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Five Uneasy Pieces

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European Democracy and Its Critique -- Five Uneasy Pieces[*]

by

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with

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Some Preliminary Comments

The output of European governance is like that of a state, even a super state: An endless stream of laws in increasingly varied areas of public and private life. They are binding on governments and individuals as part of the law of land. Indeed they are a higher law of the land -- supreme over conflicting State laws. The structure and process of European governance, by contrast, is not at all, in many of its features, like that of a state. In particular it lacks many of the features we associate with democratic government.

In this essay we try to make a contribution to the Post-Maastricht discussion about democracy in, and democratization of, the European Union.

The essay is non-linear: There is no central thesis which is developed and carried through the paper. Instead we will first present a "Standard Version" of the critique of democracy in the Union. The Standard Version is non-attributable. It is an aggregate of public opinion data, politicians' statements, media commentary, and considerable learned analysis. It is an uneasy attempt to capture the core of the present discussion on European democracy. Our attempt is earnest: We share much of the critique in the Standard Version and take responsibility for its shortcomings. Our purpose thus is not to set up a caricature, an Aunt Sally or straw man which we shall later debunk. The remaining four uneasy pieces are meant instead to explore unstated or unexplored premises of the Standard Version and to widen the range of issues which we believe should be part of the discussion. Despite the overall length of this essay, each part will, inevitably be sketchy, work-in-progress, an agenda for further reflection.

Following the Standard Version we shall address the following:

I. *Who is the Demos?* We will first attend to the uneasy issue of Demos. Much democratic theory presupposes a polity (usually a State) and almost all theories presuppose a demos. Democracy, in a loose sense, is about the many permutations of exercise of power by and for that demos. Indeed, the existence of a demos is, we think, not merely a semantic condition for democracy. In the case of Europe we can not presuppose demos. After all, an article of faith of European

integration has been the aim of an ever closer union among the peoples of Europe. Demoi, then, rather than demos. Can there be democratization at the European level absent a transcendent notion of a European people? Is there a European demos around which, by which, for which a democracy can be established? How should or could it be defined? How could or should it fit into political theory? These are some of the questions we shall address.

II. *What is the Polity?* Although in a formal sense we can speak of the Union as a single polity, from the perspective of governance and power -- its exercise, control and accountability -- the notion of a European polity is no less uneasy than the notion of European peoplehood. We will present a description of European governance which has (at least) three principal facets: International, Supranational and Infranational. Our argument is simple. In this sense there are three polities, or three regimes, or three modes of governance. This trichotomy creates fundamentally different permutations of power distribution in the overall European polity. The problems of democracy manifest themselves in different ways which need to be explored.

III. *Which Democracy?* An interesting feature of the democratization discussion in Europe, especially the blueprints for change, concerns the very understanding of democracy. Very rarely, if at all, is there more than cursory acknowledgment of the uneasy co-existence of competing visions and models of democracy which, in turn, should inform both diagnosis, prognosis and possible remedy of democratic shortcomings. Typically and endearingly there is an implicit projection onto Europe of a national self-understanding of democratic governance. The task is rendered more complex by the need to juggle models of democracy with the Unions permutations of governance. We shall offer some pointers in that direction.

IV. *Democracy over What?* The final piece addresses an issue which is not merely uneasy, it is notorious. What should be the limits of the Union's jurisdiction? Is there anything one can add to the issue of "subsidiarity", competences and jurisdiction? Apart from making the banal point that this issue too belongs to the core of the democracy discussion, we shall explore jurisdictional lines as part of governance process and institutional structure rather than addressing the substantive problem of allocating material competences.

In broadening the discussion in the ways we propose, the result we have in mind is, evidently, a Revised Version, not a revisionist version of the democracy debate.

I. The Critique of Democracy in Europe: "The Standard Version"

The democratic problems of European integration are well explored. The phenomenon is frequently labelled as the "Democratic Deficit" of the Community but whatever nomenclature is employed, the principal features are notorious. Here is a capsule version.

> European Integration has seen many, and increasingly important, government functions transferred to "Brussels", brought within the exclusive or concurrent responsibility of the Community and Union. This is problematic in a variety of ways.
>
> Though the formal political boundaries of the State have remained intact, in the areas of transfer of responsibility to the Union the functional political boundaries of the polity have been effectively re-drawn. If critical public policy choices about, say, international trade, or environmental protection, or consumer protection, or immigration come exclusively or predominantly within Community responsibility, for those matters the locus of decision-making is no longer the State but the Union. Even if the Union were to replicate in its system of governance the very same institutional set-up found in its constituent states, there would be a diminution in the specific gravity, in the political weight, in the level of control of each individual within the redrawn political boundaries. That is, *arguendo*, an inevitable result from enlarging the membership of the functional polity (when a company issues new voting shares, the value of each share is reduced) and from adding a tier of government thereby distancing it further from its ultimate subjects in whose name and for whom democratic government is supposed to operate. If you want a label, call this Inverted Regionalism. All the real and supposed virtues of regionalism are here inverted.

Inverted Regionalism does not simply diminish democracy in the sense of individual disempowerment, it also fuels the separate and distinct phenomenon of de-legitimation. Democracy and legitimacy are not co-terminus. One knows from the past of polities with arguably democratic structure and process which enjoyed shaky political legitimacy and were replaced, democratically, with dictatorships. One knows from the past and present of polities with egregiously undemocratic governmental structure and process which, nonetheless, enjoyed or enjoy high levels of legitimacy. Inverted Regionalism, to the extent, that it diminishes democracy in the sense outlined above or to the extent that it is thought to have that effect, will, to a greater or lesser extent, undermine the legitimacy of the Union.

The perceived perniciousness of Inverted Regionalism and its delegitimation effect will be/are enhanced by three factors:

The reach of the Community or Union into areas which are, or are thought to be, classical symbolic "State" functions in relation to which "Foreigners" should not be telling "Us" (French, or Danes, or Irish etc.) how to run our lives. These areas, socially constructed and culturally bound, are not fixed. They range from the ridiculous (the British Pint) to the sublime (the right-to-life of the Irish abortion saga).

The reach of the Community or Union into areas which are, or are thought to be, matters left to individuals or local communities and in relation to which "Government" should not be telling "Us" (the people) how to run their lives.

The perception, whether or not rooted in reality, that there is no effective limit and/or check on the ability of the Community or Union to reach into areas previously thought to be the preserve of the state or of the individual.

Inverted Regionalism is only one feature of the alleged democratic malaise of European Integration. We wrote above: "Even if the Union were to replicate in its system of governance the very same institutional set-up found in its constituent states, there would be a diminution in the specific gravity, in the

political weight, in the level of control of each individual within the redrawn political boundaries." But, of course, the Union does not replicate domestic democratic arrangements.

A feature of the democratic process within the Member States, with many variations of course, is that government, the executive branch, is, at least formally, subject to parliamentary accountability. In particular, when policy requires legislation, parliamentary approval is needed. National parliaments, apart from exercising these "power functions," also fulfil a "public forum" function described variously as information, communication, legitimation etc. The argument is that Community and Union governance and Community institutions have a perverse effect on these principal democratic processes within the Member States and within the Union itself.

Community and Union governance pervert the balance between executive and legislative organs of government of the State. The Member State executive branch, Government Ministers, are reconstituted in the Community as the principal legislative organ with, as noted above, an ever widening jurisdiction over increasing areas of public policy. The volume, complexity and timing of the Community decisional process makes national parliamentary control, especially in large Member States, more an illusion than a reality. In a majority decision environment, the power of national parliaments to affect outcomes in the Council of Ministers is further reduced. The European Parliament does not offer an effective substitution. Even after Maastricht the powers of the European Parliament in the legislative process leave formal and formidable gaps in parliamentary control. On this reading, Union governance results in a net empowerment of the executive branch of the States.

The European Parliament is debilitated not only by its formal absence of certain powers but also by its structural remoteness. The technical ability of MEPs to link and represent actual constituents to the Community process is seriously compromised in the larger Member States by simple reasons of size. Its abstract representation function of "the people" -- its public forum function -- is also compromised, by a combination of its ineffective powers (the real decisions do not happen there), by its mode of operation (time and place), by its language "problem", by the difficulty (and disinterest) of media coverage.

It is evocative that over the years one has seen a gradual increase in the formal powers of the European Parliament and a decrease in the turn-out to European elections. And when they turn out, these elections are dominated by a national political agenda, a mid-term signal to the national party in power. This is, an evocative fact too, the opposite of American politics where State elections are frequently a mid-term signal to the central federal government. The non-emergence of true trans-European political parties is another expression of the phenomenon. Critically, there is no real sense in which the European political process allows the electorate "to throw the scoundrels out", to take what is often the only ultimate power left to the people which is to replace one set of "governors" by another. In its present state, no one who votes in the European elections has a strong sense at all of affecting critical policy choices at the European level and certainly not of confirming or rejecting European governance.

Community governance might have a distorting effect also if one takes a neo-corporatist view of the European polity. Under this view, government -- both executive and legislative branches -- do not monopolize policy-making and are but actors, important actors, in a broader arena involving public and private parties. The importance of parliament under this model is to give voice and power to diffuse and fragmented interests whose principal political clout derives from a combination of their electoral power and the re-election drive of politicians. Other actors, such as, say, big industry or organized labour, whose "membership" is far less diffuse and fragmented, exercise influence through different channels and by different means such as political contributions, control of party organization, and direct lobbying of the administration. When policy areas are transferred to Europe there will be a per-se weakening effect on diffuse and fragmented national interests deriving from the greater difficulty they will experience in organizing themselves at the transnational level compared to, say, a more compact body of large manufacturers (e.g. the tobacco industry). In addition, the structural weakness of the European Parliament has a corresponding effect on these interests even if organized. Electoral power simply carries less weight in Euro-politics.

Since the outcome of the Community legislative process becomes the supreme law of the land, national judicial control of primary legislation -- in

those systems which have such control (e.g. Italy, Germany, Ireland) -- is compromised, too. The European Court of Justice, like the European Parliament, does not, *arguendo*, offer an effective substitution since, inevitably it is informed by different judicial sensibilities in particular in relation to interpreting the limits of Community competences. Since the governments of the Member States are not only the most decisive legislative organ of the Community, but also fulfil the most important executive function (they, much more than the Commission, are responsible for the implementation and execution of Community law and policy) they escape, too, national parliamentary (typically weak) and national judicial (typically stronger) control of large chunks of their administrative functions.

Domestic preferences are, arguably, perverted in a substantive sense, too. A Member State may elect a center right government and yet might be subject to center left policies if a majority of, say, center left governments dominate the Council. Conversely, there might even be a majority of, say, center right governments in the Council, but they might find themselves thwarted by a minority of center right governments or even by a single such government where Community decisional rules provide for unanimity. Both in Council and in the European Parliament the principle of proportional representation is compromised whereby enhanced voice is accorded citizens of small states, notably Luxembourg, and, arguably, inadequate voice accorded citizens of the larger states, notably Germany.

Lastly a feature which is said to pervade all Community governance, and negatively affect the democratic process, is its overall lack of transparency. This is not just a result of the added layer of governance and its increased remoteness. The process itself is notoriously prolix, extremely divergent when one moves from one policy area to another and in part kept secret. "Comitology" is an apt neologism -- a phenomenon which requires its very own science which no single person has mastered.

This concludes the Standard Version. Our argument is that it represents some kind of "Received Knowledge" though we have tried to be careful in my claims about its veracity. It is true if it corresponds to some objective reality; it is real, albeit in a different way, if it is believed to be true. Probably no one subscribes to all of its

tenets. We will not critique it directly but instead turn to certain features which have been absent from the debate or have been underplayed in the Standard Version.

II. Democracy without a Demos?

Here is one way of introducing this issue. For decades lawyers have been speaking loosely about the "constitutionalization" of the Treaties establishing the European Community and Union. In part this has meant the emergence of European law as constitutionally "higher law" with immediate effect within the "legal space" of the Community. Thankfully, the political science of European integration, which had lagged somewhat in noticing the phenomenon and understanding its importance, has in recent times been addressing it. But so far most searching, and illuminating, analysis has been on constitutionalization as an element in understanding governance with most attention given to the newly discovered actors (e.g. the European Court and national courts), to the myriad factors which explain the emergence and acceptance of the new constitutional architecture, to the constraints, real or imaginary, which constitutionalism places on political and economic actors and to the dynamics of interaction between the various actors and between legal integration and other forms of integration. In very large measure all these phenomena have been discussed in positivist terms, positivism as understood both in political science and law.

There is an underlying issue which, to date, has received, to the best of our knowledge, less attention: By what authority, if any -- understood in the vocabulary of normative political theory -- can the claim of European law to be both constitutionally superior and with immediate effect in the polity be sustained. Why should the subjects of European law in the Union, individuals, courts, governments et cetera feel bound to observe the law of the Union as higher law, in the same way that their counterparts in, say, the USA are bound, to and by, American federal law? It is a dramatic question since constitutionalization has formally taken place and to give a negative answer would be very subversive. This is partly why the critique of European democracy is often conflicted. One can, it seems, proclaim a profound democracy deficit and yet insist at the same time on the importance of accepting the supremacy of Union law.

One of the most trenchant critiques of authority to emerge recently has come from a certain strand of German constitutional theory and can be entitled the No-Demos thesis. Interestingly, it found powerful expression in the so-called Maastricht decision of the German Federal Constitutional Court. The decision, formally unanimous, contains conflicting strands. We shall present the robust version culled from decision and constitutional writing. We should add that this is but a German version of deep strand in both the political self-understanding and the theory of the European Nation-State.

The No Demos Thesis

The following is a composite version of the No Demos thesis culled from the decision of the Court itself and some of the principal exponents of this thesis.

> The people of a polity, the Volk, its demos, is a concept which has a subjective -- socio-psychological -- component which is rooted in objective, organic conditions. Both the subjective and objective can be observed empirically in a way which would enable us, on the basis of observation and analysis, to determine that, for example, there is no European Volk.
>
> The subjective manifestations of peoplehood, of the demos, are to be found in a sense of social cohesion, shared destiny and collective self-identity which, in turn, result in (and deserve) loyalty. These subjective manifestations have thus both a descriptive and also a normative element.
>
> The subjective manifestations are a result of, but are also conditioned on, some, though not necessarily all, of the following objective elements: Common language, common history, common cultural habits and sensibilities and -- this is dealt with more discretely since the twelve years of National-Socialism -- common ethnic origin, common religion. All these factors do not alone capture the essence of Volk -- one will always find allusions to some spiritual, even mystic, element as well. Whereas different writers may throw a different mix of elements into the pot, an insistence on a relatively high degree of homogeneity, measured by these ethno-cultural criteria, is typically an important, indeed critical element of the discourse. Here rests, of course, the most delicate aspect of the theory since the insistence on homogeneity is

what conditions in its statal operationalization the rules for inclusion and exclusion. When, say, Jews were excluded from full membership in many European nation-states as equal citizens it was often on the theory that being a Christian was essential to the homogeneity of the people.

The "organic" nature of the Volk is a delicate matter. We call "organic" those parts of the discourse which make, to a greater or lesser degree, one or more of the following claims: The Volk pre-dates historically, and precedes politically the modern State. Germany could emerge as a modern Nation-State because there was already a German Volk. The "nation" is simply a modern appellation, in the context of modernist political theory and international law, of the pre-existing Volk and the state is its political expression. It is on this view that the compelling case for German (re)unification rested. One could split the German State but not the German nation. Hence, maybe unification of the State but certainly only reunification of the people. Anthropologically, this understanding of, say, being German, which means being part of the German Volk, is "organic" in the following sense: It has, first, an almost natural connotation. You are born German the way you are born male or female -- though you can, with only somewhat greater ease, change your national identity (even then you will remain an "ex-German") and to the extent that ethnicity continues to play a role -- muted to be sure -- in this discourse of the Volk, ethnicity is even more immutable than gender -- there is no operation which can change one's ethnicity. The implication of this is that one's nationality as a form of identity is almost primordial according to this view, taking precedence over other forms of consciousness and membership. I may have solidarity with fellow Christians elsewhere, fellow workers elsewhere, fellow women elsewhere. This would make me a Christian German, a Socialist German, a feminist German or, at most, a German Christian, a German Socialist, a German feminist. I cannot escape my Volkish, national identity.

No one today argues that the "organic" is absolute. One can, after all, "naturalize", acquire membership in a new nation -- but even here, doesn't the word "naturalization" speak volumes? And one can, more as an hypothesis than a reality, imagine that should the objective conditions sufficiently change, and a measure of homogeneity in language, culture, shared historical

experience develop, a subjective consciousness could follow and a new Volk/nation emerge. But, realistically, these mutations are possible in a "geological" time frame -- epochal, not generational.

Volk fits into modern political theory easily enough. The German Constitution may have constituted the post-War German state, but it did not constitute the German people except, perhaps, in some narrow legal sense. The Volk, the Nation, understood in this national, ethno-cultural sense are the basis for the modern State. They are the basis in an older, self-determination sense of political independence in statehood. Only nations "may have" states. The State belongs to the nation -- its Volk, and the Nation (the Volk) "belong" to the State.

Critically, Volk/nation are also the basis for the modern democratic State: The nation and its members, the Volk, constitute the polity for the purposes of accepting the discipline of democratic, majoritarian governance. Both descriptively and prescriptively (how it is and how it ought to be) a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same Volk, belong to the nation. That is an integral part of what rule-by-the-people, democracy, means on this reading. Thus, nationality constitutes the state (hence nation-state) which in turn constitutes its political boundary, an idea which runs from Schmitt to Kirchhof. The significance of the political boundary is not only to the older notion of political independence and territorial integrity, but also to the very democratic nature of the polity. A parliament is, on this view, an institution of democracy not only because it provides a mechanism for representation and majority voting, but because it represents the Volk, the nation, the demos from which derive the authority and legitimacy of its decisions. To drive this point home, imagine an anschluss between Germany and Denmark. Try and tell the Danes that they should not worry since they will have full representation in the Bundestag. Their screams of grief will be shrill not simply because they will be condemned, as Danes, to permanent minorityship (that may be true for the German Greens too), but because the way nationality, in this way of thinking, enmeshes with democracy is that even majority rule is only legitimate within a demos, when Danes rule Danes. Demos, thus, is a condition of democracy. By contrast, when democrats like

Alfred Verdross argued for a Greater Germany this was clearly not motivated by some proto-fascist design but by a belief that the German speaking "peoples" were in fact one people in terms of this very understanding of peoplehood.

Turning to Europe, it is argued as a matter of empirical observation, based on these ethno-cultural criteria, that there is no European demos -- not a people not a nation. Neither the subjective element (the sense of shared collective identity and loyalty) nor the objective conditions which could produce these (the kind of homogeneity of the ethno-national conditions on which peoplehood depend) exist. Long term peaceful relations with thickening economic and social intercourse should not be confused with the bonds of peoplehood and nationality forged by language, history, ethnicity and all the rest. At this point we detect two versions to the No Demos thesis. The "soft" version of the Court itself is the Not Yet version: Although there is no demos now the possibility for the future is not precluded a-priori. If and when a European demos emerges, then, and only then, will the basic political premises of the decision have to be reviewed. This is unlikely in the foreseeable future. The "hard" version does not only dismiss that possibility as objectively unrealistic but also as undesirable: It is argued (correctly in my view) that integration is not about creating a European nation or people, but about the ever closer Union among the peoples of Europe. However, what the "soft" and "hard" version share is the same understanding of peoplehood, its characteristics and manifestations.

Soft version or hard, the consequences of the No Demos thesis for the European construct are interesting. The rigorous implication of this view would be that absent a demos, there cannot, by definition, be a democracy or democratization at the European level. This is not a semantic proposition. On this reading, European democracy (meaning a minimum binding majoritarian decision-making at the European level) without a demos is no different from the previously mentioned German-Danish anschluss except on a larger scale. Giving the Danes a vote in the Bundestag is, as argued, ice cold comfort. Giving them a vote in the European Parliament or Council is, conceptually, no different. This would be true for each and every nation-state. European integration, on this view, may have involved a certain transfer of state

functions to the Union but this has not been accompanied by a redrawing of political boundaries which can occur only if, and can be ascertained only when, a European Volk can be said to exist. Since this, it is claimed, has not occurred, the Union and its institutions can have neither the authority nor the legitimacy of a Demos-cratic State. Empowering the European Parliament is no solution and could -- to the extent that it weakens the Council (the voice of the Member States) -- actually exacerbate the legitimacy problem of the Community. On this view, a parliament without a demos is conceptually impossible, practically despotic. If the European Parliament is not the representative of a people, if the territorial boundaries of the EU do not correspond to its political boundaries, than the writ of such a parliament has only slightly more legitimacy than the writ of an emperor.

What, however, if the interests of the nation-state would be served by functional cooperation with other nation-states? The No Demos thesis has an implicit and traditional solution: Cooperation through international treaties, freely entered into by High Contracting Parties, preferably of a contractual nature (meaning no-open ended commitments) capable of denunciation, covering well-circumscribed subjects. Historically, such treaties were concluded by heads of state embodying the sovereignty of the nation-state. Under the more modern version, such treaties are concluded by a government answerable to a national parliament often requiring parliamentary approval and subject to the material conditions of the national democratic constitution. Democracy is safeguarded in that way.

Democracy and Membership

There is much that is puzzling in the reasoning of the German Court. For example:
If the concern of the German Court was to safeguard the democratic character of the European construct in its future developments, and if its explicit and implicit thesis that absence a European demos, democracy can be guaranteed only through Member State mechanisms, it is hard to see how, employing the same sensibilities it could have given a democratic seal of approval to the already existing European Community and Union. Whatever the original intentions of the High Contracting parties, the Treaties establishing the European Community and Union have become like no other international parallel, and national procedures to ensure democratic

control over international treaties of the State are clearly ill suited and woefully inadequate to address the problems posited by the European Union.

One could suggest, explicitly or implicitly, that the current situation of the Union has been democratically legitimated by national processes -- for example the successive approvals of the Community by the houses of the German parliament. But this is problematic and somewhat embarrassing, too. First, even if the current Union has been democratically approved by successive approvals of Treaty amendments (such as the Single European Act and the various acts of accession of new Member States) this takes a very formal view of democratic legitimation. Is it not just a little bit like the Weimar elections which democratically approved a non-democratic regime? Is it not the task of a constitutional court to be a counter-balance to such self-defeating democratization? Member State mediation does have a powerful impact on the social and formal legitimacy of the European construct but it has done only little to address the problems of deficient democratic structures and processes. If the current democratic malaise of the Union can be said to have been cured by the simple fact that national parliaments have endorsed the package deal in one way or another, the Court would have engaged at worst in another form of fiction about the reality of the Union and the democratizing power of national structures and institutions, at best in adopting a formal and impoverished sense of what it takes to ensure democracy in the polity.

The Court could have adopted an alternative construct: Highlight, embarrassing as this may have been, the democratic failings of the Community, uncured by Maastricht and in which all European and Member State institutions (including courts) connived. Since, despite these failings, the Union was formally legitimated the Court could have, for example, approved the Treaty but insisted that the existing gap between formal legitimation and material democratic deficiency must be regarded as temporary and could not be accepted in the medium and long term. In this way the Bundesverfassungsgericht would have thrown its formidable power behind the pressure for democratization. For all its talk about democracy, the Court, by adopting the view it has on Volk, Staat and Staatsangehörigkeit has boxed itself into a further untenable situation. Stated briefly: If the judges who subscribed to the decision truly believe that a polity enjoying democratic authority and legitimate rule-making power must be based on the conflation of Volk, Staat and Staatsangehörigkeit, that the only way to conceive of the demos of such a polity is

in thickly homogeneous ethno-cultural terms, then, whether one admits it or not, the future of European integration poses a huge threat. The problem is not that there is not now a European demos; the problem is that there might one day be one. And why is that a problem? Because the emergence of a European demos in a European polity enjoying legitimate democratic authority would signify -- on this understanding of polity and demos -- the replacement of the various Member State demoi, including the German Volk. This, we would agree, would be a price too high to pay for European integration. But since on their reading there is only a binary option -- either a European State (one European Volk) or a Union of States (with the preservation of all European Völker -- including Germans) their fear is inevitable.

We shall try and show how this view is based on one and perhaps two profound misconceptions with unfortunate consequences both for Germany itself and for Europe. Our challenge, note, is not to the ethno-cultural, homogeneous concept of Volk as such. It is, instead, to the view which insists that the only way to think of a demos, bestowing legitimate rule-making and democratic authority on a polity, is in these Volkish terms. We also challenge the concomitant notion that the only way to think of a polity, enjoying legitimate rule-making and democratic authority, is in statal terms. Finally, we challenge the implicit view in the decision that the only way to imagine the Union is in some statal form: Staat, Staatenbund, Bundesstaat, Staatenverbund. Noteworthy is not only the "enslavement" to the notion of State, but also, as we shall see, the inability to contemplate an entity with a simultaneous multiple identity. Polycentric thinking is, apparently, unacceptable.

We shall construct the critique step-by-step beginning with Demos-as-Volk first. We want to raise three possible objections to the Court's version of the No Demos thesis and its implications.

The first objection has two strands. One, less compelling, would argue that the No Demos thesis simply misreads the European anthropological map. That, in fact, there is a European sense of social cohesion, shared identity and collective self which, in turn, results in (and deserves) loyalty and which bestows thus potential authority and democratic legitimacy on European institutions. In short that there is, want it or not, a European people on the terms stipulated by the No Demos thesis and that the only problem of democracy in the Community relates to the deficient processes, such as the weakness of the European Parliament, but not the deep

structural absence of a demos. Though there is no common European language, that cannot in itself be a conditio sine qua non as the case of, say, Switzerland would illustrate. And there is a sufficient measures of shared history and cultural habits to sustain this construct. The problem is that this construct simply does not ring true. For most Europeans any sense of European identity defined in ethno-cultural or ethno-national terms would be extremely weak. We do not wish to pursue this critique as such.

But there is one strand worth picking up from this first objection. One can argue that peoplehood and national identity have, at certain critical moments of transition, a far larger degree of artificiality, of social constructionism and even social engineering than the organic, Volkish view would concede. As such they are far more fluid, potentially unstable and capable of change. They decidedly can be constructed as a conscious decision and not only be a reflection of an already pre-existing consciousness. Indeed, how could one ever imagine political unification taking place if it has strictly to follow the sense of peoplehood? In the creation of European states involving political unification such as, yes, Germany and Italy, the act of formal unification preceded full and universal shift of consciousness. Although conceptually the nation is the condition for the state, historically, it has often been the state which constituted the nation by imposing a language and/or prioritizing a dialect and/or privileging a certain historical narrative and/or creating symbols and myths. This would, often, have to be the order in the process of unification. Think, say, of Prussia and Austria. Is it so fanciful to imagine a different historical path in which Prussia went its own way, privileging a particularized read of its history, symbols, cultural habits and myths and developing a sense of Volk and nation which would emphasize that which separates it from other German-speaking nations and that Austria, in this would-be history, could have just become another part of a unified Germany?

We are, of course, taking no position here on the desirability or otherwise of European unification driven by the notion of nation and peoplehood. (As will transpire, we oppose it.) But we are arguing that to insist on the emergence of a pre-existing European Demos defined in ethno-cultural terms as a precondition for constitutional unification or, more minimally, a re-drawing of political boundaries, is to ensure that this will never happen. The No Demos thesis which is presented by its

advocates as rooted in empirical and objective observation barely conceals a pre-determined outcome.

The second objection is more central and is concerned with the notion of membership implicit in the No Demos thesis. Who, we may ask, are the members of, say, the German polity? The answer would seem obvious: The German Volk, those who have German nationality. They are Germany's demos. Germany is the state of the Germans defined in the familiar ethno-national terms. By contrast, to say that there is no European demos is equivalent to saying that there is no European nation. We should immediately add that we agree: There is no European nation or Volk in the sense that these words are understood by the German Court and the constitutionalists on which it relies.

But that is not the point. The real point is the following: Is it mandated that demos in general and the European demos in particular be understood exclusively in the ethno-cultural homogeneous terms which the German Federal Constitutional Court has adopted in its own self-understanding? Can there not be other understandings of demos which might lead to different conceptualizations and potentialities for Europe?

We have, so far, in this English language narrative studiously avoided using the concept of citizen and citizenship. Can we not define membership of a polity in civic, non-ethno-cultural terms? Can we not separate ethnos from demos? And can we not imagine a polity whose demos is defined, understood and accepted in civic, non-ethno-cultural terms, and would have legitimate rule-making democratic authority on that basis? To be sure, there is a German constitutional tradition from which the No Demos thesis arises which masks these possibilities since historically, at least from the time of the Kaiserreich or so there has been such a strong current which insists on the unity of Volk-Nation-State-Citizenship. A German citizen is, save for some exceptions, a German national, primarily one who belongs to the Volk. Belonging to the Volk is normally the condition for citizenship. And, in turn, citizenship in this tradition can only be understood in statal terms. Here the very language reflects the conflation: The concept of State is built into the very term of Staatsangehöriger. If there is citizenship, Statehood is premised. If there is Statehood, citizenship is premised. This is not simply a matter of constitutional and political theory. It finds its reflection in positive law. That is why naturalization in

Germany -- other than through marriage, adoption and some other exceptions -- is an act which implies not simply accepting civic obligations of citizenship and loyalty to the State but of embracing German national identity understood in this thick cultural sense, a true cultural assimilation and a demand for an obliteration of other Volkish loyalties and identification. Thus, for example, emancipation of the Jews in Germany was premised on a consignment of Jewishness and Judaism to the realm of religion and a refusal to accept Jewish peoplehood. To be a German citizen, under this conception, you have to be part of the Volk. And Germany as a State, is the State of the Germans understood in these terms.

Likewise, until very recently, you may have been a third generation resident of Germany and be denied citizenship because you are unable or unwilling to become "German" in a cultural and identification sense. With few exceptions, the law specifically denies naturalization to resident who would wish to embrace the duties of citizenship but retain an alternative national identity. Multiple citizenship is permitted in peculiar circumstances but is frowned upon. By contrast, if you are an ethnically defined German national even if a third generation citizen and resident of some far flung country you would still be a member of the Volk and hence have a privileged position in applying for citizenship. On this view, the legal "passport" of membership in the polity is citizenship: Citizenship is what defines you as a member of the polity with full political and civil rights and duties. But that, in turn, is conflated with nationality, with being a member of the Volk in the ethno-cultural sense. And, since Demos is defined in national terms, the only Demos conceivable is one the members of which are citizen-nationals -- hence the state.

We should point out again that Germany is not the only state in Europe or elsewhere whose membership philosophy is so conceived. In some measure that is the philosophy of the nation-state. But it does offer a rather extreme example of the conflation of State, Volk/Nation and Citizenship.

Be that as it may, this conflation is neither necessary conceptually, nor practiced universally, nor, perhaps, even desirable. There are quite a few states where, for example, mere birth in the state creates actual citizenship or an entitlement to citizenship without any pretence that you thus become a national in an ethno-cultural sense. There are states where citizenship, as a commitment to the constitutional values and the civic duties of the polity are the condition of naturalization whereas

nationality, in an ethno-cultural sense is regarded, like religion, a matter of individual preference. There are states, like Germany, with a strong ethno-cultural identity, which, nonetheless, allow citizenship not only to individuals with other nationalities, who do not belong to the majority Volk, but to minorities with strong, even competing, ethno-cultural identities. It is, we suppose, a matter for the Germans to decide whether the unity of Volk, Staat, and Staatsangehörigkeit continues to be the best way in which to conceive of their state, nation and citizenry.

Embedded, however, in the decision of the Bundesverfassungsgericht is an understanding not only of German polity and demos but of Europe too, notably in its "Not Yet" formulation. When the German Court tells us that there is not yet a European demos, it implicitly invites us to think of Europe, its future and its very telos in ethno-national terms. It implicitly construes Europe in some sort of "pre-state" stage, as yet underdeveloped and hence lacking in its own legitimate rule-making and democratic authority. It is this (mis)understanding which produces the either-or zero sum relationship between Europe and Member State. If demos is Volk and citizenship can only be conceived as Staatsangehörigkeit, then European demos and citizenship can only come at the expense of the parallel German terms.

What is inconceivable in this view is a decoupling of nationality (understood its Volkish ethno-cultural sense) and citizenship. Also inconceivable is a demos understood in non-organic civic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend ethno-national differences. Equally inconceivable in this view is the notion of a polity enjoying rule making and democratic authority whose demos, and hence the polity itself, is not statal in character and is understood differently from the German self-understanding. Finally, and critically, what is also inconceivable on this view is that a Member State like Germany may have its own understanding of demos for itself (for example its relatively extreme form of State=People=Citizens) but be part of a broader polity with a different understanding of demos.

At the root of the No Demos thesis is ultimately a world view which is enslaved to the concepts of Volk, Staat and Staatsangehöriger and cannot perceive the Community or Union in anything other than those terms. This is another reason why

the Union may appear so threatening since the statal vision can only construe it in oppositional terms to the Member State. But that is to impose on the Community or Union an external vision and not an attempt to understand (or define it) in its own unique terms.

Between State Citizenship and Union Membership

How is it possible, it may be asked by those to whom Volk is the demos, and this demos is the basis for legitimate authority in a statal structure, other than in a formalistic and semantic sense to decouple peoplehood from citizenship? Do not Volk and nationality with their ethno-cultural grounding create in the individual member a sense of closeness, in the national community a sense of social cohesion, which are both necessary for the sense of duty and loyalty which are and should be conditions for citizenship?

There may be strength in this argument. The critique of it is not that it is necessarily wrong, but that it is a world view which may be seen as more or less attractive. It is certainly far from compelling. We wish to look at it first at the level of state and then at the European level.

Here are some reasons to be suspicious of this view even at the statal level:

Note first the impoverished view of the individual and human dignity involved in the Volk-State-Citizenship equation: Is it really not possible for an individual to have very strong and deep cultural, religious and ethnic affiliations which differ from the dominant ethno-cultural group in a country, and yet in truth accept full rights and duties of citizenship and acquit oneself honorably? And to look at the other, societal, side of this coin: Is it necessary for the state to make such a deep claim on the soul of the individual, reminiscent of the days when Christianity was a condition for full membership of civic society and full citizenship rights -- including the right to have citizenship duties?

Note, too, that the view that would decouple Volk from Demos and Demos from State, in whole or in part, does not require a denigration of the virtues of nationality -- the belongingness, the social cohesion the cultural and human richness which may be found in exploring and developing the national ethos. It simply questions whether

nationality, in this ethno-cultural sense must be the exclusive condition of full political and civic membership of the polity. Let us not mince our words: To reject this construct as impossible and/or undesirable is to adopt a worldview which informs ethnic cleansing though we am not suggesting of course that the German Court and its Judges feel anything but abhorrence to that particular solution.

Be all this as it may at the level of state and nation, the conflating of Volk with demos and demos with state, is clearly unnecessary as a model for Europe. In fact such a model would deflect Europe from its supranational civilizing telos and ethos. There is no reason for the European demos to be defined in terms identical to the demos of its Member States or vice-versa.

Consider the Maastricht citizenship provisions:

Article 8

> Citizenship of the Union is hereby established.
> Every person holding the nationality of a Member State shall be a citizen of the Union [...]

The introduction of citizenship to the conceptual world of the Union could be seen as just another step in the drive towards a statal, unity vision of Europe, especially if citizenship is understood as being premised on statehood.

But there is another more tantalizing and radical way of understanding the provision, namely as the very conceptual decoupling of nationality/Volk from citizenship and as the conception of a polity the demos of which, its membership, is understood in civic rather than ethno-cultural terms. On this view, the Union belongs to, is composed of, citizens who by definition do not share the same nationality. The substance of membership (and thus of the demos) is in a commitment to the shared values of the Union as expressed in its constituent documents, a commitment to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of classic ethno-nationalism -- those human features which transcend the differences of organic ethno-culturalism. What is special in this concept is that it invites individuals to see themselves as belonging simultaneously to two demoi, albeit

based on different subjective factors of identification. I am a German national in the inreaching strong sense of ethno-cultural identification and sense of belongingness. I am simultaneously a European citizen in terms of my European transnational affinities to shared values which transcend the ethno-national diversity. So much so, that in the a range of areas of public life, I am willing to accept the legitimacy and authority of decisions adopted by my fellow European citizens in the realization that in these areas we have given preference to choices made by my outreaching demos, rather than by my inreaching demos.

The Treaties on this reading would have to be seen not only as an agreement among states (a Union of States) but as a "social contract" among the nationals of those states -- ratified in accordance with the constitutional requirements in all Member States -- that they will in the areas covered by the Treaty regard themselves as associating as citizens in this civic society. This would be fully consistent with, say, Habermass' notion of Constitutional Patriotism. But we can go even further. In this polity, and to this demos, one cardinal value is precisely that there will not be a drive towards, or an acceptance of, an overarching ethno-cultural national identity displacing those of the Member States. Nationals of the Member States are European Citizens, not the other way around. Europe is "not yet" a demos in the ethno-cultural sense and should never become one.

One should not get carried away with this construct. Note first that the Maastricht formula does not imply a full decoupling: Member States are free to define their own conditions of membership and these may continue to be defined in Volkish terms. (But then we know that the conditions of nationality and citizenship differ quite markedly from one Member State to another.) Moreover, the gateway to European citizenship passes through Member State nationality. More critically, even this construct of the European demos, like the Volkish construct, depends on a shift of consciousness. Individuals must think of themselves in this way before such a demos could have full legitimate democratic authority. The key for a shift in political boundaries is the sense of feeling that the boundaries surround one's own polity. We are not making the claim that this shift has already occurred. Nor are we making any claims about the translation of this vision into institutional and constitutional arrangements. We are making, however, the following claims: A. We don't know about public consciousness of a civic polity based demos because the question has to be framed in this way in order to get a meaningful response. B. This shift will not

happen if one insists that the only way to understand demos is in Volkish ways. C. That this understanding of demos makes the need for democratization of Europe even more pressing. A demos which coheres around values must live those values.

There is one final issue which touches, perhaps, the deepest stratum of the No Demos thesis. It is one thing to say, as does Maastricht, that nationals of Member States are citizens of the Union. But are not those nationals also citizens of their Member State? Even if one accepts that one can decouple citizenship and nationality and that one can imagine a demos based on citizenship rather than on nationality, can one be a citizen of both polities? Can one be a member of not one but also a second demos? We have already noted the great aversion of this strand of German constitutionalism to multiple citizenship.

We want to address this question in two different ways. One is simply to point out the fairly widespread practice of states allowing double or even multiple citizenship with relative equanimity. For the most part, as a matter of civic duties and rights this does not create many problems. This is so also in the Community. It is true that in time of, say, war the holder of multiple citizenship may be in an untenable situation. But cannot even the European Union create a construct which assumes that war among its constituent Member States is not only materially impossible but unthinkable? The sentiment against multiple citizenship is not, we think, rooted in practical considerations.

Instead, at a deeper level the issue of double citizenship evokes the spectre of double loyalty. The view which denies the status of demos to Europe may derive thus from a resistance to the idea of double loyalty. The resistance to double loyalty could be rooted in the fear that some flattened non-descript unauthentic and artificial "Euro-culture" would come to replace the deep, well articulated, authentic and genuine national version of the same. It could also be rooted in the belief that double loyalty must mean that either one or both loyalties have to be compromised.

On the first point we do not believe that any of the European ethno-cultural identities is so weak or fragile as to be risked by the spectre of a simultaneous civic loyalty to Europe. We have already argued that the opposite is also likely. Unable to rest on the formal structures of the State, national culture and identity has to find truly authentic expressions to enlist loyalty which can bring about real internally

found generation. What is more, the existential condition of fractured self, of living in two or more worlds can result not in a flattening of one's cultural achievement but in its sharpening and deepening. Can anyone who has read Heine, or Kafka, or Canetti doubt this? (It might in fact be threatened far more by the simple economic Europe of the Single Market and the like. One cannot overestimate the profound impact of the market on low and high culture.)

But what about the political aversion to double loyalty? This, paradoxically, is most problematic especially in a polity which cherishes ethno-cultural homogeneity as a condition of membership. It is hard to see why, other than for some mystical or truly "blood thicker than water" rationale, say, a British citizen who thinks of herself as British (and who forever will speak with an English accent) but who is settled in, say, Germany and wishes to assume all the duties and rights of German citizenship could not be trusted in today's Europe loyally to do so? Moreover, we have already seen that European citizenship would have a very different meaning than German citizenship. The two identities would not be competing directly "on the same turf." It seems to us that the aversion to double loyalty, like the aversion to multiple citizenship itself, does not seem to be rooted primarily in practical considerations. It rests we think in a normative view which wants national self-identity to rest very deep in the soul, in a place which hitherto was occupied by religion. The imagery of this position is occasionally evocative of those sentiments. Religion, with greater legitimacy, occupies itself with these deeper recesses of the human spirit and, consequently makes these claims for exclusivity. The mixing of State loyalty and religion risks, in our view, idolatry from a religious perspective and can be highly dangerous from a political one. Historically, it seems as if Volk and Staat did indeed come to occupy these deepest parts of the human spirit to the point of being accepted "über alles" with terrifying consequences. our view of the matter is not that the very idea of Volk and Staat was murderous nor even evil though, as we think is clear from this essay, our preference is for multiple loyalties, even demoi within the polity. It is the primordial position which Volk and Staat occupied, instilling uncritical citizenship which allowed evil, even murderous designs to be executed by dulling critical faculties, legitimating extreme positions, subduing transcendent human values and debasing one of the common strands of the three monotheistic religions that human beings, all of them, were created in the image of God.

How then do we achieve "critical citizenship"? The European construct we have put forward, which allows for a European civic, value-driven demos co-existing side by side with a national ethno-cultural one (for those nation-states which want it), could be seen as a rather moderate contribution to this noble goal. Maybe in the realm of the political, the special virtue of contemporaneous membership in a national ethno-cultural demos and in a supranational civic, value-driven demos is in the effect which such double membership may have on taming the great appeal, even craving, for belonging in this world which nationalism continues to offer but which can so easily degenerate to intolerance and xenophobia. Maybe the national in-reaching ethno-cultural demos and the out-reaching supranational civic demos by continuously keeping each other in check offer a structured model of critical citizenship. Maybe we should celebrate, rather than reject with aversion, the politically fractured self and double identity which dual membership involves which can be seen as conditioning us not to consider any polity claiming our loyalty to be "über alles." Maybe this understanding of Europe makes it appear so alluring to some, so threatening to others. In any event, if there is to be a European demos, it should, we argue, be constructed in this, rather the ethno-cultural mode.

III. European Democracy -- International, Supranaitonal, Infranational

A description and analysis of European governance will depend today in large measure on the literature you chose to study. Three approaches have become prominent -- for convenience we have called them, international (intergovernmental) supranational and infranational. There is an inevitable correlation between the disciplinary background of the literatures and their respective focus on governance. The international approach, typified by the work of, say, Andrew Moravscik, has its intellectual roots and sensibilities in international relations. The supranational approach, typified by the work of say, Weiler and others, has its roots and sensibilities in public law and comparative constitutionalism. The infranational approach, typified by the work of Giandomenico Majone and his Florence associates, stems from a background in domestic policy studies and the regulatory state. This is not, however, a case of disciplinary entrenchment. All approaches are mindful of the need to weave together the political, and social, the legal and economic. Nor is it yet another simplistic instance of the proverbial Blind Men and the Elephant. The three approaches are aware of the others but choose to "privilege"

what, given the disciplinary background, seems most important to explain and understand in Union governance. More importantly the approaches, in our view, reflect a reality. In some crucial spheres Union governance is international; in other spheres it is supranational; in yet others it is infranational. How the Single European Act was negotiated is not simply an example of the IR approach; it is an example of the Community at a high international or intergovernmental moment. Instances of Supranational decisionmaking would be, say, the adoption of the big framework harmonization directives such as Banking or Video Rental Rights or, at a lover level, the Tobacco Labeling Directive and, no less interestingly, the rejection of the Tobacco Advertising Directive. The Infranational approach is characterized by the relative *unimportance* of the national element in the decision making. Technical expertise, economic and social interests, administrative turf battles shape the process and outcome rather than "national interest." Infranational decision making is typified by the miasma of, say, health and safety standard setting, telecommunications harmonization policy, international trade rules-of-origin.

It is not, then, that the observational standpoint and the sensibility of the observer defines the phenomenon. On our reading certain objective aspects of the phenomenon attract the attention of different observers. There are three approaches but also three modes of governance. Likewise, it would be facile, based on the above examples, to conclude, simpliciter, that intergovernmental deals with "important" issues, supranational with "middle range" issues and infranational with trivia. The commonsensical wisdom of Parkinson may well apply in this area too: Huge diplomatic effort may be invested in this or that provision of, say, the SEA; enormous resources may be invested in sheparding an harmonization measure through the ever more complex Commission-Council-Parliament procedures; and yet the reality of important aspects of the Single Market may have a lot more to do with the details of implementation, with the actual standards set by committees and the like. Here, too, we will resort to a mere capsule version of the three modes.

For the International approach States are the key players and Governments the principal actors. As a mode of governance, the Union, on this perspective is seen as an inter-national arena or regime in which governments (primarily the executive branch) are the privileged power holders. The Union is principally a context, a framework within which states/governments interact. In the Supranational approach States are privileged players but the Community/Union is not only or primarily a

framework but a principal player as well. The privileged actors are State governments and Community Institutions. State governments here is understood to include the main branches -- legislative and judicial though, not necessarily with equal weight. But here, too, the executive branch is the key State player. The Commission, Council and increasingly the European Parliament, are critical actors and fora of decision making. The Infranational approach downplays both the Community and the Member States as principal players and likewise the role of primary state and community institutions. In that it is distinct from the international and supranational. It is like the international approach in that Union is primarily a context, a framework within which actors interact. The actors however tend to be, both at Union and Member State levels administrations, departments, private and public associations, certain, mainly corporate, interest groups.

In the international mode the focus is on negotiation, intergovernmental bargaining and diplomacy. There is a relatively low level of institutionalization, and a premium on informal and unstructured interaction. Formal sovereign equality (including a formal veto) and the loose reflexes of international law prevail which, of course, should not be understood as leading to full equalization of power among the actors. The materia is often -- though clearly not always -- constitutional (in non-technical sense). The modus-operandi of the supranational mode is more structured, formal and rule bound. Bargaining and negotiation are far more akin to a domestic legislative process of coalition building, vote counting and rule manipulation. The materia is, frequently, primary legislation. Infranationalism is mostly about regulatory governance and management. There is a medium to low level of institutionalization and informal networking between "government" and corporate players abound. The international mode is characterized typically by high actor visibility and medium to low process visibility. Supranationalism is characterized by medium (aspiring to high!) actor visibility and medium to low process visibility. Infranationalism has both low actor and process visibility.

Internationalism, Supranationalism and Infranationalism -- Static (structural) Elements

Arena	**International**	**Supranational**	**Infranational**
Disciplinary Background of Observers	International Relations	Law (typically public law)	Policy Studies; Sociology
Typical Issues of Governance	Fundamental system rules; Issues with immediate political and electoral resonance; International "High-Politics"; Issues *dehors* Treaty	The primary legislative agenda of the Community; Enabling-legislation; Principal Harmonization measures	Implementing and executive measures; standard setting;
Principal Players	Member States	Union/Community & Member States	[Union/Community is policy making context]
Principal Actors	Governments (Cabinets-Executive Branch)	Governments, Community Institutions: Commission, Council, Parliament	Second level organs of governance (Com. Directorate, Committee, Govt. departments etc.); Certain corporate and social-industrial NGOs.
Level of Institutionalisation	Low to Medium	High	Medium to Low
Mode of Political Process	Diplomatic negotiation	Legislative process bargaining	Adminstrative process, "networking"
Type/style of Intercourse	Informal procedures; low level of process rules	Formal procedures; high level of process rules	Informal procedures; low level of process rules
Visibility/ Transparency	High actor and event visibility. Low transparency of process	Medium to low actor and event visibility and medium to low transparency of process	Low actor and event visibility and low transparency of process

Internationalism, Supranationalism and Infranationalism -- Dynamic Elements

The inter-supra-infra trichotomy enables us to build a better picture of the disbursement of power and accountability in the Union. Critical in building this picture is to understand not only the different modes of empowerment of, and desert to, various actors according to the mode of governance but also the fluidity and hence dynamics of allocation of issues to the different forms of decision making. The stakes as to arena, *where* (in this scheme) issues get decided, is as important as *what* gets decided -- since the where impacts, indeed determines the what. For the lawyers among readers, the ERTA decision or Opinion 1/76 was not about content but about forum and mode of decision making: A bid by the Commission to transfer the treaty negotiation from the international to supranational arena. The Maastricht three pillar structure is also about arena, and the various positions of the European Parliament in the ongoing Community debate should be partly understood as bids about mode rather than content of policy making. Since the SEA which saw the strengthening of both the legal framework of supranational decision making and the relative empowerment of the Commission and Parliament, we have seen considerable political battles concerning fora rather than outcome. Comitology becomes a live issue in exactly the same period.

The static model already suggested "inbuilt" empowerment of certain actors: State Government in the international mode, State Government and Community Institutions in the Supranational mode, Administrations (national and Community) and certain corporate actors in the infranational mode. But this, surely, is only a starting point. Examine the three modes from the perspective of non-governmental public and private actors. Actors which have privileged access to national government (eg government political parties) could have an interest in international decision making. An opposition party may, by contrast, presage for supranational decision making, if the Community balance of power favours its position. A coalition of Member States may pressage transfer (or maintenance) of an issue in the Surpanational arena where majorities have more weight and are more legitimate. A minority or individual Member State may pressage for transfer to the international arena (eg. France over the Blair House Agreement) where definitionally the specific gravity of each Member State is higher.

Control and accountability are also critical variables in understanding the implication of the three modes. The international mode will favour domestic arenas of accountability (national parliaments, national press). The supranational mode suffers from all the defects which the Standard Version tends to highlight. Infranationalism has an all-round low level of accountability. By contrast, Judicial Review tends to be more substantive in the supranational arena, procedural in the infranational arena and scant in the international arena. When judicial review is perceived as a threat we may expect to find arena battles.

This capsule only hints at a research agenda; but it is suggestive of the need for a differentiated approach in understanding the democratic problems of European integration.

IV. Models of Democracy

Whatever insight the study of the three arenas may eventually yield regarding the disbursement and accountability of power, it will not, in and of itself, point to "democratic" defficiencies or solutions. One key problem is that democratic theory, and democratic sensibilities, have developed almost exclusively in statal contexts. One enterprize would be to fashion a tailor made democratic theory for the Community. In this project we are far less ambitious. We wish to use off-the-peg democratic wares. But the discussion of demos and of governance illustrate the care with which we must handle the transferability of statal concepts to the European context. What is needed, perhaps, are different garments for the different arenas and modes of Union governance.

We shall only take a first step in this essay: Exploring possible "fits" between varous democratic models and Union modes of governance with a view to a better understanding of the problems of democratic governance in the Union.

International (Intergovernmental) Governance and the Consociational Model

Consociational theory emerged to fill a gap in traditional democratic theory. One of the principle tasks of democratic theory was to explain the functionality and stability of pluralistic democratic political systems, given that by definition of pluralist

democracy, such systems would be divided by competing political forces. The classical explanation given by democratic theory to this basic paradox of functional stability in a competitive pluralistic society was by reference to the notion of cut-crossing cleavages. Cut-crossing cleavages, for reasons which do not interest us here, have the effect of leading both to stability and functionality.

By contrast when social cleavages reinforce each other (catholic-protestant; poor-rich; urban-agrarian etc.) when the social policy is deeply fragmented, society becomes conflict-laden which leads (while democracy is preserved) in turn to immobilism in policy-making and erosion of stability.

And yet, historically, several smaller countries in Europe - Holland, Austria, Switzerland, and Belgium up to a point - were socially "cleavaged" in just that way and yet managed to display in certain periods the functionality and stability of the centripetal explanation until the 60s. (Daalder, a Dutchman, and one of the Fathers of Consociational theory, recalls how he was told by a leading political scientist: "You know, your country theoretically cannot exist".) Consociational theory tries to explain the functionality and stability of these countries. Its basic explanatory device has been the behavior of political elites which control/lead the fragmented social segments.

Crucial to Consociational theory is the existence of sharply segmented societal sectors. Consociational theory is not interested in the reasons for segmentation (the content of the cleavages), but in their empirical existence. At this level then the model seems to correspond to International dimension of Union governance: A transnational polity sharply segmented by its Member States and indeed displaying the expected characteristics of immobilism - and yet somehow creating structures which manage to transcend these immobilistic tendencies.

Of course, the very creation of *structures and institutions* for the international mode, like the two non-Community Maastricht Pillars, like the European Council, may be said to indicate a higher level of commonality than consociationalism is designed to respond to. We think the commonality is in the desire to have a common policy but substantive policy fragmentation is acute in relation to several of the contexts in which the International mode operates. Indeed, *the very lack of*

substantive commonality is what pushed the Member States to insist on this form of governance in this area.

The essential characteristic of consociational democracy is not so much any particular institutional arrangement as the deliberate joint effort by the elites to render the system functional and stable. The key element is what Dahrendorf has termed a cartel of elites.

Consociational theorists seek to show how in all successful consociational democracies, normal traditional political fora were bypassed, and substituted by fora in which the leaders of all social segments participated, and compacts were arrived at, disregarding the principle of majority rule and using instead consensual politics. Competitive features are removed and cooperation sought. Worth noting is that the alternative fora might in themselves become institutionalized and rather formal. Typically Consociationalism works on the basis of consensus, package deals and other features characteristic of elite bargaining. The elites, representing their respective segments, realize that the game is not zero-sum nor is it a winner take all.

The two basic requirements for success according to Consociational theory would be that elites share a commitment to the maintenance of the system and to the improvement of its cohesion, functionality and stability; and that elites understand the perils of political fragmentation. Elites must also be able to "deliver" their constituents (and compliance) to deals thus struck.

This of course begs some questions. In traditional Consociational theory this commitment will come out of the loyalty of elites to their country and society. Our claim is that the formal extension in Maastricht of Union governance to areas hitherto dealt with informally or, at best, within European Political Cooperation, demonstrates a degree of commitment to the European polity which, however is not matched by sufficient degree of trust in supranational governance. Hence consociationalism as a model.

But Consociational theorists suggest it is possible in addition to identify several further features which will be conducive to the success of Consociationalism. These include the length of time a consociational democracy has been in operation; the existence of external threats to the polity; the existence of a multiple balance of

power; a relatively low total load on the decision-making apparatus. We think all these features are characteristic of the Union international mode of governance too.

So far we have concentrated on the behavior of the elites themselves. Consociational theory stipulates two further conditions for successful functioning:The elites must be able to carry their own segments along. And there should be widespread approval of the principle of government by elite cartel.

In looking at past practice there do seem to be several points of contact between the Consociational model and the international practice of the Union: The existence of a structure composed of highly sharp segments (the Member States) which display a tendency to immobilism (which classical theory would predict) but which manages nonetheless to score a measure of functionality and stability (which Consociational theory tries to explain). The key factor of Consociationalism elite behavior, (in our case governments) also seems confirmed in the international mode.

The pay-off of consociationalism seems to be the achievement of stability in the face of high degree of social fragmentation which normal pluralist models cannot achieve. There are, naturally, implications for self-understanding of democracy in the polity. The democratic justification of consociationalism begins from the acceptance of deep and permanent fragmentation in the polity. Even in traditional constitutional pluralist democracies there is an acceptance that certain "high stake" decisions, such as constitutional amendments, require "super majorities" or other mechanisms which would be more inclusive of minorities. Consociationalism rejects the democratic legitimacy of permanent minorityship which is possible, even likely, for a fragmented polity operating a pluralist, majoritarian election and voting system. Consociationalism seems, thus, to enhance legitimacy in its inclusiveness and the broadening of ultimate consent to government. Theoretically, there is a strong case to be made for a consociational type of inclusiveness also in relation to at least certain areas of Union governance. If the international mode is, in fact, consociational, this would be a justification not from an efficiency and stability perspective but from a normative representational one as well.

The democratic problems of consociationalism and hence of the Union when operating in the International mode are no less grave. First, the democratic gaze must shift to the constituent units of the consociational model -- in this case to the

Member States. It will often be discovered that some elites, within the consociational cartel of elites, have very deficient internal democratic structures of control and accountability. Even a facile comparison among the structures which exist within the various Member States to control their governments is sufficient to illustrate this point. Even more troubling: Consociationalism might actually act as a retardant to internal democratization because the"external" context both empowers the representing elite (executive branch of government) and may even create a mobilizing ethos of, say, the "national interest" which justifies sacrificing calls for transparency and accountability. These calls can be, and usually are, presented as "weakening" the ability of the elite to represent effectively in the external context.

Second, consociational power-sharing is favorable to "status" social forces, those whose elites participate in the cartel. It excludes social forces which are not so recognized. "New" minorities are typically disfavoured by consociational regimes. The corollary of this in the Union would be "new" minorities within the Member States whose voices are not vindicated by the Government and are those doubly disfavoured both at national and Union levels. Consociationalism can be seen as weakening true representative and responsive government.

Finally, consociational politics typically favour the social status quo and, whilst mediating the problems of deeply fragmented societies also are instrumental in maintaining those very fragments. This can be highly problematic for some conceptions of European integration. Given that the consociational fragments in this context are the Member States themselves, the International mode understood in consociational terms is not only about ensuring the inclusion of all Member State voices in certain critical areas but in actually sustaining the Member State and their governments as such and, for example, retarding the formation of transnational coalitions of interests who, in the areas of the international mode, would and could have no impact in a process which privileged States and their governments.

B. Supranationalism, Pluralism and Competitive Elitism

The Supranational mode of governance is the closest to a State model and thus, paradoxically perhaps, we will say little about it. It can be analyzed most profitably in our views either with insights from Weberian or Schumpeterian competitive elites model of democracy or, aspirationally at least, to a statal, federal version of pluralist

democracy. The Standard Version we presented above captures most of its actual or even would be shortcomings and we do not plan to recapitulate these here.

C. Infranationalism and the Neo-Corporatist Model of Governance and Democracy

It is not our claim that Infranationalism is the Union variety of neo-corporatism. But it does share some common features and hence the conjunction of both may help us identify some of the democratic problems with infranationalism.

Classical neo-corporatism identified a privileging of government, industry and labour in an attempt to avoid a confrontational mode of governance and reach a politics of accommodation which would resolve economic problems in both periods of expansion and stagnation. The focus was on macroeconomic policy as defining the central public choices confronting the polity. Neo-corporatism was, in our mind, a technocratic view which believed in management, distrusted to some extent markets, and favoured stability and predictability. It is not surprising that its political instincts also favoured governance through negotiation with highly organized interests having representational monopoly. In some respect neo-corporatism is a technocratic version of consociationalism. Neo-corporatism does not replace parliament and other institutions and processes of pluralist democratic government, but simply side-steps them in reaching the fundamental public choices of the polity. Inevitably there is an erosion in the substantive power and status of parliamentary bodies parties and the like. Corporatism of the pre-World War II was aimed at undermining those aspects of pluralist democracy in the name of efficiency and stability. Its post War neo-corporatist version did not have that objective but had some similar institutional frameworks.

The Infranational arena is no neo-corporatist model. Its reach extends well beyond macro-economic policy and the concerns of managing the business cycles which dominated politics of the 60s and 70s. It is decidedly not a tripartite relationship between government, business and labour. But it has some evocatively similar features:

1. The underlying ethos of Infranationalism is managerial and technocratic; the belief that a rational management and regulatory solutions can be found by an employment of technocratic expertise.

2. There is an underlying premise which puts a premium on stability and growth and is suspicious of strongly re-distributive policies and, more generally, on ideology and "politics".

3. Infranationalism has a strong push toward representational monopolies and the creation of structures which will channel organized functional interests into the policy making and management procedures (CEN, CENLEC and the like).

4. Infranationalism, because of its managerial, functional and technocratic bias operates outside parliamentary channels, outside party politics. There is nothing sinister or conspiratorial in infranationalism, but its processes typically lack transparency and may have low procedural and legal guarantees. Its seeks its legitimation in results rather than process.

As we would expect, in some respects Infranationalism overcomes some of the problems of the international mode. It is both an expression of, and instrumental in, the decline of the State and its main organs as the principal vehicle for vindicating interest in the European polity. Infranationalism is about transnational interest groups, governance without (State) government, empowerment beyond national boundaries and the like. But it suffers too from many of the problems of neo-corporatism and some problems of its own. We would mention in particular the following:

a. The technocratic and managerial solutions often mask ideological choices which are not debated and subject to public scrutiny beyond the immediate interests related to the regulatory or management area.

b. Participation in the process is limited to those privileged by the process; fragmented and diffuse interests, other public voices are often excluded.

c. As in the consociational model, the process itself might distort power relationships and democracy within the groups represented in the process.

d. The process itself not only lacks transparency but also is typically of low procedural formalities thus not ensuring real equality of voice of those who actually do take part in the process. Judicial review is scant and tends to insist on basic rights to be heard rather than fairness of outcome.

e. In general, the classical instruments of control and public accountability are ill-suited to the practices of infranationalism. They are little affected by elections, change in government and the new instruments introduced by, say, Maastricht.

V. Fundamental Rights and Fundamental Boundaries

Let us start with yet another truism. Although the principle of universal suffrage and majoritarianism informs all modern systems of democratic governance, it is not an absolute principle. Modern democracies, taking their cue principally from the American rather than British democratic tradition, increasingly acknowledge a higher law -- typically a constitution -- which binds even the legislature. In an increasing number of modern democracies the higher law is backed up by courts and a system of judicial review which give it, so to speak, teeth. Within this constitutional ethos judicial protection of fundamental human rights has a central place. Constitutionalism, despite its counter-majoritarian effect are regarded as a complimentary principle to majoritarianism rather than its negation. One formulation which describes the complex relationship between the two is the notion of protection against a tyranny of the majority -- seemingly an oxymoron. We will not enter into the complex theoretical discussion of rights and their relationship to democracy. The appeal of rights, whatever the theoretical justification has to do with two roots. The first of these two roots regards fundamental rights as an expression of a vision of humanity which vests the deepest values in the individual which, hence, may not be compromised by anyone. Probably one of the oldest and most influential sources of this vision is to be found in the Pentateuch: And God created man in His own image, in the image of God created He him. (Gen.I:27).

With this trademark, what legislator has the authority to transgress the essential humanity of the species? Naturally, there are secular, humanist parallels a plenty. The other root for the great appeal of rights and part of the justification of their countermajoritarian semblance looks to them as an instrument for the per-se value of putting constraints on power. Modern democracy emerges, after all, also as a rejection of absolutism and absolutism is not the prerogative of kings and emperors.

Similar sentiments inform the great appeal of fundamental boundaries in non-unitary systems -- federal states and the European Union. We use the term Fundamental Boundaries as a way of conceptualizing in a normative sense the principle of enumerated powers or limited competences of the central authorities in these systems. The appeal of fundamental boundaries rests in two parallel roots. First as an expression of a vision of humanity which vests the deepest values in individual communities existing within larger polities which, thus, may not be transgressed. The vision of humanity derives from an acknowledgment of the social nature of humankind, as a counterbalance to the potential atomism of fundamental rights, -- And the Lord God said: It is not good that man should be alone -- (Gen II:18) and from the realization that smaller social units can suffer parallel oppression to individuals by stronger societal forces. That enumeration is also said to work as a bulwark against aggregation of power is its second appeal.

We are unaware of any federal system which does not claim to give expression to these notions. But there are as many variants as there are systems. Comparative analysis can be particularly alluring here. In Europe there has been a practical eruption of the hitherto dormant question of Community "competences and powers" , a question and debate which has found its code in the deliciously vague word, term and concept of Subsidiarity. This is inevitably connected to the continued pre-occupation with governance structures and processes, balance between Community and Member State and the Democracy and legitimacy of the Community.

What accounts for this eruption?

First a bit of history. Here is an analysis from the run-up period to the Maastricht IGC.

The student of comparative federalism discovers a constant feature in practically all federative experiences: a tendency, which differs only in degree, towards controversial concentration of legislative and executive power in the centre/general power at the expense of constituent units. This is apparently so independently of the mechanism for allocation of jurisdiction/competences/powers between centre and "periphery". Differences, where they occur, are dependent more on the ethos and political culture of polities rather than on mechanical devices.

The Community has both shared and differed from this general experience:

It has shared it in that the Community, especially in the 70s, has seen a weakening of any workable and enforceable mechanism for allocation of jurisdiction/competences/powers between Community and its Member States.

How has this occurred? It has occurred by a combination of two factors.

a. Profligate legislative practices especially in, for example, the usage of Article 235 .

b. A bifurcated jurisprudence of the Court which on the one hand extensively interpreted the reach of the Jurisdiction/competences/powers granted the Community and on the other hand has taken a self-limiting approach towards the expansion of Community jurisdiction/competence/powers when exercised by the political organs.

To make the above statement is not tantamount to criticizing the Community, its political organs and the Court. This is a question of values. It is a sustainable thesis, which we share, that this process was overall beneficial, in its historical context, to the evolution and well being of Community, Member States and its citizens and residents. But this process was also a ticking constitutional time bomb which, we wrote, one day might threaten the evolution and stability of the Community. Sooner or later, "Supreme" courts in the Member States would realize that the "Socio-legal Contract" announced by the Court in its major constitutionalizing decisions, namely that "the Community constitutes a new legal order... for the benefit of which the states have limited their sovereign rights, albeit within limited fields" (emphasis added) has been shattered, that although they (the "Supreme" courts) have accepted

the principles of the new legal order -- supremacy and direct effect -- the fields do not seem any more to be limited, and that in the absence of Community legislative or legal checks it will fall on them to draw the jurisdictional lines of the Community and its Member States.

The interesting thing about the Community experience, and this is where it does not share the experience of other federative polities, is that despite the massive legislative expansion of Community Jurisdiction/competences/powers there had not been any political challenge or crisis on this issue from the Member States. (The challenges and dissatisfaction occurred on some of the occasions when competences mutated as a result of a Court decision such as in the ERTA case or Rubber Opinion).

How so?

The answer is simple and obvious and resides in the pre-Single European Act decision making process. Unlike federal states, the governments of the Member States themselves (jointly and severally) could control absolutely the legislative expansion of jurisdiction/competences/powers. Nothing that was done could be done without the assent of all national capitals. This fact diffused any sense of threat and crisis on the part of governments.

This era has now passed with the shift to majority voting and the seeds -- indeed the buds -- of crisis are, we wrote, with us. Not only is there an imminent danger that one of the national courts will take the position predicted (and this might happen sooner rather than later with the decision now pending before the Federal Constitutional Court in Germany concerning the Television Without Frontiers Directive), but the Member States have become aware that in a process that does not give them a de jure or de facto veto, the question of jurisdictional lines has become crucial.

Our own concern, we wrote then, is that if something is not done so that the European Court of Justice is seen to be the obvious body for resolving this kind of prospective dispute, some national supreme courts will "rebel" very much as the Italian and German Constitutional Courts "rebelled" in the 1960s and early 70s on

the issue of protection of fundamental human rights when it was not clear that the European Court was going to act in this matter in a vigorous manner.

We are well aware that in theory the Court already has jurisdiction to resolve this kind of issue under Article 173 and 177(b) (lack of competences), but since to date no Commission or Council measure has been struck down for pure and simple lack of competences our assessment is that this existing provision in itself will not satisfy the fears of the Member States.

Somewhat later than predicted in the above passage, the German Constitutional Court did just that. It rejected the ECJs claim to exclusive Kompetenz-Kompetenz and claimed that the limits to Community legislative powers was as much a matter of German constitutional law as it was a matter of Community law. As such it, the German Constitutional regards itself as competent, indeed as mandated by the German constitution to monitor the jurisdictional limits of the Community legislative process.

Formally, the decision constitutes a flagrant act of defiance vis-a-vis the European Court of Justice in direct contradiction with its jurisprudence on the power of national courts to declare Community law invalid. It flies in the face of, inter alia, the third paragraph of Article 177 It is also untenable in a legal functionalist sense: There would be as many fundamental boundaries to the Community as there are Member States. And how can the same Community measure be considered intra-vires in one Member State and ultra-vires in another.

But how should one evaluate this development in legal-political terms? We want to use some of dynamics of the Cold War as a device for evaluating the Kompetenz-Kompetenz aspect of the Maastricht Decision of the German Constitutional Court.

On this reading, it is not a declaration of War but the commencement of a cold war with its paradoxical guarantee of co-existence following the infamous MAD logic: Mutual Assured Destruction. For the German Court actually to declare a Community norm unconstitutional rather than simply threaten to do so, would be an extremely hazardous move, so hazardous as to make its usage unlikely. The use of a tactical nuclear weapons always was considered to carry the risk of creating a nuclear domino effect. If other Member State courts followed the German lead, or if

other Member States legislatures or governments were to suspend implementation of the norm on some reciprocity rationale a veritable constitutional crisis in the Community could become a reality -- the legal equivalent of the Empty Chair political stand-off in the 60s. It would be hard for the German government to remedy the situation especially if the German Court decision enjoyed general public popularity. Could the German Constitutional Court, would the German Constitutional Court be willing to face the responsibility of dealing such a blow (rather than a threat of a blow) to European integration?

But the logic of the Cold War is that one has to assume the worst and to arm as if the other side would contemplate a first strike. The European Court of Justice would, thus, have to be watching over its shoulder the whole time, trying to anticipate any potential move by the German Constitutional Court.

It could be argued that this situation is not unhealthy. That the German move of the 90s in relation to competences resembles their prior move in relation to human rights and that it was only that move which forced the European Court to take human rights seriously. Thus, the current move will force the Court to take competences seriously.

This view has some merit in it, but ultimately we find it unpersuasive for two reasons.

> There is no "non proliferation treaty" in the Community structure. MAD works well, perhaps, in a situation of two superpowers. But there must be a real fear that other Member State Courts will follow the German lead in rejecting the exclusive Kompetenz-Kompetenz of the ECJ. The more courts adopt the weapon, the greater the chances that it will be used. Once that happens, it will become difficult to push the past back into the tube.
>
> Courts are not the principal Community players. But this square-off will have negative effects on the decision making process of the Community. The German Government and Governments whose Courts will follow the German lead, will surely be tempted to play that card in negotiation. ("We really cannot compromise on this point, since our Court will strike it down...)

For reasons which space does not allow to elaborate we do not think that a solution to this problem can be found by a simple drawing up of new list of competences for the Community. Instead, we believe that long term solution can only take place by a change of ethos. Institutions can play a role in this. One possible solution is thus institutional and we wish to give its bare bones. We would propose the creation of a Constitutional Council for the Community, modeled in some ways on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted but before coming into force. It could be seized by any Community institution, any Member State or by the European Parliament acting on a Majority of its Members. Its President would be the President of the European Court of Justice and its Members would be sitting members of the constitutional courts or their equivalents in the Member States. Within the Constitutional Council no single Member State would have a veto power. The composition would also underscore that the question of competences is fundamentally also one of national constitutional norms but still subject to a Union solution by a Union institution.

We will not elaborate in this essay some of the technical aspects of the proposal. Its principal merit, if it has any, is that it gives expression to the fundamental boundary concern without however compromising the constitutional integrity of the Community as did the German Maastricht decision. Since, from a material point of view, the question of boundaries has an inbuilt indeterminacy, the critical issue becomes not what are the boundaries but who gets to decide. The composition of the proposed Constitutional Council removes the issue, on the one hand, from the purely political arena; on the other hand, it creates a body which, on this issue, would, we expect, enjoy a far greater measure of public confidence than the ECJ itself.

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