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Daniel Halberstam

The Bride of Messina or European Democracy and the Limits of Liberal Intergovernmentalism

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The Bride of Messina
or
European Democracy and the Limits of Liberal Intergovernmentalism

Daniel Halberstam*

INTRODUCTIONINTRODUCTIONINTRODUCTIONINTRODUCTION

There is an ongoing debate between scholars who maintain that the Union is the predictable product of agreements among the member states and scholars who argue that much of the Union is the unintended consequence of those intergovernmental agreements.[1] The former contend that supranational actors fill in gaps and render credible intergovernmental commitments in ways that member states ultimately want. The latter suggest that the institutional arrangement has allowed supranational actors to exercise power in their own self-interest, thus creating a semi-autonomous realm of European action. This essay argues that both accounts still miss something important: both conceptions of the Union underestimate the role that a commitment to principle on the part of individuals plays in the European enterprise. As this essay will show, the failure to appreciate this particular role of individuals has important consequences for how we understand democracy in Europe.

Both sides of the current debate still largely embrace a rational actor model, in which different institutions make rivaling claims based on their respective rational self-interest. Depending on how "rationality" and "self-interest" are understood, this may indeed be accurate. But all too frequently, the argument about institutional self-interest eclipses a more fine-grained inquiry into just what the motivations and self-conceptions of actors in this enterprise are.

This essay, in contrast, deliberately pursues a more playful metaphor of human action taken from the work of Friedrich Schiller. As Schiller wrote in the

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[1] For a helpful overview of different approaches to European integration, see Paul Craig, The Nature of the Community: Integration, Democracy, and Legitimacy, in The Evolution of EU Law (Paul Craig and Gráinne de Búrca, eds., 1999).

introductory essay to *The Bride of Messina*: "[A] faithful painter of what is real . . . will grasp the accidental appearances, but never the spirit of nature. He will only bring back the stuff of the world; but it will not be our work, not the free product of our formative spirit, and therefore cannot have the beneficial effect of art, which is freedom."[2] In the spirit of this recognition, the hope is that a foray into Schiller's moral aesthetics will help illuminate the importance of the ethical self-conception of individual actors to the direction of European integration.[3] Although grand bargains may set the stage and member state continue to play a crucial role in the Union, individual actors nonetheless retain an important measure of freedom to express their principled commitments in whatever roles they are assigned to play.

This essay will argue that European integration and Europe's growing democratic aspirations have depended in considerable part on the self-conception of individuals making decisions within particular institutional settings. It will argue that individual actors have repeatedly seized the decisional autonomy granted by whatever institutional arrangement they inhabit. And it will argue that they have done so in ways that are neither arbitrary nor simply reflective of personal or institutional self-interest. Instead, this essay contends, individual actors have exercised their discretion by drawing on their own principled commitments and their resulting conceptions of the nature of the European enterprise.

In particular, this appeal to principle has entailed an understanding of the Union as liberating the individual (and her communities of interest) from the comfortable monopoly of member state processes of political decision making. The descriptive and normative run together here. Acting on this democratic vision, individuals have brought about a pervasive normative recalibration of the Union. They have shifted integration away from the member states governments as the exclusive locus of normative concern, and included the individual as the direct subject of the enterprise. As this essay will show, this "democratic recalibration" of the treaties has had a profound effect on the development of European integration.

The following discussion proceeds by way of responding to the most prominent contemporary proponent of an intergovernmental account of the Union: Professor Andrew Moravcsik.[4] After briefly placing Moravcsik's arguments in the context of the debate about European integration, Part I will offer a different account focused on the role of the individual as both actor and subject of the European enterprise. Part II will then specifically address Professor Moravcsik's argument about the current state of the Union's democratic legitimacy.[5] This Part will reject the notion that European integration is a relatively limited enterprise that concerns itself only with matters that would be (and are) relegated to relatively non-participatory processes within the member states. First, Part II.A. will illustrate the breadth of

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[2] Friedrich Schiller, *The Bride of Messina*, introductory essay entitled "Über den Gebrauch des Chors in der Tragödie," 4 Gesammelte Werke 311, 313 (Carl Noch, ed., 1959).

[3] Friedrich Schiller, Über Anmut und Würde, *reprinted in*, 8 Gesammelte Werke at 240.

[4] See Andrew Moravcsik, The Choice for Europe: Social Purpose & State Power From Messina to Maastricht (1998). See also, Andrew Moravcsik, Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach, 31 J.C.M.S. 473 (1993). For helpful reviews of Moravcsik's theory, see, e.g., Frank Schimmelfennig, Liberal Intergovernmentalism, *in* European Integration Theory 75 (Antje Wiener and Thomas Diez, eds., 2004); Helen Wallace, James A. Caporaso, Fritz W. Scharpf, and Andrew Moravcsik, Review Section Symposium: The Choice For Europe: Social Purpose and State power from Messina Maastricht, 6 J. Eur. Pub. Pol'y 164 (1999).

[5] See, e.g., Andrew Moravcsik, Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis, 39 Government and Opposition 336 (2004) [hereinafter "Democratic Deficit"]; Andrew Moravcsik, In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union, 40 J.C.M.S. 603 (2002) [hereinafter "Reassessing Legitimacy"].

European policies. Next, Part II.B. will address the nature of member state democratic processes and the ways in which the Europeanization of public policy can undermine as well as promote democracy. As will already become clear in this Part, the disagreement with Moravcsik on this score is not only about the facts, but about the way in which we conceive of democracy. Part III will highlight the normative dimension in the debate between these different visions of European integration and democracy. The differences pursued here go beyond the question of accuracy in describing how the Union came about or what it does today. Instead, these disagreements have important normative implications for whether and how judges, bureaucrats, politicians, and citizens should take democratic values into account when interpreting the current European legal order as well as building for its future. The last part is the conclusion.

I. EUROPA AND THE INDIVIDUALI. EUROPA AND THE INDIVIDUALI. EUROPA AND THE INDIVIDUALI. EUROPA AND THE INDIVIDUAL

The "liberal intergovernmentalist"[6] claim that European integration is the predictable product of deliberate bargaining for common policies and institutional arrangements by states with stable (or at least autonomous) preferences over time has been the subject of much criticism. The complaint lodged by so-called "institutionalists" or "neo-functionalists" against this theory tends to be that liberal intergovernmentalism does not adequately account for the role of the supranational actors in Europe, in particular the Commission, the European Court of Justice, and the European Parliament.[7] So far, this debate has been informed largely by rivaling accounts of rational self-interest. On the one hand, liberal intergovernmentalism has argued that interest group politics at the member state level compose the self-interest of member state governments, which, in turn, promote their rational preferences at the supranational level of governance. On the other hand, neo-functionalists and institutionalists have argued that supranational institutions contain sufficient slack to allow supranational actors to act on their own rational (institutional) self-interest and enhance their powers vis-a-vis the member state governments.

The current debate still misses an important dimension of the turn to democracy in European integration. As the next two sections will show, understanding this dimension depends on two insights. The first is that the current state of the Union and its emerging aspirations for the future are in important part the product of what we might call the "democratic recalibration" of European integration, that is, the consistent interpretation in big ways and small of the European enterprise as focused not only on member states, but also directly on the individual. The second is that, to a significant degree, this democratic recalibration has been brought about neither by member state government design nor by individuals acting in their own (institutional) self interest, but by individual actors exercising their discretion and appealing to democratic principle.

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[6] Moravcsik labels his theory "liberal intergovernmentalism," since it is an account of intergovernmental bargaining based on national aggregation of preferences through domestic pluralist politics. See Moravcsik, Preference and Power, *supra* note 4.

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A. The Democratic Recalibration of European IntegrationA. The Democratic Recalibration of European IntegrationA. The Democratic Recalibration of European IntegrationA. The Democratic Recalibration of European Integration

Consider the European Court of Justice. From its earliest decisions, the Court has held that the treaty provides rights to, and imposes responsibilities not only the member states, but also directly on individuals. Beginning with the original decisions on direct effect[8] and supremacy[9] to the decisions a decade later on gender equality[10] and the recent decisions on citizenship,[11] the Court has repeatedly interpreted the treaty against the recorded wishes of the concerned member state governments and in favor of giving individuals a stake in the process of European integration. Similarly, in the context of market integration the Court has prominently protected individual traders' economic rights when the political process, which was controlled by member state governments, was stalled.[12]

This development suggests that the Court has long been committed to identifying individuals, as opposed to member state governments, as the relevant locus of value and concern. The thrust of this recalibration is fundamentally at odds with the conception of the Court as an agent of the member states. Without suggesting the dissolution of member states in a vast singular "demos," this recalibration represents an important and pervasive shift in focus away from member state governments and toward the inclusion of the individual as the unmediated unit of normative concern. Indeed, this has formed a central part of what has been generally understood as the "constitutionalization" of the treaties.

Recalibrating the treaties around the individual comes naturally for the judges of the ECJ. To be sure, one might have thought that these judges, who are senior members of the national legal profession, would act conservatively and protect the integrity of member states' "sovereignty." But here, too, it should really come as no surprise that judges would not follow such a direction. Members of the European Court of Justice are educated in national settings and thus generally more comfortable with domestic constitutional modes of legal analysis than they are with interpreting intergovernmental treaties. Hence, when given the freedom to do so, they may naturally gravitate toward constitutional rather than international modes of legal interpretation. One need not impute sinister motives of self-aggrandizement to explain this tendency. To the contrary, this move is consistent with the basic democratic impulse that views governments not as ends in themselves, but only as means to protecting the well-being of individuals.

Accordingly, the work product of the judges is not the simple reflection of member state government preferences as urged by intergovernmental accounts of the Union. But neither do these supranational actors simply follow technocratic necessities or institutional self-interest, as "neo-functionalism" would generally suggest. To be sure, Member state governments' preferences and relative power play a legitimate role in the everyday administration of the Union, and they loom

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[8] C-26/62, N.V. Algemene Transport en Expedite Onderneming Van Gend en Loos v. Nederlandse administratie der belastingen, [1963] E.C.R. 1.

[9] C-6/64, Costa v. ENEL, [1964] E.C.R. 585; C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, [1978] E.C.R. 629.

[10] C-43/75, Defrenne v. Societe Anonyme Belge de Navigation Aerienne (Sabena), [1976] E.C.R. 455.

[11] See, e.g., C-184/99, Rudy Grzelczyk v. Centre Public d'Aide Social D'Ottignes-Louvain-la-Neuve (CPAS), [2001] E.C.R. I-6193; C-85/96, Martinez Sala v. Freistaat Bayern, [1998] E.C.R. I-2691.

[12] See generally, Miguel Pioares Maduro, We, the Court (1998).

especially large in the grand bargains that move the Union along, reintroduce centripetal forces into its architecture, or do both. Similarly, expertise, shared forms of technical reasoning, and institutional self-promotion also play a significant role among bureaucratic actors who are implementing and, in some cases, driving European integration. But the real contribution to European integration of judges, as well as parliamentarians, commission members and other individuals acting at the supranational level, lies not in paying heed to the grand necessities or minute technical logics of European integration. Nor does it lie in the opportunistic exploitation of individual realms of discretion for self-regarding reasons. Their contribution lies elsewhere.

The story of European integration and the role of the individual is as much about what Schiller termed "grace" and "dignity,"[13] as it is about rational accounts of preferences and power. In Schiller's moral aesthetics, grace (or, better, "gracefulness") lies in the particular manner, in which we carry out goal-oriented tasks. Unlike beauty, which may inhere in the accidental features of an individual, gracefulness is the highly personal product of a subject taking action under certain conditions of freedom.

Since no task is exhaustively determined by its purpose, an actor will invariably shape the execution of a task according to her deepest inclinations.[14] Herein lies the realm of gracefulness. Whether we find gracefulness here, further depends on whether an individual's purposeful action in fact expresses that person's moral sentiment. In particular, Schiller suggests, gracefulness is the apparent ease with which our ethical inclinations infuse actions that are only crudely determined by the exigencies those actions serve.

Dignity, in Schiller's view, is the closely related assertion of ethical control over our passions and preferences. This, too, involves a claim of personal authorship. It also involves the assertion of freedom, in this case freedom to reject preference and desire. And yet, in checking desire through a deliberate appeal to ethical reasoning, dignity depends on acknowledging the force of desire.[15] Thus, according to Schiller, dignity stands in stark contrast to gracefulness. While dignity is the deliberate (and visible) assertion of ethical control over ones actions, gracefulness is the apparently effortless expression of ones ethical sensibilities in the course of action.[16]

Finally, dignity and grace come together, in that each depends on the presence of the other. Without the appearance of gracefulness, the successful control of preference and passion may simply suggest dull sensibilities. Conversely, without the appearance of dignity, the pervasive effortlessness of seemingly ethical action may suggest a lack of deliberateness here as well. Thus, while grace indicates the presence

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[13] Friedrich Schiller, Über Anmut und Würde, *reprinted in* 8 Gesammelte Werke 240 (Curt Noch, ed., 1959).

[14] Schiller provides a simple example: "By stretching out my arm to receive an object, I am carrying out a purpose, and the movement that I make is prescribed by the goal that I want to achieve thereby. But which path I want to let my arm take to the object and how far I want to let the rest of my body follow--how swiftly or slowly and whether with much or little exertion I want to perform the movement, I do not engage in this precise calculation at *that* moment, and thus something is left here to my nature. But yet somehow that which is not determined by the purpose must be decided, and therefore here my sentiment can be the decisive factor and, through the tone it sets, determine the manner of the movement." *Id.* at 255.

[15] *See, e.g., Id.* at 281.

[16] *Id.* at 283.

of ethical sensibilities, dignity legitimizes the subject as the deliberate author of her ethical actions.[17]

Consider now the European Court of Justice in the light of these ideas. The language in which we think about judging may, of course, have deep ramifications. And yet, without intimating any particular jurisprudential stance or conclusion,[18] it makes sense to think of the judicial enterprise in roughly the following manner: when the judges of the Court interpret the treaty, they are engaged in purposive activity that nonetheless provides them with a certain measure of discretion. The inevitable freedom that inheres in this act of practical judgment, in turn, invites the interstitial expression of the judges' ethical inclinations. In this way, a judge's interpretation of the law is constrained and yet becomes her own.

Liberal intergovernmentalism generally ignores this freedom by assuming that the European Court of Justice, along with every other European institution and actor, merely carries out the preferences and goals of member state governments. To be sure, one of these preferences is the credibility of member state commitments. And another may be the designation of a third party to fill in certain gaps. But any discretion and autonomy granted on this model ultimately serves the interests of the member state governments. On this view, then, all "law talk" is understood as purely instrumental (or even epiphenomenal?) to the reliable transmission of political preferences over time. To the extent liberal intergovernmentalism acknowledges the existence of interpretive freedom that runs against the interests of the member states, this freedom must be considered negligible slippage in the gears of national preference aggregation. Only thus can the core claim still hold true: that the rational self-interest of member state governments explains the current state of European integration.

Both "neofunctionalist" and "institutionalist" accounts, in contrast, specifically acknowledge the Court's interpretive discretion in interpreting the law. Most important, on this view, is the fact that the Court's judgments interpreting the foundational treaties of European integration cannot be reversed absent unanimity of member state governments, consultation of the Parliament and possibly the Commission, and ratification in the member states. Add to this that the treaties are sufficiently incomplete or ambiguous to allow room for (and indeed to demand) interpretation, and you have what Thatcher and Stone Sweet have identified as a "strategic zone of discretion"[19] or what Shapiro calls a "semi-autonomous decisional space" for the Court.[20]

Neither the appointment process nor the Court's dependence on member state judiciaries (in the context of reference actions) offers member state governments much control over the E.C.J.'s decisions. As for the appointments process, the collegiate nature of the Court makes it difficult to assign responsibility for a decision to any particular judge. As for the member state judiciary, the Court has famously coopted member state judges by empowering the latter to exercise judicial review (at least more broadly than domestic judges had previously done), engaging member state

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[17] *See id.* at 286-87.

[18] Acknowledging this element of interstitial expression of ethical sensibilities in judging therefore should not and need not entail commitment to any particular view in the debate about legal positivism.

[19] See Alec Stone Sweet, European Integration and the Legal System, *in* 6 The State of the European Union 18, 24 (Tanja A. Börzel and Rachel A. Cichowski, eds., 2003) (quoting Mark Thatcher and Alec Stone Sweet, eds., Special Issue, The Politics of Delegation: Non-Majoritarian Institutions in Europe, 25 West European Politics (2002)).

[20] Martin Shapiro, The European Court of Justice, *in* The Evolution of EU Law, *supra* note 1, at 321, 327.

judiciaries in a dialogue in "legalese," and professional networking.[21] To be sure, the dependence on member state judges has pushed the Court to develop its jurisprudence responsibly, such as developing a fundamental rights jurisprudence and tempering the scope of Community powers (especially under Articles 95 and 308 EC). But both of these latter developments, while in some sense "constraining" the Court, wound up improving the perceived legitimacy of the Court's jurisprudence and thus ultimately increased the stature of the Court.

The practice of the Court confirms this account. The judges in Luxembourg have routinely availed themselves of the autonomy of decision they possesses.[22] As a general matter, the E.C.J. has not decided cases in ways that matched member state preferences or those of any politically powerful subgroup of member states. Of course, one can always assert that member states indicate their agreement with the Court's decisions by not amending the treaty. But as far as the deliberate presentation of member state preferences to the European Court of Justice are concerned, Eric Stein and, more recently and more systematically, others have confirmed that member state preferences are not generally good predictors of the Court's decisions.[23] The Court is much more likely to follow the Advocate General or the Commission (neither of whom behave as an agent of the member states).

But institutionalists and neofunctionalists who merely stress the Court's autonomy from member state governments tend to miss something, as well. All too frequently, we encounter here, too, a jaundiced view of individual actors' motivations. Some scholars, for example, suggest that judges are simply clever opportunists who appeal to purported legal norms solely as a means to promote "their independence, influence, and authority."[24] Others suggest that law is merely a "mask" for "the promotion of one particular set of political objectives against contending objectives in the purely political sphere."[25] And yet others go so far as to accuse the European Court of Justice of a cynical use of legal doctrine merely as a tool to expand its own influence in utter disregard of the values the Court purports to be advancing by such doctrines.[26] In general, all this seems to imply that granting supranational actors any "strategic zone of discretion" must be a mistake. Decisional autonomy, on this view, is simply an invitation to another set of actors to engage in self-promotion. In the case of the European Court of Justice, the suggestion seems to be that the Court's law talk simply has the rest of us fooled. And any beneficial effect of the Court's judicial "activism" is merely a fortuitous by-product of institutional self-promotion.

Schiller's understanding of gracefulness and dignity, however, suggests that we should recognize the decisional autonomy of judges (and of other individual

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[21] *See, e.g.*, Laurence Helfer and Anne-Marie Slaugher, Toward a Theory of Effective Supranational Adjudication, 107 Yale L. J. 273, 298 (1997); J.H.H. Weiler, A Quiet Revolution: The European Court of Justice and Its Interlocutors, 26 Comp. Pol. Stud. 510 (1994). For a more general development of the idea of global networks, see Anne Marie Slaughter, The Real New World Order, Foreign Aff., Sept.-Oct. 1997, 183, 189.

[22] The classic account is Eric Stein, Lawyers, Judges, and the Making of a Transnational Constitution, 75 Am. J. Int. L. 1 (1981).

[23] *See* Stein, *supra*; Alec Stone Sweet and Thomas L. Brunell, Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community, 92 Am. Pol. Sc. Rev. 63, 75 (1998).

[24] Karen J. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe 45 (2001).

[25] See, Anne-Marie Burley and Walter Mattli, *supra* note 7, at 72.

[26] *See* Jason Coppel and Aidan O'Neill, The European Court of Justice: Taking Rights Seiously?, 29 C.M.L.R. 669 (1992). Perhaps in a similar vein are also portions of Hjalte Rasmussen's famous study. See Hjalte Rasmussen, On Law and Policy in the European Court of Justice 12 (1986).

actors) as creating an important normative space for ethical behavior. Put simply, the judges of the European Court of Justice can seize their interpretive freedom in good, bad, or normatively neutral ways. They may opportunistically expand their power, randomly create friction in the aggregation of member state preferences, or narrowly appeal to technocratic logics. But they may also bring to bear their personal and professional commitments to such things like democracy, equality, and transparency. Moreover, as Schiller's distinction further suggests, the judges may do any of this prominently and after great deliberation in landmark cases that seem to challenge the more political branches by prominent appeals to principle, as well as subtly, instinctively, and with apparent ease in the course of everyday adjudication.

This does not suggest that we are at the mercy of a bevy of Platonic judges. But the nature of judging enables the judiciary to become an important interlocutor in a dialogue with the constituted political branches and the public over the meaning of a foundational text--and even secondary legislation. Once judges have rendered their decision, it takes significant political will to undo their handiwork. Moreover, by deciding a case one way or another and setting the backdrop for political action, judges may significantly alter the tenor or scope of the political debate about the primary policy issue. Indeed, as has happened so often in the European Union, the first move of the courts may be ultimately confirmed (rather than undone) by subsequent political action that had previously seemed impossible.

Judging the Court often depends on understanding its freedom in this way. Freedom in legal interpretation and the ethical choices that interpretation demands of individual judges allows us to judge the Court's work product beyond calling the judgments either legal or lawless. Thus, even when we are satisfied that a decision has remained within the bounds of the law, we may condemn or praise the Court. For example, we may condemn the Court for the apparently self-interested interpretation that the Community lacked the power to accede to the European Convention of Human Rights, even if we are willing to posit that the decision itself was not lawless.[27] Conversely, we may praise the Court for acting "not only . . . legally, but also wisely and courageously" as it did in creating a general jurisprudence of fundamental rights at the Community level.[28] These kinds of judgments ultimately express approval or disapproval (and thereby acknowledge the existence) of the ethical choices that judges make under certain conditions of freedom in interpreting the law.

B. Democracy and the Self-Conception of European ActorsB. Democracy and the Self-Conception of European ActorsB. Democracy and the Self-Conception of European ActorsB. Democracy and the Self-Conception of European Actors

European integration cannot be divorced from the ethical self-conception of the individuals who make up the project. This is neither an assertion of methodological individualism nor a denial of institutional politics. Instead, it suggests that the current state of European integration is at least in part a product of the way in which various actors have used the freedom inherent in the supranational institutional environment they inhabit. The European Court of Justice, in particular, has exercised its decisional autonomy to recalibrate the treaties away from the member states with a focus on the individual. The Court no longer understands the individual as

[27] Cf. Opinion 2/94, Accession by the Community to the European Human Rights Convention, [1996] E.C.R. I-1759.

[28] Joseph H.H. Weiler, Eurocracy and Distrust, 61 Wash. L.R. 1103, 1106 (1986).

exclusively confined to national processes for the vindication of her rights and interests, but also, in certain respects, as an unmediated subject of the European enterprise.

Judges are not the only actors pursuing this shift in normative focus. Parliamentarians and others, too, have embraced this idea in numerous ways. In any event, whether practiced by the Court or elsewhere, the democratic recalibration is neither the simple result of member state preferences nor a pure by-product of supranational institutional self-aggrandizement. Although preferences and power have played a part, to a significant degree the recalibration of European integration is the product of individuals exercising their discretion in a way that is informed by democratic principle.

1. Democratic Principle and the Court1. Democratic Principle and the Court1. Democratic Principle and the Court1. Democratic Principle and the Court1. Democratic Principle and the Court. -- The democratic recalibration undertaken by the European Court of Justice has at least five dimensions. The first lies in the classic establishment of supremacy and direct effect.[29] Here, the Court expressly rejected the member state governments' interpretation of the treaties as tools of exclusively intergovernmental relations. Instead, the Court held, that the treaties were created for the benefit of individuals, as well as governments, and that this entailed rights and duties for both.[30] As Judge Pierre Pescatore suggested long ago, these decisions were "the consequence of a democratic ideal" that liberated the individual from the confines of her national government.[31] "[I]n the Community, as well as in a modern constitutional State, Governments may not say any more as they are used to doing in international law: 'L'Etat, c'est moi.'"[32] As Pescatore famously concluded, the judges of the European Court of Justice had "'une certaine idée de l'Europe' of their own," based not on "legal technicalities" but on the individual as the normative subject of European integration.[33] These cases are thus at once a brilliant move to render Community law more effective, and a systematic democratizing shift in interpretative focus that gives individuals an immediate stake in the process of integration. No longer are individuals, and the communities of interest of which they are a part, confined to national political and judicial processes to vindicate their interests.

The second dimension of this shift in focus is the Court's support for the Parliament as an independent actor in the institutional structure of the Union. Here, the Court notably granted the European Parliament standing to assert rights of participation in the European political process, despite the fact that the Treaty conspicuously omitted extending such rights to that institution.[34] The Court expressly relieved the Parliament of any dependence on the member states for protection in this regard. As the Court noted, "the bringing of an action by Member States . . . for the annulment of the act are mere contingencies, and the Parliament cannot be sure that they will materialize."[35] Accordingly, the Court saw the need for a "legal remedy

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[29] See cases cited *supra* notes 9-10.
[30] *See, e.g.,* Van Gend, *supra* note 9, at 12.
[31] Pierre Pescatore, The Doctrine of "Direct Effect": An Infant Disease of Community Law, 8 European Law Rev. 155, 158 (1983).
[32] *Id.*
[33] *Id.* at 157.
[34] C-302/87, European Parliament v. Council, [1988] E.C.R. 5615.
[35] *Id.* at para. 18.

which is suited to the purpose which the parliament seeks to achieve."[36] In a related vein, the Court extended substantive judicial review to the Parliament's own actions, thereby furthering the understanding of the Parliament as an authoritative independent actor within the Union.[37]

The third dimension is the Court's development of a jurisprudence of human rights. To be sure, the development of fundamental rights emerged from an institutional standoff between member state highest courts (notably Germany's) and the European Court of Justice.[38] And yet, the manner in which this standoff was resolved, suggests that democratic principle, not institutional self-interest, decisively informed the decisions of both supranational and member state judges. For example, although the German federal Constitutional Court might have insisted on reviewing all fundamental rights complaints lodged against the European Community policies and its German implementing authorities, the German court ultimately took a back seat role.[39] It specifically acknowledged the status of the European Court of Justice as the constitutionally lawful judge in such disputes, while reserving to itself only the right to step in if the ECJ should fail in a wholesale manner to protect rights properly.[40]

The European Court of Justice, in turn, sought to protect fundamental rights within the scope of Community law by reference to a universalized conception of individual rights. As a matter of jurisdiction, the Court would ensure compliance with fundamental rights of Community measures as well as of member state actions whenever member states were acting within the scope of Community law.[41] As for the substance, the Court might have resolved the tension between Community law and fundamental rights by looking to the protection afforded by the member state in whose jurisdiction the alleged injury occurred. To be sure, it would not have served the effectiveness of Community law to subject Community action to every national fundamental rights limitation. But the the Court might well have developed a jurisprudence that limited fundamental rights protection to *at most* what the national jurisdiction would have provided in analogous cases. Instead, the Court expressly developed a universalized understanding of fundamental rights that lifted the individual out of the particular member state she was in, considering her instead to be part of a European-wide community of values.[42]

The fourth dimension of the democratic recalibration pertains to citizenship. Here, too, the Court seems to have gone beyond what member state governments envisioned when bargaining about the treaties. During the intergovernmental conference on the Maastricht treaty, member states became concerned with the

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[36] *Id.* at para. 23.

[37] C-294/83, Parti-Ecologiste >Les Verts' v. European Parliament, [1986] ECR 1339.

[38] For a very brief description of this development, see J.Abr. Frowein, Note, Solange II (BVerfGE 73, 339). Constitutional Complaint Firma W., 25 Comm. Mkt. L. Rev. 201 (1988).

[39] See Brunner v. European Union Treaty, 89 BVerfGE 89, 155 (original), [1994] 1 C.M.L.R. 57 (English translation).

[40] See Frowein, *supra*.

[41] See generally Paul Craig and Gránne de Búrca, EU Law: Texts, Cases, and Materials 319-327, 337-349 (2003).

[42] *See, e.g.*, C-5/88, Wachauf v. Germany, [1989] E.C.R. 2609, at para. 17; C-22/84 Johnston v. Chief Constable of the Royal Ulster Constabulary, [1986] E.C.R. 1651, at paras. 18-19; C-44/79, Hauer v. Land Rheinland-Pfalz, [1979] E.C.R. 3727, ar para 14-15. This approach yields rejection of a member state's higher level of protection, see T-112/98, Mannesmannröhren-Werke v. Commission, [2001] E.C.R. II-729, at para. 84, as well as a member state's lower level of protection, see, Case 137/84, Ministère Public v. Mutsch, [1985] E.C.R. 2681, 2690 (Opinion of Advocate General Lenz), if that level conflicts with what Community law protects.

awakening of a potentially critical European public to the advanced state of European integration.[43] The worry at the time was that something was needed to address the individual members of this incipient polity or else the citizens would feel left out and object to the treaty. The largely cosmetic result was a set of new citizenship provisions that provided a few specific rights, and two more general citizenship provisions, Article 17 and 18 (then 8 and 8a) EC, which did not by its literal terms appear to grant any new rights at all.[44] Instead, the political branches were empowered to create new rights.[45] Broader proposals, originally submitted as part of the intergovernmental conference, were specifically rejected in the negotiations among the member states.[46]

Despite these narrow intentions of the member state governments, the Court's first case interpreting Article 18 nonetheless held that the general provisions extended new rights to citizens. In particular Union citizens residing legally in another member state were protected against certain forms of discrimination on the basis of nationality, regardless of whether these citizens qualified as a protected economic agent under any other provision of the treaty.[47] This ruling went well beyond the governing *acquis*, according to which an individual had to be an economic actor before gaining rights to equality.[48]

Putting to one side the potentially enormous consequences of these judgments, the citizenship decisions confirm that the Court views itself as a forum of democratic principle, not as the administrator of the member state governments' preferred public relations campaign. In the Court's view, prominently conferring "Union citizenship" on every member state citizen, had to be more than an empty label or hollow promise of future action. It had to be of some consequence, and to the Court that meant freedom from second class status in a member state that was not the European citizen's own. The Court refrained from holding that this provision of its own force provided a right of free movement to all Union citizens. But it nonetheless held that as long as a member state considered a citizen of another member state to be a legal resident, that "Union citizen" could not be subject to arbitrary discrimination based on nationality.

The final dimension of democratic recalibration lies in developing the social aspects of economic freedoms. Here, the Court has repeatedly challenged the conception of national systems as impermeable communities of social protection and pushed member states toward what one scholar calls the "existence of possible pan-European solidarity publics."[49] Early decisions interpreting Regulation 1408/71, for

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[43] See generally, Siofra O'Leary, The Evolving Concept of Community Citizenship 23-30 (1996).

[44] Article 18 EC confers the "right to move and reside freely within the territory of the Member States," but makes this right "subject to the limitations and conditions laid down in the this Treaty and by the measures adopted to give them effect."

[45] See Article 18, para. 2 EC; David O' Keeffe, Union Citizenship, in Legal Issues of the Maastricht Treaty 94 (David O' Keeffe and Patrick M. Twomey, eds., 1994) ("it will only be if the legislator uses Article 18 as the basis for further legislation that anything new will be added").

[46] See, e.g., O'Leary, *supra* at 136 (noting rejection of broader proposals regarding rights of free movement).

[47] See C-85/96, Martinez Sala v. Freistaat Bayern, [1998] E.C.R. I-2691.

[48] For early assessments, see Siofra O' Leary, Putting Flesh on the Bones of European Union Citizenship, 24 European L. Rev. 68 (1999); Jo Shaw, The interpretation of European Union Citizenship, 61 Mod. L. Rev. 293 (1998). Subsequent cases quickly confirmed this broad suggestion in Sala. See, e.g., C-184/99, Rudy Grzelczyk v. Centre Public d'Aide Social D'Ottignes-Louvain-la-Neuve (CPAS), [2001] E.C.R. I-6193.

[49] Maurizio Ferrera, *European Integration and National Social Citizenship: Changing Boundaries, New Structuring?*, 36 Comparative Pol. Stud. 611, 643 (2003).

example, considered a means-tested retirement supplement to be an element of "social security," as opposed to mere "social assistance", and thus subject to the regulation's nondiscrimination requirement.[50] Other cases made such benefits portable, with the result that "French taxpayers were de facto subsidizing some needy Italian elders residing in Mezzogiorno."[51] The Court also interpreted Regulation 1408/71 broadly to allow individuals access to foreign health care providers whenever the treatment sought is "necessary and effective."[52] In this case, the member states responded by amending the regulation to restore discretion to national governments in granting approval for the receipt of out-of-state medical care.[53] But the Court recently struck back, this time on somewhat different legal grounds, once again granting individuals access to medical care outside their own health care systems.[54]

In these rulings the Court demonstrates considerable skepticism regarding member states' claims to the financial integrity of their social and medical insurance systems. The decisions stress, instead, the need to consider the nature of the patient's condition, the individual's desire for speedy treatment, and the individual's autonomy in choosing from appropriate available treatment options.[55] Similarly, the Court has recently expanded individuals' access to support allowances while seeking jobs in another member state.[56] Thus, even within the economic sphere, the Court frequently focuses on the social aspect of rights, and seems determined to free the individual from the ready control of her own member state.

In summary, the Court's decisions on supremacy and direct effect, the rights of the Parliament, the fundamental rights of individuals, citizenship, and the social dimension of economic rights can all be seen as part of a comprehensive move to interpret the treaty with a focus on the individual as the immediate subject of European integration. In momentous decisions as well as the everyday interpretation of the treaty, these decisions lift the individual from the exclusive confines of member state processes of political decision making. As the following part will show, this approach to the treaties and to the project of European integration is not unique to the European Court of Justice.

2. Democratic Principle beyond the Court2. Democratic Principle beyond the Court2. Democratic Principle beyond the Court2. Democratic Principle beyond the Court2. Democratic Principle beyond the Court. -- The Court does not have a

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[50] See, e.g., C-1/72, Rita Frilli v. Belgium, [1972] ECR 457. See Josephine Steiner, The Right to Welfare: Equality and Equity under Community Law, 10 Eur. L. Rev. 21 (1985). In justifying its decision the Court appeared to rely on Advocate General Mayras assessment of the growing European wide "tendency" to "guarantee a minimum income" as a matter of social security. C-172, AG Opinion, at para.. Cf. C-172, Frilli, at paras. 13-15. Cf. Steiner, *supra* at 27.

[51] Ferrera, *supra*, at 636.

[52] C-182/78, Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v. G. Pierik, [1979] ECR 1977, at para. 13.

[53] Council Regulation 2793/81/EEC, 17. September 1981, amending Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EEC) 574/71 fixing the procedure for implementing Regulation (EEC) 1408/71, OJ L 275/ (1981).

[54] See, e.g., V.G. Müller-Fauré and onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, Judgment of Court (13 May 2003) (relying on Articles 49 (formerly 59) and 50 (formerly 60) EC); C-158/96, Kohll and Union des Caisses de Maladie, [1998] ECR I-1931 (relying on Articles 59 and 60 TEC (now 49 and 50 EC); C-120/95, Nicolas Decker and Caisse de Maladie des Employés Privés [1998] ECR I-1831 (relying on Articles 30 and 36 TEC (now 28 and 30 EC)).

[55] See, e.g., Müller-Fauré, *supra*, at paras 89-90, 93.

[56] C-138/02, Collins and Secretary for Work and Pensions, Judgement of the Court (23 March 2004)

monopoly on vindicating commitments to principle. In other institutions, too, the ethical self-understanding of participants who carry out their specific tasks within the project of integration matters. Whether the Union remains a strictly intergovernmental project or grows into something more ultimately depends on whether the denizens of Europe's institutions perceive themselves as acting solely on behalf of their respective member states or whether they view themselves as part of a larger enterprise that, in some way, transcends national boundaries. And here, too, there is considerable evidence that the latter spirit prevails.

Just think of Giscard d'Estaing. Whatever criticism one may have regarding his heavy hand in the Convention or his ambitious sense of self, he did not carry out the bidding of the member state governments without making their project his own. For example, without specifically flouting the member states' instructions in the Laeken declaration, Giscard veered from member state expectations by insisting on (and ultimately delivering) a single document instead of a pallet of options.[57] Although the member state governments were free to reject his work product, it is nonetheless difficult to imagine that Giscard's move, as well as his rhetoric, will have had no consequences on the path of European integration. Similarly, the general criticism of his heavy hand in the Convention is only further acknowledgment of the ethical choices (or lapses) in this individual's exercise of discretion. Along these lines, Giscard's interpretation of "consensus" appears to have involved a considerable measure of discretion, as did his failure to consult his colleagues in any meaningful way on the drafting of the preamble.

The importance of the ethical self-conception of individual actors is not limited to the most mighty participants in this enterprise. For example, even at the ordinary Convention-member level, self-conceptions of the proper role of "conventioneers" influenced much arguing and bargaining during the proceedings. As Jon Elster has written, members of constitutional conventions tend to view themselves as operating in a realm of principle with significant autonomy from the powers that originally convened the gathering.[58] And indeed, Kalypso Nicolaidis and Paul Magnette observed the effects of a commitment to principled discussions, or at least of what Elster has called the "civilising effects of hypocrisy."[59] In particular, they noted the significant commitment of convention members to the goal of "simplification," which led to certain gains for the European Parliament beyond what the member state governments would likely have preferred. Here, the goal of simplification (laid out in the Laeken declaration) resonated with a strong sense among the convention members that it was their job to make the basic structure of the Union more transparent to citizens.

Last but certainly not least, consider the European Parliament. There is a growing and important literature about the role of the European Parliament, and the difficulty that the directly elected Parliament presents for an intergovernmental vision of the Union. To be sure, the member states originally created an early version of the

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[57] The Laeken Declaration was ambiguous on this score, noting that the Convention "will draw up a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved." See http://european-convention.eu.int/pdf/LKNEN.pdf. Giscard, however, quickly made it public that he would insist on the production of a draft constitution, i.e. a single "recommendation" adopted by consensus.

[58] See generally Jon Elster, Deliberation and Constitution Making, in Deliberative Democracy 97 (1998). *See also id.* at 98.

[59] See Paul Magnette and Kalypso Nicolaidis, The European Convention: Bargaining in the Shadow of Rhetoric, 27 West European Politics 381 (2004).

present institution. But the increase in the European Parliament's democratic credentials through direct election as well as the steady increase in the Parliament's powers as a co-legislator at the European level represents a serious challenge to the view that member state governments remain in charge of the European policymaking enterprise. As we have already seen, the self-understanding of other actors, such as the European Court of Justice in its decision on the Parliament's standing to sue, or of European Convention members in their drive for simplification, contributed to the Parliament's increase in powers. It should come as no surprise, then, that the Parliament's own actions are similarly driven by a democratic recalibration of the European enterprise, with lasting structural implications for the Union as a whole.

First, the European Parliament may have increased its influence by interpreting the rules regarding its own position and power against the interests of the member state governments.[60] For example, in Simon Hix's account, following the Treaty of Maastricht, the European Parliament interpreted ambiguities in the rules for the new co-decision procedure in its own favor. It prevailed in its interpretation over the member states, largely because the Parliament valued the long term institutional gain of its favored interpretation over any potential short term policy loss of whatever particular measure was at issue. Once its preferred interpretation became standard practice, the Parliament could successfully lock in this view at the next intergovernmental conference. This version of events supports the institutionalist approaches that consider supranational actors as acting purely in their institutional self-interest and thereby deepening their autonomy from the member states. Thus, this account further challenges the intergovernmental vision of the Union.

Even more intriguing, however, is a second idea, namely that the self conception of parliamentarians doing their daily business of arguing and bargaining on policies has also contributed to the erosion of the intergovernmental aspects of the Union. Put another way, an important source of the European Parliament's challenge to the intergovernmental conception of the Union derives from how parliamentarians in their daily actions conceive of the Union. When examining the votes of European Parliament members and parliamentary groupings, for example, we find suggestions that European party cohesion is growing.[61] Parliamentarians are increasingly voting with their parliamentary groupings, which are spread out on a familiar left-right dimension of politics, as opposed to along national cleavages. This, in turn, indicates that European parliamentarians are understanding themselves as conducting politics much like any domestic parliamentarian would.[62] Thus, here, too, we witness a democratic turn away from the member states (and their governments and parliaments) as the exclusive determinants of popular will, and toward a more immediate connection between the European Parliament and the citizen and her communities of interest.

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[60] See Simon Hix, Constitutional Agenda-Setting Through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam, 32 British J. Pol. Sc. 259 (2002).

[61] See Simon Hix, Abdul Noury and Gerard Roland, Power to the Parties: Competition and Cohesion in the European Parliament, 1979-2001, British Journal of Political Science, 34(4), 767-93. See also, Simon Hix, Electoral Institutions and Legislative Behavior: Explaining Voting-Defection in the European Parliament, 56 World Politics 194-223 (2004) (available at http://muse.jhu.edu/journals/world_politics/v056/56.2hix.pdf <visited Nov. 2, 2004>).

[62] See Simon Hix, Abdul Noury and Gerard Roland, Politics Like Any Other: Dimensions of Conflict in the European Parliament, research paper available at http://personal.lse.ac.uk/hix/Working%20Papers/HNR-Politics_Like_Any_Other.pdf <visited Oct. 29, 2004>.

Finally, the Parliament's proposals for structural reform more generally reflect this democratic turn, often placing this institution in the vanguard of the democratization of the Union. For example, the Parliament had long urged the other European institutions to adopt comprehensive principles of transparency to grant individuals access to European documents.[63] Although it took several years before others were convinced, such principles were eventually adopted by all.[64] Similarly, the Parliament had argued before the Court in favor of the Community's power to accede to the European Convention of Human Rights.[65] The Court rejected this contention in a decision in which judicial self-interest regrettably outbid democratic principle. But here, too, the Parliament's suggestion was finally taken up and has now found its way into the proposed constitutional treaty.[66] Finally, the Parliament had long ago urged the adoption of a constitutional document as the foundation of the Union.[67] Here, too, in many respects, the Parliament was prescient.

In summary, European integration, like all projects of collective self-governance, depends on the self-understanding of its participants, which, in turn, is reflected in the actions they take. One cannot isolate one institutional structure within this system, as Liberal Intergovernmentalism seeks to do, and suggest that state governments control the workings of the enterprise as a whole. Instead, myriad actors, at the supranational, national, and infranational levels exercise discretion in great moments as well as everyday administration and participation in the European project. In doing so, they bring their understanding of the project, and of their own personal and professional roles within that project, to bear. Accordingly, the extent to which today's European Union is democratic is as much a product of the ethical commitment to democracy of its individual actors as it is a product of the institutional arrangement laid down by the agreements among the governments of the member states.

II. ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION II. ACCOUNTABILITY AND DEMOCRATIC LEGITIMACY IN THE EUROPEAN UNIONII. ACCOUNTABILITY AND DEMOCRATIC LEGITIMACY IN THE EUROPEAN UNIONII. ACCOUNTABILITY AND DEMOCRATIC LEGITIMACY IN THE EUROPEAN UNION

When judging the democratic legitimacy of the European Union, Andrew Moravcsic properly reminds us not to apply utopian standards to the workings of the Union. We should judge democracy in the Union by comparison to the actual practice of democracy in the Member States, not by what we might expect in theory from an ideal system. When measured by realistic standards, Moravscik concludes, the Union does quite well. Summarizing his argument in a recent article, he writes: "failure to view democracy realistically, as well as the failure to take into account the empirical idiosyncracies of the European case -- notably its limited mandate and the

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[63] See European Parliament, Resolution on the Compulsory Publication of Information, OJ C 172/176 (1984). *See e.g., id.* at para D(1) "the European Community should have its own legislation on openness of government of Community affairs," *id.* para. D(6) "every citizen should have access to any studies, research, statistics, etc., on which a Directive or Regulation is based."

[64] See, e.g., Bo Vesterdorf, Transparency--Not Just a Vogue Word, 22 Fordham Int'l L. J. 902 (1999).

[65] See Opinion 2/94, Accession by the Community to the European Human Rights Convention, [1996] E.C.R. I-1759.

[66] See Draft Constitutional Treaty, Article I-7, para. 2.

[67] See, e.g., Udo DiFabio, A European Charter: Towards a Constitution for the Union, 7 Colum. J. Eur. L. 159, 162 (2001).

continuing role of national governments -- has given critics the impression that the EU is undemocratic. In fact, it is merely specializing in those aspects of modern democratic governance that typically involve less direct political participation."[68]

The admonition for realistic comparisons between Union democracy and member state democracy as actually practiced is warranted, but the sanguine conclusion about the state of European democracy is not. To be sure, the Union is not an out-of-control superstate, as some have charged.[69] But democracy in the Union at times falls short of the mark, even when applying realistic standards of member state alternatives. Moravcsik overlooks this because of two central assumptions of his thesis. The first is the assumption that Europe's "limited mandate" means that the Union engages only in matters that, domestically, are generally delegated to expert agencies with little democratic participation anyway. The second is the assumption that the "continuing role of national governments" in the political process of the Union makes up for any perceived lack of democratic accountability elsewhere in the Union. Each of these assumptions, however, is questionable.

A. The Nature of Union Policies A. A. A.

Moravcsik presents the European Union as a highly limited project, at the core of which are still areas like "trade and services, the movement of factors of production, the production of and trade in agricultural commodities, exchange rates and monetary policy, foreign aid and trade-related environmental, consumer and competition policy."[70] He contrasts these areas with those that are left out of the Union's purview: "taxation and the setting of fiscal priorities, social welfare provision, defense and police powers, education policy, cultural policy, non-economic civil litigation, direct cultural promotion and regulation, the funding of civilian infrastructure, and most other regulatory policies unrelated to cross-border economic activity."[71] This second list should come as no surprise, we are told, because the EU lacks the power to tax beyond the equivalent of 2-3% of member state government spending.[72] In Moravscik's view, this renders the EU merely what Giandomenico Majone has termed a "regulatory polity."[73]

It is not quite clear what we are to take from this description of what the Union is and is not. To be sure, the conception of the EU as a regulatory state captures an important insight about some of the key limitations of the Union. It tells us, for example, that the European Union is not like the United States, in which each level of government possesses the full complement of powers to tax, legislate, adjudicate, and execute.[74] This suggests a limitation, for example, on the growth of the corps of European officials and bureaucrats and their limited ability to coerce member states into compliance. And this, in turn, should indeed calm certain fears about an unruly superstate that will practically engage in a hostile forced takeover of the member states.

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[68] Moravcsik, Democratic Deficit, *supra* note 5, at 362.
[69] Larry Siedentop, Democracy in Europe (2001).
[70] Moravcsik, Democratic Deficit, *supra* note 5, at 350.
[71] *Id.*
[72] Moravcsik, Reassessing Legitimacy, *supra* note 5., at 608.
[73] *Id.*
[74] For an examination of some of the potential consequences of these differences, see Daniel Halberstam, Comparative Federalism and the Issue of Commandeering, *in* The Federal Vision 213 (Kalypso Nicolaidis and Robert Howse, eds., 2001).

But the claim that the Union's democratic process can be thin because the policies of the Union merely regulate (or deregulate) cross border economic activity and thus do not regulate, or spend money on, welfare, culture, and security, is dubious. Like social welfare policy, many European Union policies directly or indirectly effect a significant redistribution of wealth. Union policies have significant effects on cultural issues, such as education and social integration. And Union policies have significant effects on security issues. These are not the kinds of policies that are relegated domestically to independent expert agencies.

1. 1. 1. 1. 1. Redistributive Policies. -- Take redistribution first. Certain core Union budget items, such as payments made as part of the Common Agricultural Policy, the Structural Funds, and the Cohesion Funds are, of course, quintessentially redistributive. Although annual expenditures under these headings (€47 billion, €35 billion, €6 billion, respectively)[75] are relatively low as a percentage of the Union's overall GDP (nearly €7 trillion),[76] these programs nonetheless effect a significant transfer of wealth to the recipients of Community largesse. In the case of Greece, for example, the annual net budgetary receipts from the Union have amounted to more than 10% of the total annual expenditures of the national government.[77] Similarly, the net annual budgetary transfers to Ireland have amounted to 5.5% of Ireland's GDP.[78] In terms of cash per person, the overall funding is not entirely trivial either. In 2003, for example, each Irish national received a total €391.70 from the Union, whereas each Dutch, Luxembourg and German national was asked to pay €120, €125 and €92.7 respectively into the EU's budget.[79] And all this while Germany's standardized unemployment rate was the highest of the major European economies (over 9% in 2003) ,[80] and its regional unemployment rate peaked at over 19% (in the late 1990s).[81] Indeed, since Ireland joined the Union, its total receipts have amounted to about what Ireland's total national debt was at the time of its accession.[82]

But even if we agree with the claim that the actual budgetary transfers are relatively low when compared to national social welfare programs, looking exclusively to the budget significantly understates the amount of redistribution conducted in the Union. If we include intra-state redistribution (which demands democratic legitimation no less than inter-state redistribution), the off-budget redistribution of wealth conducted at the European level is indeed worthy of democratic attention. In the case of the CAP, for example, actual transfers from

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[75] See European Commission, General Budget of the European Union for the Financial Year 2004, SEC(2004)500.

[76] The Economist, Pocket World in Figures 230 (2004).

[77] Theodore Georgakopoulos, Economic Integration and unequal development: the experience of Greece, *in* Economic Integration between Unequal Partners 98, 100 (Theodore Georgakopoulos, Christos C. Paraskevopoulos, and John Smithin, eds, 1994).

[78] Michael Hennigan, Ireland Tops Cash per Head Income Aid from European Union, Finfacts.ie, available at http://www.finfacts.com/comment/irelandeunetreceiptsbenefits.htm <visited Nov. 2, 2004>.

[79] *Id.*

[80] See OECD Standardized Unemployment Rates (April 2003), available at http://www.oecd.org/dataoecd/4/42/2956595.pdf <visited Nov. 2, 2004>.

[81] Stephen J. Silvia, The Causes of Declining Unemployment in Germany: Can the Schröder Government Take Credit?, at p. 3, American Institute for Contemporary German Studies Paper Series: Germany 2000BTen Years of Unity (citing Deutsche Bundesbank statistics), available at http://www.aicgs.org/research/germany2000/silvia.pdf <visited Nov. 1, 2004>.

[82] See Hennigan, *supra*.

consumers and taxpayers to farmers are twice the budget figures, amounting to well over €100 billion per year.[83]

Indeed, simply considering the compliance costs of a handful of European regulatory policies over the years, gives some indication of the magnitude of off-budget redistribution effected by Community policies. Whenever the benefits of regulatory programs do not to fall on those charged with carrying out or complying with the relevant regulations, compliance costs may provide a rough first estimate of the magnitude of wealth transferred through regulation. This, too, tends to be an underestimate, however, since the distribution of any efficiency gains from regulation contains another implicit distributive decision of regulation. Moreover, even when taxpayers (or consumers) fund the implementation of regulatory programs that ostensibly benefit all, regulation effects a transfer of power from those who would rather forego the benefit than pay for the costs of implementation to those who willingly incur the regulatory expense in exchange for the promised result.

Take, for example, the impact of European regulation of the workplace. When the European Court of Justice decided the Defrenne case in 1976, the British Government submitted estimates that a requirement of equal pay for men and women would amount to an increase of 3.5% of the national wages and salaries bill.[84] Ireland estimated that the immediate implementation of the equal pay principle in the manufacturing sector would cost even more -- around 5% of wages and salaries.[85] More recently, the British Chamber of Commerce found that from 1999-2003, the Working Time Directive has cost UK businesses over £11 billion, representing the largest single regulatory cost to business.[86] The UK government further estimated that the European temporary agency workers directive would add £500 million a year in costs to UK businesses.[87] The government also projected that the work councils directive would add £14.5 million annually and a one time startup cost of £8.4 million.[88] A government impact assessment determined that the directive prohibiting discrimination on the basis of race would be generally cheap to implement, but could cost British fleets over £40 million per year, due to the current lenient regulation of their foreign recruitment practices.[89] And the German government recently estimated

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[83] See OECD, Analysis of the 2003 CAP Reform, at p. 39, available at http://www.oecd.org/dataoecd/62/42/32039793.pdf <visited Nov. 1, 2004>.

[84] See C-43/75, Defrenne v. Societe Anonyme Belge de Navigation Aerienne (Sabena), [1976] E.C.R. 455, 464-465 (Report for the Hearing).

[85] *Id.*

[86] See British Chamber of Commerce, Response to: Trade and Industry Committee: Inquiry into UK Employment Regulations (June 2004), available at http://www.chamberonline.co.uk/policy/issues/employment/Response_to_Trade_and_Industry_Comittee_June04.pdf <visited Nov. 3, 2004>; British Chamber of Commerce, Red Tape Costs Spiral to £30bn (March 8, 2004), available at http://www.chamberonline.co.uk/business_news/page/document?id'BEP1_pressrel_0000063093 <visited Nov. 1, 2004>. This is close to the *ex ante* cost estimate of the UK government, which put compliance costs at roughly ,1.9 billion per year. See Working Time Regulations Regulatory Appraisal, at par. 18.

[87] See U.K. Department of Trade and Industry, Proposal for a Directive of the European Parliament andOf the Council on Working Conditions for Temporary Agency Workers - Regulatory Impact Assessment, at p.2, available at http://www.dti.gov.uk/er/agency/ria3.pdf <visited Nov. 1, 2004>.

[88] See U.K. Department of Trade and Industry, Implementation of the Regulations on European Works Councils - Regulatory Impact Assessment, http://www.dti.gov.uk/er/emp-ria.pdf <visited Nov. 1, 2004>.

[89] See U.K. Department of Trade and Industry, Full Regulatory Impact Assessment for Race, available at http://www.dti.gov.uk/er/equality/raceria.pdf <visited Nov. 1, 2004>.

that application of the working time directive to doctors' on-call time, as demanded by a recent ECJ decision, could increase health care costs in that country alone by up to €1.75 billion a year.[90]

A sampling of environmental regulations suggests that here, too, European regulation effects a significant redistribution of wealth. The British government, for example, estimated that implementation of the Chemical Agents Directive would cost the country between £175 and £420 million over ten years.[91] The UK estimated total compliance costs under the Petrol Directive to be £117 million annually.[92] A World Bank study found that Poland would have to spend between $30-60 billion in onetime capital investment and between $2-6 billion in annual operating and maintenance costs to implement the core environmental *acquis*.[93] And the French ministry of Economics and Finance estimated in 1997 that in France, the implementation of European regulations of urban residential waste water would cost over €13 billion and that proposed European regulation of drinking water would cost between €3 - 20 billion (depending on which of the proposed directives would be adopted).[94]

There should be nothing shocking in these numbers. These figures do not suggest an out-of-control superstate. Nor do they suggest an unjustified level of European regulation generally. But they do provide a rough sense of the magnitude of the redistributive enterprise conducted at the European level. However unreliable implementation cost estimates may be, they give some indication of how various political actors assess the magnitude of positive integration at the European level (i.e. policies other than the simple elimination of barriers to trans-border trade). As the numbers indicate, secondary measures directing positive integration are routinely of a magnitude that would seem to call for a rich democratic process of legitimation. And although a member state's domestic politicians will indeed debate these regulations in the course of implementation, domestic legislation at that point is no longer a simple question of substantive policy, but a matter of legally required compliance with Union mandates.

2. Security Policies2. Security Policies2. Security Policies2. Security Policies2. Security Policies. -- Security issues are similarly part of the European regulatory agenda, especially in recent times.[95] For example, a recent Council

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[90] AWorking Conditions: Commission Launches Consultation on Working Time Directive," European Report, January 7, 2004 (No. 2832). See also, "Court ruling to cost employers millions," EUObserver.com, September 10, 2003.

[91] U.K. Health and Safety Executive, Amendments to the Control of Substances Hazardous to Health Regulations and the Control of Lead at Work Regulations: Regulatory Impact Assessment, available at http://www.hse.gov.uk/ria/chemical/coshh.pdf <visited Nov. 1, 2004>.

[92] U.K. Department for Transport, Regulatory Impact Assessment - European Directive 2003/17/EC, available at http://www.dft.gov.uk/stellent/groups/dft_roads/documents/downloadable/dft_roads_508237.pdf <visited Nov. 1, 2004>.

[93] Slawomir Tokarski and Alan Mayhew, Impact Assessment and European Integration Policy, Sussex European Institution Working Paper No. 38, at p. 38 (2000), available at http://www.sussex.ac.uk/Units/SEI/pdfs/wp38.pdf <visited Nov. 1, 2004>.

[94] David Litvan, Les coûts de la réglementation environnementale, Regards Sur L'actualite No. 231, at pp. 41, 42 (May 1997). Figures in text are recalculated in 2003 Euros.

[95] For a review of these measures, see Damian Chalmers, Constitutional Reason in an Age of Terror, *in* The Constitutional Challenge in Europe and America: People, Power and Politics (Daniel Halberstam and Miguel Maduro, eds., forthcoming Cambridge University Press, 2005). See also Statewatch, " 'Scoreboard' on post-Madrid Counter-Terrorism Plans" (March 2004), available at http://www.statewatch.org/news/2004/mar/swscoreboard.pdf (visited Oct. 1, 2004); E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF), The Balance Between Freedom and Security

directive adopted over the protest of the European Parliament requires carriers to collect airline passenger data and transmit such data to public authorities.[96] A framework decision of the Council sets out a European wide definition of terrorist offenses, which member states are charged with implementing.[97] Another framework decision instructs member states to criminalize, in the private sector, giving or receiving an undue advantage in exchange for action or inaction that would constitute a breach of the recipient's legal or professional duties.[98] Another framework decision, which has gotten considerable press, provides for turning over an individual to another member state without a case specific evaluation of the evidence or potential jail sentence and, in a range of specified cases, regardless of whether the alleged offense is criminal in the host state.[99] Finally, a series of European policies coordinated by the Council and the Commission set up pan-European teams of prosecutors from various member states, a European prosecutorial hub in the form of Eurojust, and access to databases that were initially designed for other purposes.[100]

This vast Europeanisation of security policies is no less demanding of democratic legitimation than are domestic policies that similarly balance the community's safety concerns against individual interests in privacy and autonomy.[101] While not raising budgetary concerns comparable to traditional national defense initiatives, these initiatives affect citizens' lives broadly. Again, the point here is not to suggest that these programs are substantively unjustified. Nor are they adduced as evidence of central government tyranny. Nonetheless, the democratic legitimation of these policies at times seems less than satisfactory. For example, an independent group of experts consulted by the Commission specifically warned against the "inadequate democratic . . . controls" at the European level, especially under the titles dealing with the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters.[102] As this group and others have further noted, the particular mode of adopting many of these measures at the European level eluded meaningful parliamentary control both at the Community and national levels.[103]

3. Social and Cultural Policies3. Social and Cultural Policies3. Social and Cultural Policies3. Social and Cultural Policies3. Social and Cultural Policies. -- Social and cultural issues are similarly not exempt from European policy control. For example, from the earliest days of the Community, gender equality has formed one of

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in the Response by the European Union and Its Member States to the Terrorist Threats" (March 2003), available at http://www.europa.eu.int/comm/justice_home/cfr_cdf/doc/obs_thematique_en.pdf (visited Oct. 1, 2004).

[96] Council Directive 2004/82/EC, of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, p. 24 (2004).

[97] Council Framework Decision 2002/475/JHA, of OJ L 164, pp. 3-7 (2002).

[98] Council Framework Decision 2003/568/JHA of 22 July 2003, on combating corruption in the private sector, OJ L 192, 54 (2003).

[99] Council Framework Decision 2002/584/JHA of 13 June 2002, on the European Arrest Warrant and surrender procedures between the Member States, L190, p.1 (2002).

[100] See Chalmer, supra.

[101] Cf. Chalmers, supra (noting that this "Europeanisation took on a new scale following the bombings in Madrid on 11 March 2004.").

[102] Balance between Freedom and Security, at 9.

[103] *Id.* See also, European Parliament Resolution of 7 February 2002 on Council Decision of 27 December 2001 on fighting terrorism, OJ C 284, p. 313 (2002). Cf. Statewatch, EU-PNR: JHA Council to Agree the Surveillance of Airline Passengers, available at www.statewatch.org/news/2004/apr/19eu-pnr-directive.htm (April 2004) (visited Oct. 1, 2004) (noting that "The European Parliament has rejected the proposal and national parliaments were given no time to scrutinise the radically changed proposal.").

the core social components of European policy. Both Article 119 (now 141 EC) of the EC Treaty (as interpreted by the Court) and subsequent directives[104] pushed not only member states, but also individual employers, to afford men and women the same opportunities at the same level of compensation. To be sure, this initiative was initially born largely out of France's desire to retain a level economic playing field, since French employers were under domestic equal treatment obligations that exceeded those in other member states.[105] The principle thus did not reflect a European wide commitment to social progress, but was part and parcel of the core project of economic integration. But this merely underscores the point that the European embrace of gender equality went well beyond the prevailing social and cultural attitudes about equality.[106] Accordingly, instead of reflecting the prevailing social mores, European gender policy was part of the process that transformed them. Much the same goes for the more specific directives regarding parental leave[107] and pregnancy.[108]

With the introduction of Article 13 EC through the Treaty of Amsterdam, the Community's impact on issues of social equality has only broadened.[109] The Community has issued or plans to issue directives prohibiting discrimination in employment on the grounds of race, religion, disability, sexual orientation, and age. In many member states, these directives will break new ground. In the United Kingdom, for example, implementation of the prohibition on discrimination against employees on the basis of sexual orientation will be the first such legal prohibition.[110] Apart from protecting up to 2 million employees in the U.K., it is unimaginable that the implementation of this provision including the specifically planned public awareness campaign will not play a part in the development of social and cultural norms on this matter in the United Kingdom. Similarly, implementing the directive against discrimination on the basis of religion will be the first such general prohibition in the UK, although this directive may indeed be more in line with mainstream commitments to religious equality.[111] The race directive, which included prohibitions against both intentional discrimination and policies with a disparate impact on minorities that are not objectively justified, covers not only employment, but also the provision of goods and services, vocational training, social protection, education, and housing.[112] This sweeping directive, too, is likely to play a significant role in shaping social norms. The same can probably be said for the disability, age, religion, and

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[104] See Council Directives 75/117/EEC, 76/207/EEC, and 79/7/EEC.

[105] *See, e.g.*, Rachel A. Cichowski, Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy, in The Institutionalization of Europe 113, 117 (Stone Sweet, Sandholtz, and Fligstein, eds., 2001).

[106] See, e.g., Case C-285/98, Tanja Kreil v Bundesrepublik Deutschland [2000] ECR I-0069, holding that Germany's blanket exclusion of women from the armed services contravened Directive 76/207/EEC.

[107] Council Directive 96/34/EC.

[108] Council Directive 92/85/EEC.

[109] Article 13 EC provides: "Without prejudice to the other provisions of this Treaty and within the limits fo the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

[110] See U.K. Department of Trade and Industry, Full Regulatory Impact Assessment for Sexual Orientation, at 1, available at http://www.dti.gov.uk/er/equality/soria.pdf <visited Oct. 1, 2004>.

[111] See U.K. Department of Trade and Industry, Full Regulatory Impact Assessment for Religion or Belief, at 1, available at http://www.dti.gov.uk/er/equality/religria.pdf <visited Oct. 1, 2004>.

[112] See Directive 2000/43/EC, OJ L 180/22 (2000) (race directive).

sexual orientation directive.[113] These are not the kinds of policies that domestically tend to be left to expert bodies operating outside the mainstream of democratic arguing and bargaining.

B. B. B. B. B. Democracy, Domestic Agencies, and the Promise and Perils of European Public Policy

Whether or not we view the Union as the predictable product of member state government design, the Europeanisation of public policy has significant effects on the conduct of political decision making. Only a thin vision of democracy could rest the legitimacy of such a shift in authority on the "continued involvement of the member states" at the supranational level of governance. This view would equate European legitimacy with formal accountability of the Union to the citizens through the executive branches of the Member States. In essence, this view suggests that as long as a formal thread of accountability can be traced from any given Union policy through the member state governments and back to the member state citizen as voter, democracy will be safe.

It is a mistake, however, to think that our concerns about democracy can be captured neatly by one set of institutions that represent the body politic. Instead, democracy demands multiple actors, formally institutionalized as well as informally constituted, with partly overlapping, partly conflicting, and partly autonomous jurisdictions. An individual must have access on the basis of reasonable equality to multiple forums of arguing and bargaining in which to pursue various aspects of her personality and a host of interests. These different forums, in turn, will generate conflict among one another to consider and reconsider the political equilibria reached within each. In this way, multiple conflicting claims of authority generate the "political disequilibria" that we value in a healthy and vibrant democracy.[114]

And indeed, in the member states, the kinds of policies that the European Union is routinely engaged in are not relegated to expert bodies operating wholly outside the mainstream processes of democratic arguing and bargaining. Even in instances in which expert bodies do participate decisively in the lawmaking enterprise, there are multiple avenues for formal and informal democratic participation and control. Thus, agency action at the member state level is not legitimate simply by virtue of a domestic thread of accountability via the executive branch to the citizen. Instead, the legitimacy of member state agencies depends in important part on the various processes (both formal and informal) that help steer an agency's policy output toward the democratic mainstream.

The Europeanization of policymaking therefore carries a real risk of undermining democracy. Moving policies to the European level of governance extracts them from the broader domestic context of formal and informal arguing and bargaining. Any resulting absence (or dilution) of formal and informal mechanisms of democratic participation and control at the European level cannot be cured by the accountability of the member states' executive branches. Member state government participation in the European lawmaking process through the Council cannot make up for such a loss of democratic legitimacy elsewhere.

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[113] See Directive 2000/78/EC, OJ L 303/16 (2000) (equality directive).

[114] See Daniel Halberstam, Of Power and Responsibility: The Political Morality of Federal Systems, 90 Virginia L. Rev. 732, 823-825 (2004) (discussing dynamics of multiple political disequilibria in democratic systems).

By the same token, however, the Europeanization of public policy has the potential to enhance democracy. For example, the Union might add a new dimension of democratic engagement to policy processes that have otherwise been monopolized by a constellation of formal and informal interests in a non-transparent domestic equilibrium of power. Put another way, in these cases European policymaking can usefully break up domestic inertia and capture without harming any broad based domestic democratic consensus. But any such judgment that the Union enhances, rather than detracts, from democratic engagement must be based on a specific evaluation of the relative processes for democratic engagement (both formal and informal), not on a wholesale conclusion about the legitimation of Union policies based on member state government control or on a general evaluation of the usual practice of domestic expert agencies.

A brief glance at domestic procedures bears out this dynamic. Germany's constitutional tradition, for example, does not envision the delegation of significant rulemaking authority to independent agencies. With few notable exceptions,[115] delegations of rulemaking power are to government ministers, departments, or supervisory agencies subject to ministerial direction and control. Even with regard to executive rulemaking, the Bundestag and Bundesrat frequently reserve the right to approve or disapprove regulations before they become effective. Such parliamentary "vetoes" are constitutional in Germany, even when exercised only by one house.[116] As Susan Rose-Ackerman's review of environmental regulation in Germany points out, reserving a veto for the Bundestag is not a rare occurrence.

Moreover, in cases in which executive regulations create administrative burdens for the Länder, the Grundgesetz specifically envisions that administrative rules not go into effect without Bundesrat approval.[117] Such Bundesrat approval can be "of substantial political and policy importance," especially in times when the federal government (which represents the majority in the Bundestag) faces a Bundesrat representing Länder governments dominated by the opposite party.[118] Given the vertical division of labor in Germany's federal system (whereby federal legislation is largely carried out by the Länder) this rule leads to substantial Bundesrat involvement in federal administrative regulations across numerous areas of substantive policy making. As one study found, from 1949 through 1994, around 40% of executive regulations were dependent on such Bundesrat consent.[119] As this commentator further notes, in reviewing proposed regulations, the Bundesrat will often neither approve nor disapprove the measure. Instead, the Bundesrat will frequently provide its consent on the condition that the executive branch amend the proposed regulation along certain lines.[120]

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[115] The status of the German Bundesbank, for example, is specially provided for in the German *Grundgesetz*. See generally Ingolf Pernice, Artikel 88, *in* 264 Grundesetz Kommentar (Horst Dreier, ed., 2000).

[116] See, e.g., BverfGE 8, 274 (1958); see also Susan Rose-Ackerman, Controlling Environmental Policy: The Limits of Public Law in Germany and the United States 59 (1995). Cf. INS v. Chadha (striking down vetoes as violating the constitutional requirement of bicameralism and presentment); Michael Brenner, Michael Brenner, Article 80, in Das Bonner Grundgesetz: Kommentar 3:143, 185-86 (Hermann v. Mangoldt, Friedrich Klein, Christian Starck, eds., 4th Ed. 2001).

[117] See Article 80(2) GG. The requirement of *Bundesrat* approval in such cases is a default that may be overridden by federal statute passed with the consent of the *Bundesrat*.

[118] See Rose-Ackerman, *supra* at 59.

[119] See Brenner, *supra*, at 154.

[120] See *Id.* at 184.

A host of informal bonds of personnel and politics further tie the work of domestic agencies to the prevailing policy decisions that emerge from the more directly democratic processes within the domestic political system. One of Germany's oldest and strongest agencies, the Federal Supervisory Authority for Insurance, for example, worked largely in accordance with the fundamental policy framework set forth by the government and parliament. As one commentator notes, from its inception over a century ago, the physical location, staffing, and organizational control of that agency by the relevant government ministry "ensured that government policy would be closely pursued."[121] When, in a later incarnation, the agency challenged the prevailing government policy regarding competition in the insurance markets, the agency won, but only after a battle in the Bundestag in which industry pressure groups strongly defended the agency's actions.[122] Furthermore, today, many significant decisions of the agency are taken by, or informed by consultation with, a separate body that includes representatives "drawn from insurers, 'competent' policy-holders from all sectors of industry and commerce, the professions, civil servants and members of companies and professional actuaries."[123]

Tying agencies into domestic political culture and policies that emerge from the ordinary democratic politics of the nation is not unique to Germany. French administrative agencies, for example, are similarly not "independent" of mainstream politics. Through appointment of personnel, control of agency powers, and the allocation of resources, the executive will retain a significant margin of influence over agency action.[124] Important decisions have at times been reserved to the relevant ministry itself, as in the case of the French competition authority. And while the French Parliament may not be able to control individual agency decisions, it has stepped in, abolished, and recreated so-called "independent" agencies whose decisions did not comport with the prevailing consensus reached in presidential and parliamentary elections.[125]

Accordingly, raising policies to the European level can undermine democracy by sacrificing the grounding of policies in formal and informal domestic democratic procedures, or it can promote democracy precisely by breaking up established domestic networks of powerful interests. In the case of Germany's regulation of insurance, for example, the entry of the European Union has upset the balance of interests that had been preserved by mainstream democratic politics in the Bundestag. By liberalizing the insurance market, the European Union has introduced an element of competition that runs counter to the long established national network of industry interests and domestic macro-economic policy. In this sense, the European Union has indeed intruded into what was previously the result of democratic arguing and bargaining at the national level. And yet, the manner in which this old network of interests is beginning to dissolve has introduced a long ignored domestic party -- the mass consumer. By liberating the voice of the consumer, the process of Europeanization can in this instance be viewed as enhancing, not limiting, democratic legitimacy.[126]

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[121] Michelle Everson, The German Federal Supervisory Authority for Insurance, *in* Regulating Europe 202, 207 (Giandomenico Majone, ed, 1996).
[122] *See id.* at 210-11.
[123] *Id.* at 213.
[124] See Fabrice Demarigny, Independent Administrative Authorities in France and the Case of the French Council of Competition, *in* Regulating Europe, *supra*, at 157, 161.
[125] *See id.* at 164-165.
[126] See Everson, *supra*, at 225-228.

Several scholars have put forth powerful theoretical arguments for how the European Union promises to counteract shortcomings of domestic democracy along these lines. Neil Komesar, for example, has described how consumer interests may be under-represented in domestic politics.[127] In a similar vein, Miguel Maduro has argued that European integration demands the consideration of a host of interests that are routinely affected by domestic policy decisions but otherwise ignored by the domestic political processes.[128] In this way, supranational governance promises to enhance the democratic legitimacy of policymaking in Europe.

These latter arguments supporting the democratic legitimacy of Union action, however, do not simply rely on the generic state of delegation at the member state level, the allegedly minimal nature of Union policies, or the involvement of member state governments at the European level of governance. Instead, they depend on a careful assessment of the effects of particular Union policies, the processes of democratic lawmaking at the European level, the substantive values furthered by European integration, and the emergence of European wide policy networks and arenas of public engagement. Only when this constellation of governance factors is properly aligned does the Union contribute to the democratic legitimacy of the public policies that govern Europeans.

III. WHY WE SHOULD CARE ABOUT HOW WE DESCRIBE THE UNIONII. THE NORMATIVE DIMENSION, OR SOME EXAMPLES OF WHY WE SHOULD CARE ABOUT HOW WE DESCRIBE THE UNIONII. THE NORMATIVE DIMENSION, OR SOME EXAMPLES OF WHY WE SHOULD CARE ABOUT HOW WE DESCRIBE THE UNIONII. THE NORMATIVE DIMENSION, OR SOME EXAMPLES OF WHY WE SHOULD CARE ABOUT HOW WE DESCRIBE THE UNION

The difficulty with an intergovernmental vision of the Union goes well beyond descriptive accuracy. It has important normative consequences. As is so often the case, fact and value cannot be neatly separated from one another. Understanding the Union as no more than the product of an intergovernmental bargain materially affects how citizens, politicians, bureaucrats, and judges go about interpreting the Treaty. Moreover, an intergovernmental approach to understanding European integration affects how satisfied we find ourselves with the institutional status quo, or how we go about evaluating various suggestions for institutional reform.

With regard to interpretation, the intergovernmental account of the Union carries with it the normative implication that the basic move of "constitutionalizing" the treaties must be wrong. Taking the individual as the fulcrum of normative concern in the way the Court has done cannot be squared with a purely intergovernmental view of what the Union is. Ironically, a contrast with the United States may be illuminating in this regard.

When the European Court of Justice set out to interpret the newly minted citizenship provisions, it might have done what the U.S. Supreme Court did a century earlier in the analogous situation.[129] It could have taken an intergovernmental

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[127] See Neil Komesar, Constitutionalism, Institutional Choice and the Supply and Demand of Rights, *in* The Constitutional Challenge, *supra*.

[128] See Miguel Maduro, Europe and the Constitution: What if this is As Good As It Gets?, Michigan Comparative & Interdisciplinary Papers on European Integration No. 02/01, available at http://www.umich.edu/~iinet/euc/PDFs/2002%20Papers/Maduro.PDF <visited Nov. 1, 2004>.

[129] See Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873).

bargaining approach to the new provisions, and held that the new definition and protection of citizenship added no new rights at all. It could have held, as the U.S. Supreme Court did with regard to the 14th Amendment in 1873, that the provisions protecting the rights of citizens merely consolidated and underscored rights that had existed all along. And it could have argued, as the U.S. Supreme Court did in that case, that it was hard to imagine that the constituent governments would have agreed upon any momentous change without express clarification in the text.

In the case of the ECJ, an intergovernmental vision of what the Union is would have counseled the Court to follow that path as well. Such a narrow view of the citizenship clauses could have drawn support from the text. And it could have drawn on an understanding of the history of the provisions as the product of an intergovernmental effort at managing public relations vis-à-vis an increasingly disaffected public. Indeed, the British, French, and German governments had argued that the ECJ do just that.[130]

The ECJ, however, rejected this intergovernmental vision of treaty, as it had done so often before. Instead, the ECJ approached the Treaty as a principled instrument intended to further democratic equality among citizens, not the long term policy preferences of constituent state governments. The Court held that by introducing the concept of citizenship, new principles of equality must now govern the treatment of every individual who can claim this privileged status.[131] In short, they chose one interpretive stance over another, rejecting the intergovernmental understanding of the Union based on the equality of member state governments in favor of a constitutional vision based on the equality of European citizens.

Similarly, with regard to how we evaluate the status quo or compare different proposals for institutional reform, it is normatively significant whether we understand European integration as the product of intergovernmental bargaining or whether we understand the Union as something more. Much has been written, for example, about the continued democratic shortcomings of the comitology process.[132] Many have called for the adoption of a European "Administrative Procedure Act," by which is meant some version of U.S. style notice and comment rulemaking.[133] Put briefly, these are all efforts to broaden democratic participation in European administrative rulemaking.

If the Union is properly understood as an intergovernmental bargain among member state governments, however, then arguments for broader based participation at the European Union level should have no prima facie democratic appeal. Similarly, on this view, calls for greater involvement of the Parliament should also not have no normative urgency. Nor should the idea of allowing member state parliaments to raise an objection to a proposed Commission policy, at least not unless the member state parliaments are thereby given a veto over the proposal. To be sure, any of these reforms might increase the quality of policymaking. But as far as democratic legitimacy is concerned, a purely intergovernmental account of the Union would let us rest content as long as the Council and member state executive bureaucrats retain formal control over the decision making process.

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[130] See C-85/96, Martinez Sala, [1998] ECR I-2691, at para. 15 (Opinion of AG La Pergola).

[131] See *supra* notes 43-48 and accompanying text.

[132] See, e.g., EU Committees: Social Regulation, Law and Politics (Christian Joerges and Ellen Vos, eds., 1999).

[133] See, e.g., Francesca Bignami, The Democratic Deficit In European Community Rulemaking: A Call for Notice and Comment In Comitology, 40 Harv. Int'l L.J. 451 (1999).

As we have already seen, all this ultimately comes down to our vision of democracy. Liberal Intergovernmentalism and the claim that the legitimacy of the Union can (in light of the Union's allegedly limited mandate) rest on the "continued involvement of the member states" seems to be based on an understanding of democratic legitimacy as formal accountability. On this view, democracy is safe as long as a formal thread of accountability can be traced from any given Union policy through the member state governments and back to the member state citizen as voter. If, by contrast, we understand democracy as the existence of multiple overlapping spheres of decision making in which citizens can argue and bargain with one another under reasonable conditions of equality,[134] then we would be inclined to assess democracy in the Union and proposals for reform quite differently.

On the view offered in this essay, the Union does not lose legitimacy whenever it becomes unmoored from member state government preferences. Nor does this view celebrate the democratic legitimacy of a Union that perfectly reflects member state government preferences. Instead, the question becomes whether Union decision making is subject to sufficient political disequilibria among a diversity of forums of democratic decision making commensurate with the Union's deep impact on citizens' lives.[135] To be sure, this depends on the continued involvement of member state governments in the European policy making process. But it also depends on the emergence of multiple, overlapping trans-national as well as national communities of interest and their representation in the decision making processes of the Union. Accordingly, this view celebrates, for example, the addition of the new Subsidiarity Protocol,[136] even though that protocol does not alter the authority (or the electoral connection) of the Commission as the final locus of decision. The protocol adds an important dimension of depth to democratic decision making by creating the opportunity for democratic conflict. This conflict, in turn, heightens the transparency and the considered nature of both deliberation and bargaining at the European level. In this way, the protocol enhances European democracy even without ever changing the final allocation of decision making power.

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[134] *See supra Part II B.*

[135] Cf. Halberstam, *supra* note 125.

[136] Protocol on the Application of the Principles of Subsidiarity and Proportionality, Draft Treaty Establishing a Constitution for Europe 229B31, E.U. Doc. CONV 850/03 (July 18, 2003), available at http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf.

CONCLUSIONCONCLUSIONCONCLUSIONCONCLUSION

Andrew Moravcsik has long argued that the European Union is best explained as a rational bargain among the governments of the member states. Already in his powerful book, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, he maintained that since their first meeting in the ancient town of Messina, member state governments have been charting the course of European integration based on political preferences and relative bargaining power.[137] Professor Moravcsik has added to this a second argument, insisting that there is no democratic deficit in the European Union, at least not if we compare politics in the EU with the actual functioning of democracy within the member states' domestic systems of politics.[138]

The marriage of these two arguments presents an especially bold claim. It posits that existing governments, bargaining effectively with one another based solely on rational political self-interest, have created a system that also happens to be in accord with democratic norms. To be sure, governments bargaining effectively may reach an efficient result. Indeed, we would expect no less from successful governments. But why would we suppose that this result should also conform to democratic norms? After all, self-interested rational actors are expected to exploit their respective bargaining advantages, including fortuitously inherited ones, whether morally justified or not. And self-interested rational actors bargaining effectively ought not to budge unless they have something to gain. Add to this that Member state governments are inherently unequal in their bargaining strength, given their differences in economic, social, cultural, and military power and influence in Europe and we have an apparent paradox. Why would unequally situated governments, each in pursuit of its own self-interest, bargain rationally with one another and yet arrive at a system that is normatively justified from the perspective of democracy?

As this essay has argued, neither element of this apparent paradox holds up under close scrutiny. Presenting European governance solely as the product of national preference aggregation and as reaching only into narrow technical matters that, domestically, would be relegated to marginal democratic processes fails the mark. Instead, the story goes something more like this:

Nearly fifty years ago, the foreign ministers of Germany, Belgium, France, Italy, Luxembourg, and the Netherlands returned from a fateful meeting in the ancient town of Messina committed to a new Europe. This new project of governance has since grown to embrace matters that lie at the very center of domestic politics. From its inception, the project has depended on accommodating the concrete national political interests of the Member States. But it has equally depended on the energy, commitment, and increasingly democratic vision of the individuals who have come together as partners in that common enterprise.

This is a story about freedom in three ways. First, the freedom of choice of member state governments to create, and remain a part of, this historic partnership. Second, the freedom of individual actors in carrying out their otherwise assigned functions in the European enterprise. And third, the promise of freedom by lifting the individual out of the exclusive confines of member state political processes. The latter is not a radical freedom intended to dissolve the member states by creating a singular

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[137] *See* Moravcsik, The Choice for Europe, *supra* note 4; Moravcsik, Preferences and Power, *supra* note 4.

[138] See Moravcsik, Reassessing Legitimacy, *supra* note 5.; Moravcsik, Democratic Deficit, *supra* note 5.

demos or aimed at establishing a federal system *á l'americaine*.[139] Instead, it is an idea of freedom based on the dispersion of power away from a monopoly of decision making previously held by the member states.

The idea that the dispersion of power and the preservation of democratic conflict among equal partners enhances, rather than undermines, self-determination is an old one. Indeed, when the Bible speaks of God creating Eve as a companion for Adam, it says that she was brought forth "as a help against him."[140] Thus, even though she was cut from Adam's side, Eve was not subject to his command. Instead, she became a partner in what was now a joint quest for knowledge and self determination. Perhaps we may understand the bride of Messina as serving the member state governments in a similar way.

[139] See, e.g., Kalypso Nicolaidis, "We the Peoples of Europe . . .", Foreign Affairs Nov./Dec. 2004, at 97; Robert Howse, Association, Identity, and Federal Community, *in* The Constitutional Challenge, *supra* note 95.

[140] The Hebrew "ı□ □" ("Ezer Kenegdo") in Genesis 2.20 is translated in the King James version as "an help meet for him," and in the Revised Standard version as "a helper fit for him." Both translations elide the sense of opposition suggested by "ı" Eve is as much a counterpart to Adam as she is there to help him.