. Many of these studies were prompted by social-democratic concerns with the threat to the welfare state supposedly inherent in harmonization; and the expected outcome was, accordingly, a race to the regulatory bottom in each area. In the event the results

rarely, if ever, confirmed the hypothesis. In most cases the outcome was more nearly a race to the top—the elaboration through the process of harmonization itself of a regulatory regime that is more demanding than that in place in most, sometimes all, the EU member states. Of course theoretical anomalies can always be explained as exceptional cases, arising under conditions outside the domain covered by the theory; and some social democratic writers have not hesitated to provide the requisite emendations to their original propositions. Others, sensing that the exceptions now overwhelm in number and importance the ruley results, are beginning to treat them not as aberrations but rather as the expressions of a systematic, if ill-understood form of public governance: the “substitute” democracy of the new Europe .

A second line of research, concerned with “comitology”— the networks of expert and interest-group committees to which the Commission entrusts elaboration of its regulatory initiatives, arrives at a strikingly similar conclusion. The research accepts the lay view that comitology is so opaque in its operations and removed from the normal controls of democratic oversight as to have the aspect of a nearly conspiratorial convocation of insiders against the public interest. But closer investigation shows that, appearances notwithstanding, comitology, like the regulatory processes of which it is a part, is not an engine for converting pressure-group interests into policies, and still less for driving a downward spiral of deregulation. Rather, as an institution it proves capable of practical, problem-solving deliberation, and so of producing results which arguable embody the public interest in

novel ways precisely by exploring the differences in current understandings of it. Hence an interpretation of comitology as a kind of “deliberative supranationalism a clique of experts owing allegiance to their professional honour, not any sovereign state or domestic interest, that conspires for, not against the international public of the new Europe. So despite its resemblance to the cosmopolitan officialdom of the cameralist bureaucracies of the late Absolutist states, comitology too can be thought of as a “substitute” democracy.

Critics are understandably quick to point out that these interpretations give little reason to view the institutional innovations that make Europe work as a “substitute” democracy—or, more exactly, a variation on familiar democratic institutions—rather than simply and ominously as a substitute for democracy. But this criticism itself supposes, without pausing to say why, that the only alternative to the democracy we know is none at all.

Part 5 challenges that supposition conceptually and empirically in interpreting the EU as an emergent directly deliberative democracy. First it provides the conceptual rudiments for experimentalist polyarchy by contrasting its assumptions to those of the social democrats, constitutionalists, and the exponents of a “substitute” democracy. Notice in all of these discourses the unbridgeable gulf between effortless and complete mutual understanding founded on identity, and selfish, incommunicable and uncomprehending solipsism: *Either* (in the social democratic view) the citizens are a nation, in which case they are transparent to one another, and generous because palpably similar; *or* they

pursue their self interest without regard to other. *Either* (in the constitutional view) the citizens will share constitutional fundamentals, and therefore can agree on to accord one another extensive rights to mutual regard. *Or* they do not share them, and only inertia can shelter them from the ravages of their differences. *Either* (in the “substitute” democracy view) decision-making is entrusted to experts, able to deliberate practically because of the professionalism that binds them together even as it sets them off from the citizens, *or* the latter, left to their own devices, to disarray. Drawing on familiar and influential arguments in variants of pragmatist philosophy associated with Davidson and others, we will argue in contrast that understanding within a language—more difficult and fraught with ambiguity than these juxtapositions suggest—is itself a kind of translation among the local languages of particular speakers, and translation between languages is therefore a possibility, being in fact an extension of just the kind of work native speakers must accomplish to grasp one another’s meaning. From this vantage the exchange of ideas among those with differing views of the world is a condition of self understanding, not a feat of transcendence. Identities and interests are emergent, not fixed. Jurisdictional boundaries are not fixed limits and reminders of identity, but rather the starting points for problem-solving investigations which entertain the possibility, among other things, of revising the boundaries along with the conceptions they mark. The polity, no longer personified, itself gives meaning to the frameworks it adopts, and need no longer delegate this task to a separate administration of experts. Formulations of this sort raise at once the suspicion that we intend only to reverse the sign of familiar debates and make society,

suddenly discovered to be self regulating, its own immediate and exclusive sovereign. To avoid misunderstanding we therefore contrast our view with two schools of thought which do exalt society in this way: the social law of Gourvitch, which (as heir to the Durkheimian tradition) see a spontaneous mutualism of the social parts, owing to (their recognition of) the natural division of labor among them, and the related idea of autopoiesis, in which each participant takes account of the activities of the other, while remaining within a conceptual world all its own.

The second step of the argument is to show how this alternative characterization of the relation of ambiguity and idiom is reflected in the institutions of directly deliberative polyarchy in general, and emergent features of the EU in particular. Here we show how the very institutions that produce a permanent dis-equilibrium in rules enable a continuing discussion of differences that clarifies as much what each entity does alone as what it does with the others. Then we show how continuing clarification opens the way to an upward drift of regulation which can be understood as a harbinger of the more encompassing and constitutional connections we envisage.

II. False Dichotomy: Market vs. "Political Community Personified" (Demos)

In contemporary European constitutional debate constitutionalism and democracy have become antagonists, with the survival of the one seeming to require sacrifice of the other. Authors in the

tradition of economic liberalism celebrate the Europeanisation process because it seems to ultimately disconnect constitutionalism from democratic practice and to firmly entrench a logic of market evolution that marginalizes politics. Social democrats have come to believe that democracy can only flourish if the solidary politics of the nation retains its sovereignty against cosmopolitan, “constitutional’ intrusions from without. In this section we examine this antagonism from both perspectives, emphasizing the commonalities that join the views despite their manifest differences.

The liberal view proceeds from the idea that the true function of constitutionalism is to protect a set of well-circumscribed private rights from the vicissitudes of pluralist politics, placing them beyond the reach of majorities by establishing them as legal principles to be applied by the courts. Constitutionalism, in such a world, provides the integrity and fidelity to principle that democratic politics, given the inevitable pluralism of incorrigible, pre-political identities and interests, inherently lacks. This framework suggests that even if democratic politics lingers on in the member states of the EU, the economic rights and liberties of the market citizen are supposed to constitute the true higher law of the Union. It is the task of the Community to implement and protect a system of open markets and undistorted competition, while the Member States retain those legislative powers that prove compatible with open markets²: The chain binding law and democratic politics breaks.

² E.-J. Mestmäcker, op. cit. at 633. The German version is even more straightforward, *idem*, ‘Zur Wirtschaftsverfassung in der Europäischen Union’, in: R.H. Hasse, J. Molsberger, C. Watrin (eds.) *Ordnung und Freiheit*. Festgabe für Hans Willgerodt zum 70. Geburtstag, 263, at 274. It runs: “Aufgabe der Gemeinschaft ist es bei dieser Betrachtung, die wirtschaftlichen Freiheitsrechte, den Binnenmarkt und das System des unverfälschten Wettbewerbs mit Vorrang vor dem Recht der

European law comes to have a distinctive legitimacy, derived from utilitarian consideration and independent of democracy. The very rationale and goal of the European Community is to separate economics and politics as far as possible.

The ideas of the feasibility of an "economic integration without political integration," of "carefully" keeping the "economic and the political tracks ... separate,"³ and of a "(d)epoliticization of European policymaking" stand, for example, behind Majone's argument that the legitimacy of the European integration process should not be assessed by standards appropriate for the nation state. His whole argument depends on the distinction, well-known from legal theory, between efficiency-oriented and distribution-oriented standards of legitimacy. The latter belong to the world of bargaining, preference aggregation and majoritarianism: Decisions involving significant redistribution of resources from one group to another cannot, Majone says, legitimately be delegated to some independent experts, but must be taken by elected officials or by administrators directly responsible to elected officials. They carry with them the relatively low rationality-presumptions of strategic politics, and the concept of democracy is identified with the majority principle. Efficiency-oriented standards in contrast are geared towards the correction of market failures and towards the increase of the efficiency of market transactions (problem solving).⁴ A precondition of the accountability of decisionmaking in the realm of efficiency-oriented standards is that they be taken in

Mitgliedstaaten zu gewährleisten. Den Mitgliedstaaten bliebe es überlassen, die demokratische Legitimation beanspruchenden, diskretionären Politiken in eigener Zuständigkeit, aber unter den Bedingungen offener Märkte zu betreiben."

³ Europe's 'Democratic Deficit': The Question of Standards, ELJ 14 (1998).

⁴ Notice the trenchant criticism by Duncan Kennedy of this distinction:

greatest possible insulation from the pressures and distortions stemming from the world of strategic/distributive politics. Majone recognises that "regulatory policies, like all public policies, have distributive consequences." But he believes nonetheless that it is possible to identify a class of (predominantly) efficiency-oriented decisions or policy areas, with regard to which a "delegation" to independent institutions is democratically justifiable as a method of achieving credible policy commitments. By contrast, where distributive concerns prevail, accountability is "political" and legitimacy can be ensured only by majoritarian means. Thus, as it turns out, in the case of efficiency-oriented standards the decisionmakers' independence and democratic accountability are complementary and mutually reinforcing rather than antithetical values. And Majone suggests that we should think of there being a "right to exercise public authority" and that this "right" is conceivable of in terms of a "political" property right which can be allocated to actors in more or less efficient ways. Delegation, in this perspective, amounts to a "transfer of political property rights in a given policy to decision-makers who are one step removed from election returns."⁵ Moreover, "the stronger the legal basis of independence, the better defined are the rights of the new 'owners'."⁶

Three important consequences follow. First, this view leads to an understanding of the EU as a device for firmly entrenching "political property rights" as a defence against "democracy" as a world of purely strategic interaction, majoritarianism and

⁵ Majone, *ibid.*, 17.

⁶ *Ibid.*

preference-aggregation. The logic which drives the European integration process, from this perspective, is to strengthen – to "constitutionalize" – the "legal basis of independence" of a realm of depoliticized processes of decision-making, hived off from the contingencies of strategic politics and faithful to efficiency-oriented standards. Accordingly, the normative standards for evaluating the EC institutions should essentially be efficiency-oriented rather than distribution-oriented. Hence the claim that the apparent European "democracy deficit" is, at a deeper level, "democratically justified"⁷ as a legitimate way of respecting the epistemological and normative differences between different realms.

Second, the distinction between efficiency-oriented and distributive standards, and the "de-politicization" of European policymaking that comes with it, has the consequence (as Majone himself asserts) of largely preserving national sovereignty intact. This implies on the one hand that EC institutions must be thought of as a regulatory branch of the Member States, as a fourth branch of government within a total complex comprising the EU and the Member States. The nation states are here the principals and the supranational European institutions are the agents. Delegation becomes the crucial device of achieving political accountability and legitimacy in a de-nationalized setting: National policy-makers alone would lack credibility both domestically and in the eyes of policymakers from other Member States. Furthermore, national capacities to monitor international agreements in areas where regulatory discretion is unavoidable are low. The "deep

⁷ Ibid., 7.

cleavages"⁸ within the EU – linguistic, economic, the division between large and small Member States – make rule-making by majoritarian procedures unlikely. Hence the way to address trans-boundary problems that leave room for substantial regulatory discretion is to delegate regulatory decision-making to politically independent agencies on two conditions. The first is that they reduce the possibilities of abuse ex ante by institutionalizing reason-giving requirements and rules "defining the rights of various groups to participate directly in the decision-making. The second is that they ensure ex-post monitoring through legislative and executive oversight, judicial review and attention to citizens' complaints. Not only do economic and political integration – as Majone says – proceed "at different speeds," but they "also follow different principles"⁹ – supranationalism in the first case, intergovernmentalism in the second case.

But third, the kind of delegation needed to mediate and ensure solidarity among strangers in a de-nationalized setting characterised by "deep cleavages" breaks with the traditional understanding of the concept as expressed in the familiar Meroni-doctrine of the ECJ.¹⁰ According to this doctrine, delegation is only feasible and legitimate when in some sense it is not needed: when, that is, the delegating authority is sufficiently knowledgeable about future states of the relevant world-segment to anticipate. and

⁸ Ibid., 11.

⁹ Op. cit., at 14.

¹⁰ The core of the Meroni-doctrine is:

The Commission may not delegate more extensive powers than it enjoys itself.

The delegation may only be in relation to the preparation or carrying through of decisions;

The Commission may not delegate a latitude for judgement or discretion;

The delegated competence must remain under the control and responsibility of the Commission;

The institutional balance between the EC institutions may not be distorted.

control consequences and side-effects of the regulatory process. One sign of this capacity is the ability to distinguish clearly between the generation and application of a rule. Contrary to this traditional understanding, Majone emphasises the independence of agencies, the impossibility of exercising control from any fixed place in the system, and the need therefore for establish accountability *ex ante*, for example by linking the grant of to reason-giving requirements.

The upshot is an irreconcilable conflict within this school of thought itself. The traditional form of delegation, based on confidence in technical logic, is needed to legitimate the EU. The non-traditional form of delegation, based on the recognition of technical ambiguity (or rather the impossibility of distinguishing cleanly between the political and the technical in the first place) is required to make the EU work. Students of US administrative law will find nothing novel in this conceptual tension, except, perhaps the confidence that it will somehow prove more amenable to resolution in the EU's adaption of US practice than it has in its homeland.

By contrast, the social democrats fear above all that this emergent form of trans-national governance will undo such progress as pluralist democracies have made towards the redistributive welfare state. Consider the defensive turn of the European social democrats in response to the construction of the EU. This line of argument is best seen as a chastened emendation of T.H. Marshall's theory of the social evolution of citizenship rights, one of the most influential formulations of the claim that reform, not revolution, is the *telos* of historical progress. Marshall defined

social policy as the use of "political power to supersede, supplement or modify operations of the economic system in order to achieve results which the economic system would not achieve of its own, ... guided by values other than those determined by open market forces."¹¹ He claimed further that in modern nation states citizenship tends to progress from the economic right to enter markets and contract to the political right to participate in democratic governance and on to the social right to a decent material existence, regardless of market vicissitudes..¹²

The core of the "neo"-Marshallian, social democratic position is the conviction that this learning process cannot be expected to spill over to, and to unfold on, the Community level. This being so, further progress toward an "ever closer union" in Europe is an undesirable, perhaps (given the tenuous democratic underpinnings of EU law) an illegitimate political goal.¹³ While the problemsolving capacity and the democratic legitimacy of national governments are being weakened, the loss is not – as the protagonists of this view argue – fully "compensated" at the European level. Accordingly (and paradoxically), on this view, the scope of national policy choices should be enlarged.¹⁴ There are two mutually reinforcing types of arguments for this position: arguments concerning the normative preconditions of the democracy principle, and arguments concerning the effectiveness of political choices:

¹¹ T. H. Marshall, *Social Policy* (London: Hutchison, 1975) 15.

¹² Marshall, *Class, Citizenship and Social Development* (Chicago and London: Chicago U.P., 1977)

¹³ So explicitly: F. Scharpf, *op. cit.* at 149.

¹⁴ F. Scharpf, *op. cit.*; D. Grimm, *op. cit.*.

The normative argument as recently advanced by Scharpf goes like this: redistributive democracy is premised upon cultural identity and upon the public-interest orientation of citizens. When we speak of democratic legitimation, we refer to arguments that establish a moral duty to obey collectively binding decisions even if these conflict with our individual preferences. Without a collective identity, however, citizens would not be prepared to treat their fellow citizens' interests in regard to particular issues as (equal to) their own. Redistributive democracy thus presupposes boundaries as a condition for or expression of the distinction between members and non-members of the relevant collectivity. To drive his point home, Scharpf distinguishes between a (procedure-oriented) "input-legitimacy" and a (substance-oriented) "output legitimacy." The argument is that while shared national identity is a nearly self-evident condition for "input-legitimacy" (who, after all, would we be apart from our mutual knowledge of who we are?), it proves to be a condition of the apparently less demanding "output-legitimacy" as well.

Without a common identity requirement, Scharpf maintains, we risk regression to a crude, pluralist democracy, which offers no warrant that the majority will take into consideration the interests of the minority. "At bottom ... notions of democracy that rely exclusively on the "will of the people" as a source of political legitimacy must assume conditions of a strong collective identity that overrides concerns based on divergent preferences and interests." (Scharpf 1998). The strong collective identity requirement (CIR) is thought to be necessary in order to provide a foundation for constitutional guarantees and rights – conceived as external constraints on the

democratic process – and, above all, to ensure the possibility of market-correcting redistribution. Put another way, the CIR is thought to be necessary in order to justify the citizens' trust that the welfare of the minority figures as an argument in the preference function of the majority.

The argument can, moreover, be extended from re-distributive to deliberative democracy. Public deliberation, Scharpf observes, creates its own constraints: certain arguments will simply count as unacceptable in a public setting. These constraints, however, can only be made operative if arguing is defined in relation to the reference group whose collective interests would be affected by the policy options discussed. Appeals to shared criteria of justice, in turn, are premised upon the CIR. In sum: Only when participants have already internalized criteria of justice and thus share a national identity is it possible to reach outcomes that regard the public interest from the uncompelled preferences of the citizens. This requirement of a substantive solidaristic bond based on cultural homogeneity cannot, however, be met on the European level, given the fact of the ethnic, cultural, linguistic and economic heterogeneity of the EU. Any further step towards further integration would therefore not be politically desirable -- it would alienate us from our democratic commitments, destroy (contrary to the principle of subsidiarity) local autonomy and in the end would subordinate cultural identity to an unattractive mixture of bureaucracy and the market. The only possible answer to the legitimation problem is therefore (in this view) the revitalization of the nation state and its democratic process.

The argument for an increase in national authority as a condition for effective democratic politics on the European level focuses on locational competition, and especially the conflict between the more highly industrial and the less developed members of the European Union. Countries of the former group can impose high wages and high social and environmental costs on firms -- and will yet remain successful in European competition because of their high labor productivity. Countries of the second group, which have a far lower average productivity, can not. Unitary European social or environmental regulations would destroy the competitiveness of the countries of the second group. Moreover, locational competition makes joint deregulation, via races to the bottom, more likely. The way out seems to be to strengthen the capacity of the nation states to deal with social and environmental issues.

However, faced with evidence that we will consider in a moment, Scharpf has had to amend his argument to include the possibility that regulatory competition does not inevitably set off a race to the bottom or "Delaware effect." (The name derives from the alleged preference of US corporations for legal domicile in Delaware over other, more demanding states). Instead it may even produce a race to the regulatory top or "California effect." (California regulation is said attract corporations because it imposes disciplines to which they would like to be subject but cannot impose on themselves.) The California effect prevails, in this view,

if regulatory competition is on "regulatory quality" rather than simply on the costs. This will be the case, for example, when national regulations serve as a trust-enhancing certificate of superior product quality that is rewarded by the market. Under such circumstances, it is likely that high levels of regulation may create a competitive advantage for the firms subjected to them, and thus exert a competitive pressure on other governments to raise their own levels of regulation. Therefore negative or market-making integration may not affect national product regulations and, when it does, need not induce a race to the bottom.

But this qualification of the argument has in turn been qualified: While national product-related standards may induce a race to the top, this is unlikely to be the case with standards which concern the social background conditions of industrial production. Examples are regulations concerning e.g. air pollution, work safety, sick pay, minimum wages as well as taxation, -- i.e. environmental process regulations and social policy measures. These areas are not characterized by a common interest in coordination but by competitive or even conflicting interests. Since none of these regulations affect the products themselves, and since (as Scharpf believes) these standards cannot easily be "translated" back into a self-interest of consumers -- that is, into a consumer preference for goods and services produced under more stringent process regulations, regulatory competition under conditions of transnational mobility will generally exert downward pressures on national regulations. So, qualified qualifications

notwithstanding, the argument reverts to the initial claim of a link between de-regulation at the EU level and locational competition.¹⁵

Accordingly, for Scharpf, the central place for democratic self-government remains the *national* policy discourse. Moreover, even within the nation state the scope of democratic self-government is rapidly decreasing given the fact that the national policy discourses have to stay attentive to the constraints imposed by supranational law (such as GATT rules, EC law, interventions by the WTO, decisions by the ECJ, etc.). In the end, therefore, Scharpf opts for elite-led national policy discourses as the proper -- and only -- place for deliberative democracy. "It is in such elite-led, but nevertheless public discourses that policy choices must be explained and justified in ways that can be challenged by counter-elites, and in terms that can also be understood and judged by (interested) non-elites as well." These national policy discourses must be guided by an awareness of the limitations of the national problem-solving capacities to meet the requirement of output-legitimacy, -- and thus avoid any illusion of (as Scharpf puts it) "omnipotence." Furthermore, the national policy discourses must develop reflexive capacities concerning the interests of other nation states, -- that is, they must be "informed by an empathic understanding of the preferences, worldviews and capabilities of the other countries involved." In this case, these discourses can, as Scharpf believes, provide a link between on the one hand efficiency- or feasibility-oriented legitimation criteria, and on the other hand input-oriented criteria that remain sensitive to "the perceptions and preferences of non-elites." Thus, the normative

¹⁵ F. Scharpf, op. cit..

perspective is one of enlightened nationalism, but not one of transnational democracy.

Hugh Collins presents a variant of this argument in challenging the project of a common European private law¹⁶. Collins' point is that the creation of a common European private law would also lead to excessive centralization, and the corresponding destruction of the cultural identity of the Member States. According to Collins, private law systems can be regarded as the language of a society.

Suffused by its characteristic principles of distributive justice a society's private law expresses its *cultural identity*. For the way a society draws the boundaries of commodification and of market-alienability articulates its defining commitments and social values. The fusion of private law systems and the substantive goals of the political community is seen as an historical triumph of each and every nation state over the abstraction and formalism of modern private law. From this perspective, the creation of a single European market disrupts the precarious balance between markets and the cultural identities of the Member States. The social democrats fear that the victory of EU regulation will lead to the dominance of the market over the solidary polity. Collins fears that, within the market itself, the victory of European economic law will lead to the dominance of the "unencumbered self"¹⁷: the un-situated, striving individual who "displays impatience with the ties of the community, and seeks to invent himself and his environment through rational choice".

¹⁶ H. Collins, 'European Private Law and the Cultural Identity of Member States' (1995) 3 *ERPL* 353.

¹⁷ On the "unencumbered self", see Sandel, *Liberalism and the Limits of Justice* (Cambridge: 1982)

Carried to its limit the social democratic view issues in sociological theories of identity that highlight the ultimate dependence of democracy and constitutionalism on the nation or the group as a pre-political condition. The theory turns sociological when stable territorial boundaries and a shared political culture and history are not just seen as a *supplément*, but as the pivotal pre-political conditions of democracy. Offe's recent work on "democratic impossibilities"¹⁸ goes this further step. His central argument is that democratic politics cannot determine the constituent features of a state; a state must always already be in place before a constitutional democracy can possibly begin to operate. The claim is that democracy cannot be brought into being by democratic means. He identifies four democratic impossibilities: "matters which, by their very logic, cannot be resolved in democratic ways." First, there must be a *pouvoir constituant* "prior to and unconstrained by the democratic principles which govern in a democratic society once established" – "the initial framework in which democratically legitimated power is to be created is not enacted democratically." Second, it is "democratically impossible for the people to decide or (re)define who belongs to the people (as opposed to who is to be enfranchised within an existing people)". Third, "territorial borders cannot be changed in obviously democratic ways". Fourth, as to democratic agenda-setting, "the citizenry of a democracy cannot decide on the issues the citizens are to decide on."

¹⁸ "Homogeneity" and Constitutional Democracy: Coping with Identity Conflicts through Group Rights, in: *The Journal of Political Philosophy*: Vol. 6, No. 2, 1998, pp. 113 – 141.

Accordingly, the very possibility of democratic self-government comes to depend upon what Offe calls "reflexive homogeneity," Homogeneity is "reflexive," because it offers a real-world grounding for mutual trust between citizens and for solidarity – both preconditions, as in Scharpf's argument, for stable, mutual obligations among citizens that ban the Hobbesian specter of a world of self-interest, and give a motivational foundation to the modern welfare state.¹⁹ Clear territorial boundaries are the "decision points" that define whose welfare is to be counted in the distributive process and whose resources are to be equalized with regard to which reference group. The ultimate remnant of constitutional democracy, in Offe's case, becomes a *pre-democratic decision*, – and consequently all interpretative efforts of this reconstructive project are directed toward assuring us that at least *this* foundational decision is removed from the endangering and de-solidarising sway of strategic politics under conditions of globalisation, precisely because it is "pre-political," – that is, *intrinsically* sundered off from and stabilized against the vicissitudes of the political process, as a matter of sociological faith. democratic constitutionalism recedes into a decisionism that recalls Carl Schmitt—our friends and our enemies are just who they are, because we are who we are.

Ultimately, then both the social democratic and the liberal-constitutional views describe the European integration process as an accommodation between European economic law and the

¹⁹ Idem, *Demokratie und Wohlfahrtsstaat: Eine europäische Regimeform unter dem Streß der europäischen Integration*, in: W. Streeck (ed.), *Internationale Wirtschaft, nationale Demokratie. Herausforderungen für die Demokratietheorie* (Campus Verlag: 1998), pp. 99 – 136.

political sovereignty of the nation states.²⁰ In both views political autonomy remains locked into the nation state. While the former – libertarian – approach celebrates integration as securing the primacy of economic rights and liberties over the political rights firmly in place on the national level, the second approach criticizes integration as *alienating* European societies from their basic democratic commitments. The second approach is sensitive to the deficiencies of the libertarian approach, but has, in its emphasis of the nation state, only a deeply ambivalent option to offer. The supranational primacy of European law over national law appears from this perspective as a dangerous anomaly in constitutional theory: the more law that has neither democratic pedigree nor warrant in tradition overrides the law with both.²¹

So tight is the grip of this dichotomy on constitutional thought that even the most deliberately innovative proposals for reform in the EU aim at the recombination of the contrary elements, not a reconceptualization of the system of categories by which they become antithetic. A prominent example is Weiler's proposal to conceive of the constitutional structure of the European Union in terms of a variable geometry of romanticism and enlightenment. Weiler calls his "a politically conservative view since it insists not simply on the inevitability of the nation state but on its virtues."²² Weiler's aim is to find an alternative to outright rejection of European citizenship (given his empirical assumption that there is

²⁰ See W. Streeck, 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy', in: St. Leibfried and P. Pierson (eds.) *European Social Policy Between Fragmentation and Integration* (Washington, D.C.: The Brookings Institution 1995) 389.

²¹ So explicitly: F. Scharpf, *op. cit.* at 149.

²² Cf. Weiler / Trachtman, __ *Northwestern Journal of Intern'l Law and Business*, 354 ff. (Winter-Spring 1996-1997).

no demos "out there:" "no demos - thesis") and reduction of European integration process to (higher-level) nation-building. His project is at the same time motivated by the insight that the nation state has lost its presumption of innocence:

"A central plank of the project of European integration may be seen ... as an attempt to control the excesses of the modern nation state in Europe, especially, but not only, its propensity to violent conflict and the inability of the international system to constrain that propensity."

Given the modern nation state's historical propensity to dangerous excesses of nationalism, it would be, Weiler notes, " more than ironic if a polity set up as a means to counter the excesses of statism ended up in coming round full circle and transforming itself into a (super) state." So Weiler's project is to join what he takes to be the virtues of the nation state with an idea of European constitutionalism. "Nationhood" is associated with "Belongingness and Originality" as a "framework for social interaction," "statehood" with "the organizational framework within which the nation is to realize its potentialities," and "supranationalism" "is about affirming the values of the liberal nation state by policing the boundaries against abuse," it "aspires to keep the values of the nation state pure and uncorrupted by ... abuses ...", it "does not reject boundaries: it guards them but it also guards against them;" it is not meant "to eliminate the national state but to create a regime which seeks to tame the national interest with a new discipline."

The idea of supranationalism, with its focus on individual rights to non-discrimination or free movement, is on the one hand "to control at the societal level the uncontrolled reflexes of national interest in the international sphere," and on the other hand to protect the nation against abuses by the state. Weiler thus offers a kind of "quasi-Kantian," *Zwei-Reiche-Lehre*: The supranational level is the realm of "liberal notions of human rights," of criticism and of "civilization," (the "intelligible world"). The national level is the realm of the good, of identification and of "Eros" (the "empirical world"). This model, allows for "a European civic, value-driven demos ... side by side with a national organic cultural one." It is designed "to reestablish a new framework for a new epoch in the life of the European nation state, and, at the same time, give legitimacy to the normative claims of European constitutionalism."

Moreover, rights-based supra-nationalism and organicist national citizenship are, according to Weiler, mutually supportive and correcting. Together they offer "a structured model of critical citizenship." European rights-based "civilization" may -- as Weiler believes -- lead to destructive abstraction from concrete forms of life: to an "increased bureaucratization," to "commodification... through competitive structures of mobility," and to "centralization of power," in short, to "the angst of modernity." This propensity to "alienation" has to be counter-balanced by the nation state, because "the nation and the state, with their organizing myths of fate and destiny, provide a captivating and reassuring answer to many." Thus European citizenship "could be regarded as emblematic of that new liberal effort which seeks to preserve the Eros of the national while holding its demonic aspects under

civilizing constraints and to bestow on the Union a legitimacy which acknowledges the constitutive elements of democracy and demos without compromising its Community non-statal telos."

Weiler believes that the strength of his view is to conceive of the Treaties (of Maastricht and of Amsterdam) as a social contract among the nationals of the Member States rather than an agreement among the States themselves. Yet the thrust of his approach is to contain and domesticate rather than valorize and foment this incipient transnational political dialogue and the novel forms of citizenship to which it might lead. It (further) constitutionalizes the national constitutional democracies through the affirmation of "supra-nationalism" without envisaging European constitutionalism as an instrument for actively advancing innovative projects among citizens creating new forms of solidarity, trust and reciprocal recognition *beyond the nation state*.

III. Counterfactuals: Democracatic Experimentation and the "Burdens of Judgement"

The consensus informing this line of argument is all the more striking because it echoes an earlier, surprising turn in a leading school of constitutional theory associated with Dworkin, Habermas, Michelman, and Rawls. That school was long committed to the claim that the possibility of constitutional democracy does not depend on the (allegedly) prepolitical cultural homogeneity and

self-evidence of a demos. A central feature of these "middle-ground" approaches has been to insist that democratic self-government is not thwarted by, but rather benefits from the heterogeneity of participants: that the "diversities of experience and vision and the thousand shocks to which human judgement is heir"²³, favor rather than impede democratic experimentation.

The highest goal of theories of this kind democratic constitutionalism was the reconciliation of two apparently contradictory ideas. The first is "democracy," meaning political self-government: the people deciding for themselves the contents of the laws that organise and regulate their political association. The second is "constitutionalism," meaning the containment of politics, and not least the sovereignty of the demos, by a "higher law" or law of lawmaking that controls which laws can be made and by what procedures. At its most ambitious, the aspiration of constitutional theory was to show that democracy as the recognition by each citizen of the others as free and equal beings would give rise to a kind of constitution of reason. This constitution of reason effectively becomes the highest law, guiding such reform in the procedures and substance of democracy that in time the people's constitutional and political choices are as one. The aspiration of constitutional theory, accordingly, was to show that democracy is not simply about individual interests and their aggregation, but about the discovery of collective courses of action that can be mutually justified among free and equal citizens in the light of collectively shared understandings of constitutional principles.

²³ Michelman, Brennan and Democracy, p. 28.

But even those sophisticated normative theories have withdrawn to incantation of a shared constitutional identity as a basic condition (and last resort) of democracy in a context of deep cleavages. Habermas—who evidently knows when he is playing with fire—calls this shared identity “constitutional patriotism.” The underlying fear is that pluralism "at all levels" will affect the higher law or constitutional essentials of a complex society, endangering the very possibility of integration through law. Given this danger the practical success of constitutional justification unexpectedly turns out to depend on what Dworkin calls the "structural conditions of democracy": the stable territorial boundaries, shared political culture central to social democratic nostalgia for the nation.

Before going into details, it may be helpful to have a look at the overall structure of the original argument. The starting point for this constitutional theory was the fundamental question: How can the exercise of political power, which is always coercive power, be rendered "justifiable to others as free and equal?"²⁴ The answer comprised three elements in constant tension with each other: Specific exercises of coercive political power are justified, when

- (i) they are validated by a set of constitutional essentials
- (ii) that everyone can see that everyone affected has reason to accept in the light of his or her own interests,

²⁴ Rawls, *Political Liberalism* (New York: Columbia UP, 1993): 217.

(iii) when sharing the commitment to conduct political argument on common ground (the "desire to honour fair terms of cooperation."²⁵), the sundry causes of disagreement about normative questions (the "burdens of judgement"²⁶) notwithstanding.

These three elements were supposed to reconcile pluralism with the constitution of reason. The guiding idea is that the principles for the constitution of a lawmaking system can be – and indeed must be – cast in terms sufficiently removed from the immediate everyday conflicts of interest and vision in order to allow for reasonable acceptability of a set of principles to everyone concerned. But this accommodation of the idea of political justification to the fact of pluralism depends on the weak motivational presupposition expressed in (iii): the presupposition that actors understand themselves as participants in a joint project of searching agreement on fair terms of cooperation within a shared social space.

The problem with this way of accommodating pluralism emerges when, in the process of self-government, reasonable disagreement is unavoidably re-iterated "all the way up" into the realm of constitutional interpretation. To the extent that the higher-law core is affected by reasonable disagreement, the constitution becomes untenably unstable. On the one hand it itself becomes an object of reasonable disagreement. On the other hand, such disagreement notwithstanding, its content must at any given moment be

²⁵ Rawls, PL, op cit

²⁶ Rawls, Political Liberalism, op. cit.

determinate enough to guide a program of constitutional that increases the security of disadvantaged groups.

In this situation, however, the initially weak motivational presupposition (iii) seems to become stronger and stronger – to the point of becoming the sole and crucial warrant of the very possibility of a meaningful process of interpretation of constitutional principles. Consider three routes to this retreat to personification.

The first is Dworkin's synthesis of constitutionalism and democracy—better known for the rights it promises to vindicate than the national ties that it supposes. Indeed, Dworkin is often read, correctly, as arguing that an ethically coherent community is in some important sense a political construct: that, *pace* Schmitt, the community supposes the polity at least as much as the other way around. Dworkin's project is to specify those conditions that must be fulfilled in order if politics is not to be an usurpation but an exercise of the citizens' special responsibility for their own lives.

How, he asks, can collectively binding decisionmaking be made consistent with the people's ethical responsibility to lead their own lives? He rejects a social contract as a useless fiction: not as a pallid contract, but as no contract at all. He rejects as well a consensus to agree on constitutional essentials while abiding disagreement on comprehensive notions of the good life do (the Rawlsian overlapping consensus). For this kind of constitution of convenience divorces justice from ethical ideals related to concrete forms of life. Rather, democracy can become an authentic form of

self-government only if it allows people, one by one, to take control over their own lives. If the political structure in which disagreement persists is, in this sense, truly democratic; if it is, as Dworkin says, a partnership among equals, then it is fair to enforce collective decisions even on those who oppose those decisions.

This partnership is in turn realized if three "relational conditions" of communal – as opposed to simply "statistical" – democracy are met: fair and equal access to the process of public will-formation; an equal measure of concern for the interests of each in decisions of public policy; and the mutual recognition of the moral independence of each citizen as a person who can take personal responsibility both on questions of the good life and on issues of justice -- i.e. about how competing interests of all citizens should be accommodated. The political community's observance in its lawmaking acts of these relational conditions provides each individual with reason to identify his or her political agency with the lawmaking acts of collective institutions.

But Dworkin realizes that the very general rights that secure the relational conditions of communal democracy are, by their very generality, too indeterminate to themselves compel resolution of the actual controversies that come before tribunals in complex societies. To close the gap between rights and controversies Dworkin appeals to what he calls a "moral reading" of the constitution. This reading "presupposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political

decency and justice....The moral reading therefore brings political morality into the heart of constitutional law."²⁷

The background conditions that make possible this moral reading, however, require in effect that the political community be personified before it can be constructed. Thus Dworkin writes: "Political integrity assumes a particularly deep personification of the community or state." He instructs judges "to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author -- the community personified -- expressing a coherent conception of justice and fairness." Political community is explicitly conceived as a "moral agent," acting above the heads of the real citizens, as "some special kind of entity distinct from the actual people who are its citizens." (Dworkin, 168) Or, as he puts the point elsewhere: "The political community must be more than nominal: it must have been established by a historical process that has produced generally recognized and stable territorial boundaries." (24) And he insists "that the members of a genuine political community must share a culture as well as a political history: that they must speak a common language, have common values, and so forth." (ibid.) In the end, then the citizens' relation to democracy, via the state is abstract, while their relation to one another, via the community, is visceral.

Not the least the ironies of this personification of the political community is its surprising – because wholly unintended – affinity with the legal positivism that Dworkin originally intended to

²⁷ Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), p. 2.

overcome. A core tenet of legal positivism is that we need a master rule of recognition that marks legitimate commands of the sovereign as such. Without such a pedigree we cannot distinguish the command of a sovereign, which is obeyed because it is the legitimate sovereign who issued it, from the orders of a gunman, which are obeyed because of the threat of violence. Of all law only the one not legitimated in this way was thought to be the rule of recognition itself, unavoidably based on the brute fact of social acceptance as a natural substratum.

Dworkin challenged this picture by showing that it leaves no place for principles within argumentative games. Principles, as Dworkin argued, do not apply, as rules do, in all-or-nothing fashion. Instead they incline a decision in one way or other, stay intact if they do not prevail, and are linked to general notions of fairness. There is no positivist test of pedigree tying legal principles back to acts of legislation. Principles are controversial, they are part of a (dialogic) process of interpretation, with regard to which Hart's sharp distinction between acceptance and validity does not hold. Arguing about principles, Dworkin says, "introduces a note of validity into the chord of acceptance." So, after all, there is no ultimate master-rule of recognition relating principles to acts of legislation, and the neat distinction between fully conventionalized rules and background culture—a distinction which leaves no space for the practice of deliberative justification itself--collapses.

Yet a consequence of Dworkin's insistence on a moral reading of the constitution and his specification of the conditions making this possible seem to root the dialogic practice of constructivist

constitutional justification in the factual existence of a sovereign (people) reminiscent of positivism. Or put in Dworkin's own language, his solution to the problem of applying principles to controversies under conditions of diversity introduces a note of acceptance in the cord of validity. The "ethical grounding" of democratic politics points to the pre-political as surely as did the social democratic concern for the social conditions of re-distribution.

The second trajectory is that of Habermas. His efforts are directed towards the reconstruction of a universalizing, or at least transatlantic idea of democratic constitutionalism that abhors the parochialism of nation political cultures. Rather than securing the convergence and legitimating force of democratic lawmaking in advance by tying it back to a (supposedly) pre-existing substantive ethical consensus of a political community, Habermas argues that it is the "democratic procedure for the production of law" itself, which is the only "postmetaphysical source of legitimacy" of coercive law. There are four aspects to this idea:

First, the idea of a legitimacy-conferring democratic procedure builds on the idea that only those laws are legitimate which might claim the agreement of all citizens in a discursive process equally open to all. Encapsulated within the democratic procedure -- and "transmitted ... to the complex and increasingly anonymous spheres of a functionally differentiated society"²⁸ through law -- is a "discourse principle (D)," according to which "only those norms of action are valid to which all possibly affected persons could assent

as participants in rational discourses." And Habermas emphasizes that only the actual discursive engagements among citizens over the contents of their country's constitutive laws -- as opposed to hypothetical agreement -- can confer legitimacy upon a legal order: Only a process of actual dialogic encounter with the full range of affected others can reliably appraise the rational acceptability of proposed fundamental laws to all those who stand to be affected by them.

Second, the emphasis on the actual democratic-procedural provenance of constitutional law goes hand in hand with what Habermas calls a proceduralist paradigm of law, which introduces his version of the idea of a non-court-centered understanding of constitutional interpretation. The proceduralist paradigm of law is directed against a legalist self-understanding of law which maintains that equal rights as moral rules are already „there“ in some sense and can be "applied" by some elitist institution -- a constitutional court, both removed from and standing for the people -- thus restricting the very scope of democratic discourse itself. The proceduralist paradigm expresses the idea that the resolution of divisive political conflicts cannot be pictured as a simple integration of morality – of procedure-independent standards of rightness – into the law by judicial acts of pure practical reason. Relatedly; against Rawlsian political constructivism Habermas objects that from the perspective of a philosophically elaborated and judicially enacted theory of justice the act of founding the democratic constitution cannot be repeated under the institutional conditions of an already constituted just

²⁸ Habermas, *Between Facts and Norms*, at 318.

society.²⁹ If the results of the theory are already sedimented in the constitution, the citizens cannot conceive of the constitution as a project: Establishing a substantive political conception of justice would in the end amount to usurping the prerogatives of free democratic discussion and to anticipating, in the wrong way, its outcomes.

Third, the proceduralist paradigm of law aims to vindicate the idea that citizens and social actors themselves, acting as societal lawmakers, decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracy. The citizens themselves, through the continuous exercise of political autonomy, have to apply the discourse principle to the legal form over and over again in an ongoing process yielding a system of equal rights which in turn offers a moral constraint upon the lawmaking process. Thus, Habermas says, a legitimate legal order is "one that has become reflexive with regard to the very process of institutionalization;" only those laws can be legitimate that can gain assent in a procedure that has itself been legally constituted. "The idea of the rule of law sets in motion a spiralling self-application of law."³⁰

Fourth, this practice of (constitutional) lawmaking, Habermas insists, cannot be assimilated to a "hermeneutical process of self-explication of a shared form of life or collective identity"³¹ or to the "clarification of a collective ethical self-understanding." Rather, the

²⁹ Cf. also M. Walzer's 1981 (?) article on philosophy and democracy, defending Ely's proceduralism against Dworkin <<check reference>>

³⁰ Between Facts and Norms, 39.

³¹ Habermas, Three Normative Models of Democracy, in: Benhabib ____

very point of constitutionalism is to institutionalize "the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation." From a discourse-theoretical point of view the "self" of the self-organizing legal community "disappears in the subjectless forms of communication that regulate the flow of deliberations in such a way that their fallible results enjoy the presumption of rationality."³² Ethical questions are "subordinate" to questions of justice which concern matters to be regulated in the "equal interest of all" and which are "not related from the outset to a specific collective and its form of life."³³ The politically enacted law of a "concrete legal community" must -- in order to be legitimate -- "at least be compatible with moral tenets that claim universal validity going beyond the legal community."³⁴

Two changes undercut this Habermasian proceduralism. One is the retreat of popular sovereignty into subjectless democratic procedures (which, Habermas says, in a denationalized context must "catch up" with globalised markets³⁵). The other is the divorce of claims to unconditional moral rightness from the citizens' ethical outlooks. Under these conditions the legitimacy-conferring force of Habermasian proceduralism comes to depend on constitutional patriotism as an empirical warrant or moral substratum. It alone bridges the conceptual gap between hypothetical consent and actual democratic practice. The practical pursuit of the idea of universalizing political justification becomes

³² Ibid. at 29.

³³ Ibid., at 25.

³⁴ Ibid.

³⁵ Habermas, *The European Nation State and the Pressures of Globalisation*, in: 235 *The New Left Review* 46 ff. (1999).

contingent upon the community's concrete ethical character, as the substance of constitutional patriotism unavoidably involves identification with an actual historical community. The emphasis shifts from universalist striving for transcendence from within, born of a discontent with the exceptionalism of national experience, back to historically shared values -- and to the idea that "(d)ie Nation oder der Volksgeist ... versorgt die rechtlich konstituierte Staatsform mit einem kulturellen Substrat."³⁶ ("The nation or the spirit of the people provides the legally constituted form of the state with a cultural substratum."—our translation)

Thus, both Dworkinian and Habermasian constitutionalism leave us with a world in which normativity – the warrant of the legitimacy-conferring character or "persuasiveness" of democratic politics under conditions of reasonable pluralism – is always where we are not: The choice is either between grounding the principle-guided "moral reading" of constitutionalism in the hermeneutic self-explication of shared value orientations, or of grounding it in a generic, quasi-transcendental consensus on communicative presuppositions, -- with each position unavoidably and continuously collapsing into its respective opposite, and no hope of conceptual closure.

These criticisms parallel Michelman's recent attempt to resolve what he calls the "paradox of democracy." In his criticism of Dworkin's theory, Michelman points out that in reducing self-government to identification, Dworkin mistakes a state of mind or an attitude for a case of agency and of dialogue. Identification with

³⁶ Habermas, *Die Einbeziehung des Anderen*, 135 (Ffm., 1996).

a result is evidently not the same as actual participation in a jurisgenerative process, not self-rule actually carried out – with "a reference to something that someone *does*."³⁷ But democracy at the same time requires, Michelman argues, a pre-inscription – itself not politically "up for grabs"³⁸ – into the "higher law" of lawmaking of whatever substantive constraints on subsequent political action are necessary to maintain "democracy-constituting conditions of equality, independence, freedom and security"³⁹ – and which "place government under reason expressed as law."⁴⁰ It is therefore, Michelman argues, "absolutely ... not possible to appoint democracy to decide what democracy is"⁴¹ and what "democracy means and requires -- as a matter of "logics." Democratic commitment, therefore, contains (on this view) a fundamental paradox: On the one hand, democratic commitment means concern with actual self-rule – with the "individualistic notion of `everyone´s´ political self-government"⁴² as the source of valid law. On the other hand, the concern with substantive, democracy-constituting conditions – procedure-independent standards of rightness – generates an "irrepressible impulse to exclude basic law-determinations from the procedural purview of democracy,"⁴³ which bars democracy from a decision-space "where it would seem urgently and rightly to want to go, that of deciding the the contents of the ... laws of lawmaking."⁴⁴

³⁷ Michelman, Brennan and Democracy, 24.

³⁸ Ibid. 33.

³⁹ Ibid. 33.

⁴⁰ Ibid. 50.

⁴¹ Ibid. 34.

⁴² Michelman, Brennan and Democracy, p. 14.

⁴³ Ibid. 34.

⁴⁴ Ibid. 34.

Michelman shows that any purely procedural resolution of the paradox of democracy would simply re-instantiate it, because any procedural standard – such as equal and unrestricted access to public discourse – is, in turn "hooked on substance." Nor would a purely "substantive" resolution be possible: Citizens, Michelman argues, cannot simply put aside those differences of comprehensive outlook that make for reasonable pluralism when they turn to matters of constitutional interpretation. Indeed, suppose citizens could somehow put their reasonable differences aside and agree on uncontroversial constitutional essentials, on the contents of "the really high law"⁴⁵: Application of those – inevitably abstract and broad – essentials to any particular problem would themselves require interpretation and further specification; this process, however, opens the constitution to divisive, eventually destructive, conflict. Given deep disagreement over the application of constitutional essentials, and in order for disagreement to remain within the realm of the reasonable, the only hope – "the only remaining possibility for self-government in politics"⁴⁶ – lies in the shared insight into (and citizens' loyalty to) the ethical bases of democracy —constitutional patriotism. Constitutional patriotism, Michelman (taking up a Wordsworthian trope) writes, "recovers and explains the possibility of moral reasons and of moral experience, but at the same time it shows them to be reasons and experience into which we always enter not in entire forgetfulness but trailing clouds of culture from our particular national home." Michelman's own project directs all

⁴⁵ Ibid. 50.

⁴⁶ Ibid. 51.

its energies to showing how constitutional practice is contingent upon constitutional patriotism as a protective ethical base: Constitutional patriotism transforms disagreements over the interpretation of constitutional essentials into a difference over a community's political self-understanding, that is, into a difference which remains always already internal to a collectively shared constitutional project. Thus, constitutional patriotism makes it possible for citizens to accept disagreement over the application of shared constitutional principles, without loss of confidence in the univocality of these principles themselves (think of it in terms of "Frustrationstoleranz"), -- it envisions constitutional justification as a process which requires "conscious reference by those involved to their mutual and reciprocal awareness of being co-participants not just in this one debate, but in a more encompassing form of life, bearing the imprint of a common past, within and from which the arguments and claims arise and draw their meaning."⁴⁷

As we will see below, democratic experimentalism / DDP will take a different route in order to reconcile the commitment to constitutional justification with the burdens of judgement. Herein lies, as we will see below, the challenge the recent developments in Europe pose for the very idea of democratic constitutionalism. Rather than seeking refuge in supposedly stable, pre-deliberative "external" certainties (hoped to confer "persuasiveness" upon the process of constitutional justification) – observable preferences, fixed identities, the boundaries of a political community personified –, the aim of the alternative view is to defend a radically internalist view of constitutionalism: to spell out the normative and

institutional infrastructure of a constructivist jurisgenerative process in which reasons and boundaries, rights and identities, actors and procedures, principles and practices, mutually transform and "educate" one another in the light of new experience. This jurisgenerative process is "hooked" neither on the hermeneutical self-explication, nor on the citizens' generic agreement on the communicative presuppositions of discourse, but blurs this distinction: Initially shared forms of discourse become, as the mutual exploration of difference proceeds, themselves stakes in political deliberation – signs, which are not just vehicles of political contention, but at the same time crucial objects of contention. These signs, on the one hand, reflect (and are motivated by) diverse perceptions of interest and situation, of need and possibility, on the other hand, anticipate common ground. By the same token, they are also tendentially oppressive – and need destabilisation through exposure to difference. Thus, in this alternative view, the polyarchical dispersion of sovereignty and legal pluralism are seen not as an evacuation of the practice of constitutional justification, but rather as an innovative way, open to modern denationalized societies, of self-consciously vindicating the original idea that democratic self-government and constitutional justification are not thwarted by, but rather benefit from the heterogeneity of participants, – thrive, that is, from the very "diversities of experience and vision and the thousand shocks to which human judgement is heir."⁴⁸

⁴⁷ Law's Republic, 97 Yale Law Journal 1493 ff, at 1512 (1988).

⁴⁸ Michelman, Brennan and Democracy, p. 28.

These ideas are closely related too, and develop certain implications of what Frank Michelman calls “romantic constitutionalism.” Michelman’s argument is that no elaboration of principle or recourse to perfected procedures can fully reconcile the requirements of constitutional democracy that the people be self governing and that the higher law guaranteeing the democratic character of lawmaking itself be subtracted from popular control and reposed, for example, in a judiciary not accountable to the electorate. We cannot accept constitutional democracy as a legitimate embodiment of the true principles of a democracy because, even if we agreed on those principles, their interpretation would be controversial, and we have no uncontroversial principles for deciding the procedures by which those controversies would be decided. A purely procedural solution, along the lines of a government equally responsive to the concerns of each of us, fails because every procedure embodies certain principles, and these, or the principles governing controversies arising under them are controversial. Nonetheless, recognizing our limits as individuals and as members of large decision-making bodies we might agree “epistemically” that a constitutional democracy is legitimate if it embodies the best possible interpretation of our understanding of democracy (“our right to be treated as equal,” for example) *and* if those empowered to interpret the higher law—the constitutional judiciary—expose themselves and other institutions to the “full blast” of opinions and interests in society. The first condition allows us to identify with our democracy, the latter allows us a measure of participation in its actual lawmaking. The constitutional judge will exercise her powers most in conformity with these commitments when she embraces what Michelan calls romantic

constitutionalism: the view that individuals can transcend the limits of their personality if society will make the social contexts that both shape and obstruct the flourishing of their identity susceptible to revision. Toleration for the clash of principle and for the jostling of competing designs for living is both a sign and an instrument of this heightening of revisability. Justice Brennan embodies the type of the romantic constitutionalist in his willingness to give room to dissident, even offensive views in his interpretation of the right of free speech; in his willingness to allow minorities to pursue remedies through courts or expressive boycotts that they might have pursued through political parties, circumstances allowing; and in his unwillingness to defer to official claims of expertise in disputes between citizens and bureaucrats.

So far Michelman's view. The question arises: Can romantic constitutionalism itself be institutionalized in the sense of embodied in systematic changes in the relations between the branches of government, judiciary included, and civil society that better serve its animating value of more democratically legitimating constitutional democracy? The earlier discussion suggests a limit to such improving institutionalization: No set of procedures can "finally" resolve the tensions of constitutionalism and democracy. Still, the limit is not the whole story. Many if not most of the changes wrought by the romantic constitutionalist judge are institutional innovations: Think of Brennan's support for expressive boycotts. Surely it must be possible to link decisions of this kind and think of them as program of institutional change in the service of romantic constitutionalism? And just as surely, some programs could be judged better than others by the lights of romantic constitutionalism itself. Our claim is that the standard-based

reforms, because of the way they link local action to the revision of the frameworks of social action have a privileged place in the family of romantic constitutionalist programs, despite its origins elsewhere. Indeed, in seeking to normalizing insurgency standards-based reform might be thought to capture the essence of romantic constitutionalism. Still, the enthusiasm may not be mutual. Advocates of romantic constitutionalism may suspect (incorrectly, in our view) that the reforms discussed here aim at a managerialist domestication of the conflict and so suffocate the struggles that permit and give meaning to the transcendent recreation of identity. See Frank I. Michelman, Brennan and Democracy, (Princeton: Princeton University Press, 1999)

There is, as Michelman in his rejoinders to Habermas observes, "no real-life disentangling of the call of unconditional rightness from the call of integrity or self-constitency, of loyalty to the best one can make of one's own and one's community life history and self-understanding."

IV. Countertheoreticals: Transnational Institutions — Managerial Informalism or Incremental Constitutionalism?

The horizon of transformative possibilities, however, is broader than this normative debate suggests. A new round of investigations into decision-making in the EU — growing originally out of concern with the threat to the welfare state supposedly inherent to harmonisation — dis-confirms claims of a race to the

bottom and points, if anywhere, to a spiralling trudge upwards. By the same token, these studies show that de-regulation through extension of the four freedoms has not simply resulted in an expansion of the private and the market to the detriment of the public and the "forum," as originally expected. Rather, de-regulation has been accompanied by re-politicisation (and "re-regulation") through the emergence of new transnational governance structures with the explicit capacity to take into account diversity. Of these new forms of governance the most important and often remarked is "comitology": the web of committees, chaired by representatives of the Commission, which assist the latter in the implementation of Community legislation. This it does chiefly by determining the terms under which social actors—"private" standard setting entities very broadly conceived—will give content to particular framework rules. These committees are variously composed of representatives of the Member States, economic interest groups, scientific experts and advocacy groups of many stripes. They explicate and scrutinize heterogeneous interests and vocabularies — national, governmental, sectoral, technical, or self-avowedly public regarding. They are designed not to reflect and aggregate self-interest, but rather to use the initially parochial and sectarian perspectives to foster mutual learning, and eventually the transformation of preferences as part of the elaboration of shared interpretations. Within this new institutional architecture, innovation — the resetting of the very conceptual frameworks and political conflict lines which gave form to the initial discussion — becomes a condition of bureaucratic and political success.

Despite broad agreement that the new empirical findings will not support the conclusions of the market-demos debate canvassed above without substantial qualification, there is nothing approaching a consensus regarding what to make of these facts. One tendency, best exemplified in the work of Weiler, is to see the new institutions as a colonialization of political sovereignty through managerial informalism. As the contrast between definition and execution of tasks softens, society's fundamental distributive questions will be decided by actors and processes so removed from the standard institutions of representative democracy as to be politically invisible and therefore unaccountable.⁴⁹ The contrary

⁴⁹ Weiler argues that comitology — originally meant to remove crucial risk-related and distributive decisions to non-court—centric politically accountable forms of decisionmaking — has resulted in disastrously undermining the fundamental constitutional value of accountable political decisionmaking. He points out that comitology remains "outside the classical parameters of constitutionalism" (343) and fears that there is (and will be) no robust substitute: "...we should not hide the utilitarian or social engineering dimension of this governance choice and it hardly provides a basis for a generalized normative model" (349).

Weiler points out that, within the setting of the comitology procedures, actors may, in a formal sense, be representatives of the Member States or of organized sectorial interests, but "(i)n substance they socialize into an independent identity" (Weiler 342). Actors develop their own self-standing "constructivist identity and culture (or subculture)" (Weiler 342), which helps them to neutralize (one-sided) national interests and sectorial pressure: Committees "composed of mid-ranking officials have long lost their allegiance to their controllers and work very much within their own universe for what they perceive as their function and task" (Weiler, 342). By generating its own universe, comitology transcends (and operates alongside) the intergovernmental / supranational divide and becomes paradigmatic for what Weiler dubs "infranationalism."

But the more comitology generates its own distinct, discretionary, value-driven and self-standing constructivist identity and culture, the more — Weiler says — it unavoidably defies and escapes "the normal constitutional categories laboriously constructed in the context of a supranational understanding of the Community" (346). Weiler elaborates the failure of the conventional judicial strategies to constitutionalize comitology: a judicial strategy which constructs committees in terms of "juridical subjects, to which ... powers may (or may not) be delegated," would, by presupposing "a subject-subject relationship between, say, Council and committee," camouflage comitology's constructivist autonomy and be blind to problems of unequal access and privileged sectorial influence. An — amended — second strategy, premised on the belief in the ability to assign "certain functions and powers to the sharply defined subjects" (343) would fail for related reasons: The idea of committees fulfilling clearly delineated tasks and functions — set out in advance — diverts attention from the fact that "committees *do* exercise considerable political and policy discretion without adequate political accountability" (345) and, as one might add, redefine these very tasks — if not the whole *raison d'être* of comitology itself — in the ongoing and self-sustaining process of executing these tasks. In the end, comitology / infranationalism inevitably undermine the normative circularity between law and politics — between the "political process explaining and conditioning legal structure and legal structure conditioning and explaining political process"⁴⁹ — the price of infranationalism being: the triumph of the managerial and expertocratic over the spontaneous and the public where ideological choices expose

tendency, exemplified in the work of Joerges, is to see the results as a potentially promising novelty requiring "a shift of paradigmatic dimensions in the legal conceptualisation of European governance" (Joerges et al. 1999) or a "new conceptual analysis." (Ladeur, 156) that reaches beyond the legal to the political and constitutional. Yet a third tendency, manifest in the work of Heritier, is to register the developments and limit commentary to the observation that the new processes and actors fill the void left by the deficiencies of the familiar ones. So long as they decide questions that representative democracy used to, but no longer can resolve, and those decisions are accepted, the new institutions amount to a "substitute democracy," regardless of whether they claim any legitimacy beyond acceptance.

But there is a tendency for the tendencies to shade into each other. Those concerned with the dangers of managerial informalism are not blind to the innovative character of developments, nor closed to the possibility of beneficent effects. Those drawn to the novelty and the conceptual innovation it apparently demands are for their part attracted to the idea that the innovations may accomplish the familiar ends of administration by new means. In particular they may improve government performance and renovate the role of the bureaucrat and expert without changing much the role of the citizen.⁵⁰ Given this convergence, and in the

themselves to a process of public scrutiny, argument and debate; the concern with stability, efficiency and growth at the expense of redistributive politics and dialogue; the rise of informalism in policymaking which renders actors invisible and eludes those fix procedural and substantive guarantees and framework-conditions which protect debate from deformations through external or internal coercion (power).

⁵⁰ Proceeding from the idea that "(t)ransnational systems must draw their legitimacy from the deliberative quality of their decision-making process".⁵⁰ Joerges proposes to interpret comitology as a "forum of deliberative politics" (311): Comitology — he says — "by virtue of its feedback links to the Member States, ... can, in principle, take all social concerns and interests into account while, at the

absence of settled criteria for deciding when a non-standard technique of public problem solving becomes a substitute for democracy, it is, finally, a short step to agreement that the new institutions are in some sense a democratically authorised

same time, links with science (as a social body) can be shaped so as to allow for the plurality of scientific knowledge to be brought to bear."⁵⁰ He suggests to understand comitology as the paradigmatic case of what he describes as a new European "deliberative supranationalism." Comitology, although "probably the least transparent of all the European institutions," thus, rather than subverting the practice of democratic constitutionalism as Weiler feared, according to Joerges "marks the transformation of the 'old' European Economic Communities into a European polity"(3).

Joerges' starting point is the idea that European primary law, as a matter of paradigmatic orientation, operates neither merely as bulwark against political interventionism, nor does it merely a discipline on domestic debate. Rather, it "compels the public presentation of one's own position in each individual case" and necessitates actors to "use arguments which are compatible with European Law, not just with regard to the contents of national legal systems as such" (317). Indeed, European primary law, he says, is conceptually organized around the fundamental deliberative principle that restrictions of freedom of action can be considered as acceptable only if they are based on regulatory interests which are legitimate within the meaning of Community law.⁵⁰

Joerges' crucial step is to suggest that the telos of the European multilevel system of government (mlsg), permitting both empirical assessment and reform, is precisely the institutionalisation of this fundamental principle of justification. As this principle binds the representatives not only of national interests, but also non-governmental actors⁵⁰, the mlsg transforms itself into an engine of "good governance." In particular, comitology becomes a key device of good governance. It permits the Member States to remain actively present, not merely in an advisory capacity, but "also as political actors", in the process of what Joerges describes as the "administration of the internal market": comitology permits to neutralize one-sided "regional and sectorial arguments" (325), to curtail the parochial pursuit of national interest (316), to enhance responsiveness to politically sensitive questions, which continue to arise in the context of implementing activities and "below the attention threshold of the legislature" (322) and thus opens framework regulations to constant revision. Moreover, the emergence of the new forms of cooperation between the Commission and Member State administrations goes hand in hand with regulatory techniques which instrumentalize the knowledge and the management potential of non-governmental organisations and firms, and which relocate control tasks into the production process itself.

In order to achieve the aim of harnessing deliberation, it is, as Joerges says, of "constitutional importance" to secure the Member States' participatory rights in the comitology process. The persuasiveness of comitology deliberations is warranted, in the mlsg Joerges describes, by two elements: First, by the participatory entitlements of the Member States and the capacity of comitology to operate "with due regard for all Member State perspectives" (317); second, by the capacity of comitology to integrate scientific expertise through a dialogue with the transnational epistemic community (317, 335) within which comitology-internal risk-assessments and decisions constantly have to expose themselves. Joerges, of course, notices that the committee system "with its emphasis upon a unitary understanding of 'science' ... is largely closed to non-governmental actors" (318), and that the public, which he speaks of, is the specialized public of the policy community, and that influence remains mediated either by national administrations or by "experts." But he seems to believe that this insulation from the broader deliberation within non-specialized publics is a virtue, if not the very bedrock, of the comitology system: For "... because of their cognitive content, the correctness of risk decisions cannot be guaranteed by unmediated recourse to interests or their negotiation — or ... by extending participation rights and veto-positions; and at European level in particular, the identification of representatives of European 'interests' is inconceivable" (334).⁵⁰ Accordingly, the key to enhancing the rationality of European decision-making processes lies not in the "inclusion of ever more 'interests'", but in the strengthening of the internal "deliberative ... quality of decision-making processes" (334).

substitute democracy. But this interplay of similarities and differences aside, and despite polemic flourishes, the debate on these matters is too frankly and invitingly exploratory to be usefully characterised through a contrast of positions that attributes to them more fixity than they pretend for themselves.

In this section, therefore, we will put further reflection on the commentaries to the side and stick to a brief review of critical facts. We begin an example of the findings that cast doubt on the race-to-the bottom view and its assumptions, then examine second-order results that cast doubt on efforts to save at least core assumptions of the de-regulation prediction by narrowing its scope. Even within this limited ambit we omit much detail, as the nuances of the findings change in this area as rapidly as the nuances of opinion. Accordingly we present only enough to document what we think must be taken for granted in further argument: It is not the case that the logic of the market is trumping the logic of politics and regulation in the construction of the EU polity, nor is it the case that interests are inherently as fixed and irreconcilable—above all so refractory to reconsideration through debate—as participants of both sides of the debates discussed so far have assumed.

A conspicuous counter-example to the market-dominance view is the demanding and innovative regime established in the last decade to regulate aspects of occupational health and safety, and in particular equipment safety. The case counts as a counter-example, first, because the regulations concern the production process, not the marketable product. By the logic of the *Wirtschaftsverfassung* discussed above, the outcome should be

determined by the interests in cost-avoidance of the median producer (state). Consumers, after all, are not concerned with injuries to workers occasioned by the production of the goods they purchase any more than they are concerned with insults to the environment, except insofar as these costs are reflected in the price. Since such costs are typically externalized—shifted to state in the form of environmental clean-up or worker compensation schemes, or directly to affected citizens (domestic and foreign) and workers) their concern will usually be minimal. For one state, moreover, to impose its pretences for, say, a safe workplace on others is, in the market view, either a disguised attempt at protectionism or an unwarranted exercise of brute power. Under these conditions the poorest producers, who generally use the dirtiest and most dangerous equipment, and in the bargain can least afford to improve it, will have strong interests in keeping regulatory levels low, and face little legitimate opposition in their assertion of the right to do so.

But in the case of the machinery safety guidelines the putative interests did not prevail. The lowest-common denominator in an area as technically complicated, as, for example, the safety devices to be incorporated into production equipment proved dauntingly difficult to define. Comitological structures helped surmount this impasse by allowing exploration possible solutions without political tutelage. In this setting attention turned to regulatory architectures that generate rules from the best practices of the relevant actors, rather than requiring a central administrator to all current rules on a continuum ranging from lax to strict, and pick as strict a point on that line as political conditions allow.

Three related innovations, each with a complex history in specialised areas of regulatory debate, were linked to achieve an acceptable solution. First, the notion of *occupational* health and safety was broadened to allow for a more capacious understanding of *occupational*. Instead of referring chiefly to tools, machines, plant and workplace, occupational came to be interpreted as meaning the world of work, including addition to the foregoing the organization of work, work time, social relations at the work place, and training. Second, the notion of *health and safety* was extended from physical integrity or reduction of the risk of physical harm to well being as the physical and psychological basis precondition of flourishing. Third, employers were required to assess risks to the well being of employees arising from the world of work, and to respond to the risks identified in the light of the most effective responses to like threats implemented by others.

This new EU regulatory architecture counts as a counter-example to the market-dominance view, second, because the standards it establishes are “higher” or more demanding than the domestic rules it supersedes in at least two senses. First, with the partial exception of Denmark and Sweden, which anticipated different aspects of the eventual European solution in national practice, the new system covers a broader range of risks arising from more varied sources than did the old. Thus Germany, long regarded as a leader in this area of regulation, had a settled practice of narrowly interpreting both occupational and safety, and this practice is open to challenge under the new system. Second, given that current rules are linked to current best practices, and these latter are

raised over time as leading employers better working conditions and advertise this to put pressure on competitors, future rules will likely be more demanding than current ones. In this the new regime instigates a race to the top whose protagonists in theory will eventually overtake the most advanced representatives of the old system regardless of their respective starting points. Whether the ground-level agents comply sufficiently with this regime, or others like, to actually produce this effect is difficult, so far, to say. But even without a crisp answer to this and related questions, it is clear that the output of the rule-making machine and its mode of operation are both sufficiently different from what the theory leads us to expect that its advocates are obligated to respond.

A first reaction might be to observe that this exception is itself exceptional, the product of freak political circumstances—sage committee members or machine-tool builders run by former skilled workers with loyalties to the blue-collar world—and not an expression of a fundamental flaw in the market-dominance view. It is insufficient to note, correctly, that the list of exceptions is long. It includes environmental regulation (rules covering the protection of flora and fauna, for instance) and transportation (as infrastructure it is, very roughly speaking, more a process than a product from the point of argument under consideration), as well as, via the ECJ, social welfare policy (a “solidary” institution in the crucial reserve of the old welfare state). For all of these exceptions might be countered by a generalization of the objection to the first one: The translation of interests into policies is never automatic. It depends on political action, which in turn depends on the structures of politics. If the political structures tend to obstruct the articulation of

some interests while permitting or encouraging advocacy of rival ones, then the regulatory outcome will reflect the surface accidents of politics rather than the underlying geology of interests. When a second accident accidentally undoes the first, the bedrock will reshape the landscape in its own image.

This argument is naturally suspect: It might just be a counter fallacy, “correcting” one wrong argument with another, in a way that renders both hard to falsify. But a more convincingly empirical objection to the objection is available is the work of Eichener. Suppose for a moment that there is some explanation in political structure for the “aberrant” outcomes of high-standard regulation. Then there should be some set of political circumstances that is either necessary or sufficient or both for such results. But Eichener could find neither, although he considered a carefully drawn list of reasonable candidates, including: qualified majority, rather than unanimous voting rules (unanimity increases the chances of hold-ups); supra-national actors such as the Commission as process managers (with an interest on outcomes that valid their own activity by going beyond the lowest common denominator); spill-over effects (that might entail regulation as the price of “negative” integration); legislative eclecticism (novelty arrived at through syncretic combinations of bits of diverse national traditions is more acceptable to all than wholesale adoption of the principles of an “advanced” country); consensus building in comitology (comitology is a necessary or sufficient means for achieving the re-valuation of interests described above); and so on.⁵¹ His conclusion, which we follow here, is accordingly that the political institutions of the EU

are now such that “high” outcomes are possible in many, if not all regulatory areas. Indeed, he argues on the basis of historical experience that changes in the political institutions are more likely to increase the probability of such outcomes than reduce them.⁵²

What we need on this account, then, is not an explanation of the exceptions that away as narrow accidents, but rather one that takes seriously the possibility that they may point the way to new forms of effective and democratic decision making. That is the kind of explanation we begin to offer next.

V. An Alternative Approach

An alternative conceptualization supposes, in contrast to the theories examined so far, the pervasiveness of ambiguity. Recall that in the demos view meaning is transparent and self evident within the nation, but only there. Citizenship is the identification with others that makes explication unnecessary. Signs are virtually superfluous because understanding is intuitive. Taken to the extreme, as in the work of Schmitt the intuitive identification of friend and foe becomes the wordless act from which all politics flows. The market view comes to a similar conclusion but uses signs to get there: It assumes that all meaning can be reduced to unequivocal symbols—prices—which need only to be publicized to guide co-ordination. At the extreme this co-ordination by price is

⁵¹ Eichehner, pp. 323 ff.

⁵² See *ibid*, pp. 335-341, noting, for instance that comitology itself originated in an effort by the Council to domestic to the Commission, but had the opposite effect in some sense. Such “perversion” of efforts to create a pristine representative democracy at the EU are the rule, not the exception. The why is another story.

seen as a more precise and continuous version of co-ordination by (national) politics, as in Boehm's remark that the market is the "plebicite de tous les jours."

The alternative is to assume that all language is ambiguous, and that the world language describes cannot be encoded in unequivocal signs or signals, even if some formalization is an indispensable scaffolding for the construction of meaning. In this view semantics—the meanings of words—depends in part on pragmatics—the contexts of their actual use. Thus it is only in addressing particular persons or audiences for particular purposes, and noting the response, that I come to understand what I mean. One upshot of this view is that meaning is dialogic: only in exchanges with others can I fix, however provisionally, what I think. A second is that communication within any one language shades into translation between languages: the mutual attribution of serviceably coherent conceptual frames, and the effort to compare and adjust them that occurs in translation is just an explicit form of the mutual scrutiny and adjustment of category that occurs routinely in communications between speakers of the same language. Put another way, the very differences that obstruct understanding in the demos view, and disappear completely in the market perspective are the engine of understanding in a world of pervasive ambiguity. We will see in a moment how this reversal in the role of difference transforms makes it possible to speak of boundaries, interests and identities and even sovereignty without invoking the demos or the nation state.

In this alternative perspective language and formal conceptual schemes both enable acts or episodes of understanding, and are transformed, piecemeal, by them. Without conceptual frames or the categories of language we would be unable to orient ourselves towards each other and the aspect of the world that commands our attention; still less would be able to fix our differences clearly enough to allow further, mutual clarification to begin. Once clarification does begin, however, it can lead to re-conceptualization of the orienting categories, and so revision of the framework itself. This revision is piecemeal because the clarifications, triggered by differences arising in particular situations, are always in some sense local, concerning only part of the skein of concepts. (The language or conceptual scheme orients thought and investigation precisely because it is so much an all encompassing matter-of-fact that we can't call it into question all as whole, even if we set our minds to it.) But the local re-categorizations can be cumulatively transformative, so that in time one formal framework of categories or signs is replaced, through use, with another. A slow revolution in the formal system of signs that relate our categories to each other is thus the indispensable instrument and the visible track of our dialogic re-characterization of the world.

To connect this way of thinking about meaning with an understanding of action to emphasize its close affinity with the pragmatism of Pierce, James, and Dewey. Shocks to (parts of) our understanding lead to doubt; doubt prompts inquiry. Inquiry leads to differing, formal understandings of previously undetected conceptual ambiguities. Some variants fare better in worldly use,

and those that do reshape the categories that guide initial response when doubt strikes again. When this process is deliberate, in the sense that the provisionality and partiality of starting points and results is recongnized from the first, and the meaning of concpets is acknowledged to implicated in their use, the process as a whole can be call experimentalist.

Many aspects of this alternative view are of course controversial. What exactly, for example, must interlocutors suppose about the commonality of their concerns and understandings so that what they share can serve as a vantage point for examination of their differences? Or, how exactly does clarification of closely related, local categories, ramify in changing the broader system of categorization of which they are a part? But even neglecting such questions, and many more like them, the sketchiest presentation of the pervasive-ambiguity view is sufficient to suggest that the accounts of meaning presumed so far do not exhaust the theoretical possibilities. On the contrary, contemporary thought is deeply marked by the repeated failure to establish foundational or indubitably self-evident knowledge under any conditions, and hence the conviction (though not of course the demonstrable certainty) that it is impossible to do so. Given this chastened conviction, the alternative view is a more plausible account than its competitors of what it means for us to come to an understanding, even if it is incapable of saying how precisely we do so. In challenging the ideas of sovereignty and democracy associated with the personification thesis and economic constitutionalism we are thus standing on conceptual ground as firm as there is.

Beyond providing such grounding, however, the semiotic or experimentalist view is crucial to our argument as a heuristic for the interpretation of the novel institutional developments that both contribute to the undeniable success of Europe as a project in public decision and deepen the puzzle of its democratic legitimacy. Indeed, arrangements such as comitology can be thought of as precisely the institutional embodiment of the semiotic view of language and meaning: With regard to particular policy areas, comitology establishes a framework that enables discussion of contrasting views of a common object, and is in turn transformed (with respect to the outcomes that continue to be explored and elaborated) by that discussion itself. The common object sought is, as we saw, typically a regulation (for the safety of foodstuffs or machine tools or cosmetics) which respects both the integrity of the common market and the public interest in its well being, where the public(s)' interest in this regard reflect differing national traditions regarding the burdens to be assumed by the state, the market, and citizens. The contrasting views are the various proposals for the requisite EU regulation that arise from the distinctive national traditions. In subjecting these proposals to a common test—how well they meet the characteristic double constraint of EU regulations—comitology makes explicit, and so heightens differing national styles of regulation. But in so doing, as we saw, it also allows for a re-combination of the elements and tropes of these traditions, suggesting possibilities obscured by the implicit assumption that continuing (that is traditional) differences amounted to a kind of proof of fundamental incommensurability. In short, difference in comitology, as in the semiotic view, is the engine of understanding. Finally, the outcome of comitology is not

a fixed rule—a once and for all solution to the initial demand for regulation—but rather a new framework for continuing re-evaluation, within new boundaries, of the provisional solution.

Looked at as an experimentalist framework for generating (experimentalist) rules, comitology seems less a curious, idiosyncratic response to the problem of the regulatory integration of the EU and more a key instance of a broad re-orientation of law-making. To see comitology as both example and component of a general movement in the direction of experimentalism, it necessary only to peer “down” from the level of comitological decision making into the national administrations that, among other thing, must implement EU decisions, or gaze “up” at the level of macro-policy making—the procedures for encompassing policy areas, such as “employment,” that affect countless particular programs and regulations. Although the actors and their scope of action are only distantly, if at all, comitological at these levels, the institutional architecture of decision making has a strong family affinity indeed.

At the level of national administration of EU member states, and of course with greater clarity in some than others, there is a blurring of the distinction between the making and administrative application of law, and more particularly a tendency—central to comitology—for the actors who will eventually be subject to the law to constitute a framework for its articulation and continuing revision. Developments in France and Italy are particularly salient. There administration at the local, regional and even national level, across policy areas from economic development, to environmental protection and transport, is increasingly by a process referred to as

“contracting,” but better rendered by convocation: A nominally superordinate authority—the ministry of finance, say—enters “contracts” with nominally subordinate entities—regions or municipalities interested in economic development projects funded by the ministry—by which the latter “obligate” themselves to develop plans for using the funds, and further to “re-contract” periodically so that initial plans can be adjusted in the light of pooled experience. Thus “contract” in this setting is a misnomer, though perhaps a reassuring one insofar as it evokes the notion of considered mutual obligation. The parties are indeed exchanging a promise. But the promise they exchange is not, as conventionally the case, to undertake some well specified task in return for a like undertaking by the other, but rather to elaborate with other promisors, in a mutually transparent and accessible way, what each will do given their joint experience. In “contracting” the administration thus an experimentalist frame for law making in which the means of executing or implementing a policy and the definition of its very purpose are determined together in a collaborative effort by those whose formal responsibilities tend to the latter (the national administration, acting under authority of the legislature) and those whose responsibilities are in theory limited to the former (the subordinate entities). (A similar blurring of the conception and execution of administrative tasks has been observed in Great Britain (and the other Whitehall countries) which were at pains to separate them as part of a private-firm inspired program of administrative modernization known as the New Public Management.)

Most of the studies of the new currents in administrative organization focus on one, or a most several closely related countries. They typically pay scant attention to European developments in general, or the connection between comitological regulatory efforts at the EU level and the shift towards what we can call experimentalist framework administration nationally. But it seems reasonable to suppose (and very preliminary accounts encourage the speculation) that the EU and national changes are mutually re-enforcing. Looked at narrowly, from the point of view of the jostling for place endemic in institutions, national-level decision makers who take part in comitological deliberation by difference are likely to encourage or at least tolerate similar methods domestically because the domestic exercise increases the range of experience they can bring to bear on the EU-wide discussion, and thus the authority with which they speak. Conversely, national-level administrators who have experience of domestic framework regulation would have an interest in participating in comitology as a way of canvassing possibilities that can be brought to bear in discussion at home. More generally, the methods, more or less particular to each policy area, for arriving at solutions serviceable as current instruments of regulation and open to correction through the experience of the regulated parties is likely to encourage, perhaps even require learning across the two levels. Put another way, in the medium term, experimentalist administration is likely to help national governments exploit the half-hidden resources of domestic diversity to accommodate the “irritating” introduction of elements of “European” law through court decisions or regulation. In the long run an experimentalist national administration could become a kind of local comitology, and

comitology an extension across national boundaries of local experimentalism.

A similar pattern is emerging at what might be called the supra-comitological level, as broad policy areas encompassing many distinct regulatory regimes within each member-state are constituted as distinct, politically tractable entities in the very process of becoming “Europeanized” through EU scrutiny and criticism. An example is employment policy. Each EU member state of course had an implicit employment policy insofar as it had policies for vocational training and continuing education, unemployment insurance, pensions arrangements, taxes on wages and salaries (to finance social insurance schemes), collective bargaining, other policies affecting job creation and the “investment climate” generally, and much else besides. Together these policies amounted analytically and de facto to an employment policy. But few countries tried to integrate these policies systematically, adjusting each part to the emergent whole; fewer, if any, systematically compared such explicit employment policy with the employment policies, explicit or not, of other countries.⁵³

But at the Brussels meeting of the European Council in December, 1993, as unemployment in the EU neared a peak of 10 percent, the member states began to formalize discussion of employment policy among themselves, with the effect of requiring increasing explication of their respective internal measures. By a process elaborated at subsequent meetings at Luxembourg, Cologne, xxx,

and yyy, the member states were required to take detailed stock of their domestic labor markets and formulate multi-year national-employment policy plans. The first plans addressed matters suggested by a rough, initial comparison of the then current policies. These plans were then evaluated collaboratively so as to allow both criticism of the individual national strategies for data-collection, decision-making, and policy integration, and refinement of the criteria of evaluation. It is becoming routine for the national employment policies to be judged, in part, on the extent to which they and the accompanying report on actual developments document improvement in areas of weak performance; and the pooled judgments of the plans then routinely prompt further elaboration of the criteria for subsequent judgement. The infrastructure for the continuing discussion and re-definition of employment policy at the EU level and between the EU and the relevant administrations of member states is provided by a series of secretariats and committees, some created expressly for the purpose and others re-directed from other tasks to it. Thus as in comitology, the comparison of different strategies creates a framework that both disciplines current activity and prompts continuing re-examination of the criteria by which discipline is to be applied. The actors, of course, are substantially different actors: members states have the initiative in “Europeanized” employment policy, as opposed to the Commission, and they ad hoc secretariats rather than the committees that give Comitology its name. Moreover, the possibilities for sanctions are different in the two cases: Disputes over comitological regulation can be carried to tribunals. Disputes over differing interpretation of comparisons of

⁵³ From the mid-1980s on there w

employment policy are fought out before a—highly attentive—public opinion. But if the process of formalized comparison proceeds, and becomes (as it is just starting to be) entwined with macro-economic policy and the management of the single currency, member states and the EU could well begin to hold individual countries to account for aspects of their labor market performance. In any case, the early evidence is that, as with the spread of experimentalist administration at the national level, the probability is high that “horizontal” comparisons of policy and performance will lead to a redefinition of the relation between super- and sub-ordinate levels of decision making.

In calling attention to these separate, but linked and potentially mutually re-enforcing occurrences of an experimentalist institutionalization of the pervasive-ambiguity or dialogic view of meaning, our intent is to broaden the debate about the possibilities of EU constitutionalization and democratization, not offer a new suggestion for concluding it. We are not, to be direct about it, suggesting that, appearances to the contrary, the EU and its member states have already adopted experimentalist decision making. Even if we lengthened the list above—for example, by including cases where national governments (as opposed to parts of their administration) compare their understanding of the “welfare state” with each other directly and via the EU—we simply lack the evidence to make the case. Nor are we suggesting that the adaptive advantages and tendencies for mutual re-enforcement of partial and limited innovations that we tracing will somehow enable the novel institutions to metabolize traditional ones. We lack the

faith in the functional superiority of the new forms (and in functional arguments in general) to advance such a claim.

But excluding these extravagant claims the evidence just introduced, combined with the continuing “surprises” of successful collaborative rule-making amidst the diversity of the EU, suggests the possibility that there is in core of the “new” Europe a distinctive institutional architecture—one that takes for granted, indeed depends on kinds of ambiguity that, from a traditional perspective, seem inimical to any kind of institutionalization at all. Supposing that this possibility is still ruled in by the evidence—and that current debate gestures at, but cannot identify it clearly—we proceed to enquire whether the new forms of collective decision making may not fall victim to the same paradoxes—the problem of delegation, boundaries, and so on—that felled the familiar ones, and, if they do not, whether they should count as democratic.

- the idea that current problems are problems of failed coordination, in which mutual gains are available if the right arrangements for collective choice are in place;
- the observation of the emergence of new forms of governance which are neither conventionally public nor conventionally private, which operate autonomously as problem-solving units, -- and which, if suitably institutionalized and interconnected will generate a new form of deliberative coordination and social learning;
- an account of the normative requirements of democratic process which shows that pluralism neither makes democracy impossible

nor drives us to an aggregative view of democracy; that is, an account that specifies what may count as legitimate reasons within deliberative political justification;

-- and an account of the required division of deliberative labour between political agencies and directly-deliberative problem-solving units: linking idea of self-regulation with wider social learning and heightened political accountability

three dimensions of conceptual transformation:

interests

boundaries

delegation

Because very generally speaking our constitutional horizontalism position shifts the burden of public decision making from the formal institutions of representative democracy back to civil society, it is easily confounded with two schools of thought which dissolve the state into society, but under different assumptions, and with correspondingly different conclusions, than those advanced here. The first takes was inspired by Durkheim, and found its fullest modern expression in the social law theory of Georges Gurvitch. The second, system-theoretic view is more recent. It derives from work on complexity in sociology (in part also traceable to Durkheim), as well as in biology and chemistry, and finds its authoritative exponent in Guenther Teubner. To clarify our own views we briefly distinguish them from these affine schools of thought.

What these views share with our own is the assumption of strong constraints on the co-ordinating capacities of central agents given the cognitive limits of the latter in relation to the tasks they face. Scepticism about the effectiveness of a unitary, centralized sovereign with pretensions of panoramic comprehension, however democratically it is constituted, follows directly. From this scepticism follows in turn the recourse to “the social” as, very broadly speaking, the alternative to the sovereign, centralised state.

The differences between these schools, and between their views and ours, concerns further assumptions about the character and communicability of the knowledge of the local agents themselves. The Durkheimian, social-law school takes local knowledge to be tacit—the capacity to do, without the ability to explain what is done—and occupation-specific in the sense of arising through mastery of a profession or craft. Occupations are taken to be inherently complementary: “Tous les industries sont soeurs” is the famous dictum of Proudhon that Gurvitch adopts as his own. Local knowledge of different occupations is therefore complementary in principle but incommunicable, at least directly, because tacit. Co-ordination among occupational groups is accomplished by the collaboration of expert representatives of each (whose temporary differences of interest are in the end tamed by their mutual dependence). These representatives are schooled in particular crafts and professions—and therefore possessed of its tacit understands—but also in formal languages that permit a measure of articulate exchange with one’s likes in

other groups. As a principle of government this view yields (neo-)corporatism, in which sovereignty rests in a federation of occupation groups and is exercised by their representatives acting directly as a chamber of occupations or indirectly as the indispensable interlocutors of a parliament too removed from practical knowledge to act without them. A vast literature recounts how, particularly in Western Europe and the Nordic countries, neo-corporatism came to define the practice of representative democracy from the inter-war years through the mid-1980s. An equally vast literature documents how, having entrenched themselves in the de facto constitution, the occupation groups came to reject as threatening (not least to their own institutional prerogatives) adjustment to the vast changes transforming the world of their immediate constituents and society as a whole. In the end the “organicist” constitution of groups, intended to make mute know-how just audible enough to permit collective action, winds up silencing the public voice and paralysing public action. Beneath much of the social democratic nostalgia for the nation, and the welfare state, lies nostalgia for the world of occupations stable enough to permit corporatism to work.

For the systems-theory school local knowledge (meaning, more exactly, knowledge sufficiently more particular than the panoramic perspective to be of use) is always formal, and its formalisms are always tied to one, and only one, of a small number of fundamental systems which together constitute complex modern societies. The economy, law and politics always figure on the list of these systems. The very formalization that allows for inter-local

communication within each system, however, forecloses communication among them. The formalisms of law being deemed incommensurate with the formalisms of the economy, for instance, mutual comprehension is impossible. Yet the coordination across systems that social integrity requires is in fact possible, on this view, through a process of reciprocal “irritation.” Thus changes in the economy, although not directly perceived as such by lawyers, irritate or perturb legal categories, calling forth a response in law that in turn irritates the economy and other systems, provoking within each a response in (its own) kind. Or in Teubner’s more delicate language, where “discourse” replaces “system”: although, “(i)n a precise sense, interdiscursive translation is impossible,” there is nonetheless, because of the perturbing effects of “conflictual polycontextuality” on each discourse, a “fragile symmetry of chances of translation” between them.

As a principle of government systems theory yields technocracy, more in the sense of government by techne or technique itself than of government by a class of experts. For in systems theory the environment—the world in which society finds itself—and the reciprocally irritating systems that define social life co-evolve, with little place for the agency of individuals and, by definition, none for a co-ordinating center of any kind. It holds out the vague promise that society can somehow control itself in a complex age without becoming hostage, as in the social-law school, to entrenched and self-interested groups or even deciding once and for all which groups are “weak” and worthy of protection, and which can fend for themselves. This is the thrust of Teubner’s suggestion that private

law can protect "weaker" -- non-economic -- discourses from colonialization by the "stronger" rationalities of economic or technocratic discourse by strengthening their powers of systemic perturbation or "discourse rights". But since systems theory does not afford a place for us to constitute ourselves as a "we" that can choose to favor this, or any other systemic outcome, the hope is just that. Put another way, the price systems theory exacts for the prospect of escape from corporatist self-blockage and market domination is submission to the tyranny of self-determining or auto-poetic systematicity itself. In the end both social law and systems theory are alike in sacrificing sovereignty conceived most generally as the capacity for public decision making on the altar of complexity.

In our view, in contrast, local knowledge is neither tacit nor fully and self-referentially systematic. Co-ordination among local collaborators is necessary because of the diversity of their views and possible because, as we have argued, the explorations of the ambiguities internal to each shades into exchange with the others. But as local co-ordination yields new ambiguities of its own, there is both need and possibility for inter-local exchange through a new center that frames discussion and re-frames it as results permit.

As a principle of government this view yields what we called at the outset directly deliberative polyarchy. It is directly deliberative because local agents—acting in geographic localities or as the ground-level actors in specific policy regimes regarding anything from education to the environment—can participate directly in problem solving, representing as it were themselves, rather than

delegating responsibility for their choices to an actor who commands a language beyond them. It is polyarchic because, even as they gain freedom of initiative, locales (generally: ground-level units of policy regimes from schools to pollution-producing firms) remain accountable to a public informed by the doings of their likes. A horizontal constitution is one that avowedly makes its interpretative choices, large and small, on the basis of such polyarchic exchange, rather than on the judgement of judges trying, for instance, to preserve the moral integrity of the citizens personified.