Citizenship Under Regime Competition: The Case of the „European Works Councils"

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European Integration online Papers (EIoP) Vol. 1 (1997) N° 005;
http://eiop.or.at/eiop/texte/1997-005a.htm

Date of publication in the EIoP: 10.4.1997

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Keywords

social policy, European works councils, Maastricht Social Protocol, citizenship, political science

Abstract

Europe will not turn into a federal state. As a consequence citizenship in Europe will remain nationally based. Due to the joint commitment of European Union member states to the freedoms of a common market, national citizenship regimes have become accountable to supranational rules, obliging them in particular not to discriminate against citizens of other member states. Sometimes this is regarded as a welcome dissociation of citizenship from the institution of the state, leading to it becoming vested in the voluntarism of a civil society kept together by common values. Drawing on the example of European Union policy on workplace representation, the paper argues that national fragmentation of citizenship in an integrated economy, however coordinated by international rules, has far less benevolent effects. In addition to exposing advanced forms of citizenship to economic competition, and in particular pressuring national systems to lower their standards of social inclusion, it also falls short of affording foreigners truly equal rights. The paper concludes that citizenship under economic competition and without being backed by state capacity inevitably lacks elements that were essential to the concept of citizenship in postwar European nation-states.

Kurzfassung

Europa wird sich nicht zu einem Bundesstaat entwickeln. Bürgerrechte in Europa bleiben deshalb auf absehbare Zeit weiterhin national begründet. Wegen der Verpflichtung der Mitgliedstaaten der Europäischen Union auf die Freiheiten des Binnenmarktes müssen nationale Bürgerrechtsregime zunehmend supranationalen Regeln genügen; insbesondere dürfen sie nicht gegen Bürger anderer Mitgliedstaaten diskriminieren. Bisweilen wird dies als eine willkommene Ablösung des Bürgerstatus von der Institution des Staates verstanden, als deren Folge soziale Teilhaberechte neu auf den Voluntarismus einer durch gemeinsame Werte zusammengehaltenen supranationalen Zivilgesellschaft gegründet werden können und werden. Am Beispiel der Politik der Europäischen Union zur Mitbestimmung der Arbeitnehmer argumentiert das Papier, daß national fragmentierte Beteiligungsrechte in einer integrierten Wirtschaft, wie gut auch immer durch internationale Regeln koordiniert, weit weniger vorteilhafte Wirkungen zeitigen. Zusätzlich zu der Tatsache, daß fortgeschrittene Formen von Bürgerrechten wirtschaftlichem Wettbewerb ausgesetzt sind und die nationalen Systeme, die sie tragen, unter Druck geraten, ihre Standards sozialer Teilhabe zu senken, sichert die supranational Regulierung nationaler Systeme auch Ausländern nicht wirklich dieselben Rechte wie Inländer. Das Papier schließt mit der Feststellung, daß einem fragmentierten System europäischer Bürgerrechte, das wirtschaftlichem Wettbewerb unterliegt und nicht staatlich abgesichert ist, unvermeidlich wesentliche Elemente dessen fehlen müssen, was für die europäischen Nationalstaaten der Nachkriegszeit charakteristisch war.

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I. Introduction

As European integration progresses, expectations are waning that it will culminate in a supranational state replicating the postwar European nation-state on a larger scale. But as yet little attention has been devoted to the question of what this implies for integrated Europe, and what in particular it portends for the role of European nation-states, and of statehood in Europe generally, *vis-a-vis* European societies and citizens. In part this may have ideological reasons. „Euro-optimists", which include most students of European integration, tend to minimize the significance of the disappearance of the supranational state perspective. Rather than dwell on what is not happening, they prefer to deal with what is. For the rest, a tacit assumption has become widely accepted that the old neo-functionalist vision of a „United States of Europe" was not meant to be taken literally in the first place, and that whatever emerges in its stead can be regarded without much questioning as its functional equivalent.

It is here that the debate on European integration links up with contemporary discussions about the state. While empirical observations of a decline of state capacity in developed industrial societies are widely shared, they are often accompanied by assurances that this is not really a loss as other, non-state mechanisms of governance - and indeed normatively preferable ones - are waiting to fill the gap. Just like the mainstream of European integration theory, the rational choice liberalism that dominates social and political thought today prefers to downplay the significance or desirability of what is not or no longer. Its proposition, sometimes explicit and mostly implied, that „soft" forms of order, constructed „bottom-up" by rational individual actors and ranging from „civil society" to

„international regimes", can do the same as states and better, must be highly congenial to integration theory in a post-federal Europe desiring to remain a harbinger of good news even without the prospect of a supranational state.(2)

But is it justified to be so sanguine, about both the state and Europe? Is there nothing that a federal Europe was expected to supply that cannot as well be supplied by a post-federal Europe devoid of an integrated state? And is a historical loss of state capacity, at national level where it existed as well as at supranational level where it has failed to emerge, really a loss of nothing else? If anything, it seems to be the issue of *citizenship* that offers itself as a site for exploring these important questions. European integration has vastly increased the opportunities for *cross-border mobility inside Europe*, in and out of formerly closed national societies, by obliging the latter in international law to open themselves up to a common „internal market". In this way integration has forcefully contributed to the rise of a *European civil society*. But since integration has not at the same time dissolved national polities, rights and obligations of *citizenship in Europe* continue to reside in a plurality of heterogeneous and formally still sovereign national legal and political systems. While not absorbing national into supranational citizenship, and indeed as an alternative to doing so, European integration has enveloped national citizenship regimes in a transnational market and in the international institutional constructions that make up today's European Union. The result is a highly complex, multi-tier configuration of national and transnational institutions which has made national systems of citizenship increasingly accountable to international agreements and supranational law, by subjecting them to rules that limit what national governments can award or deny, not just to the citizens of other European countries but to their own citizens as well.(3)

The question is what exactly these changes imply - for the institution of citizenship, the role of the state in European society, and the „nature of the beast" (Puchala 1972) of European integration. One influential and extremely well-argued position, that of Joseph Weiler (1991; 1995), takes the fact that national citizenship has become accountable to a supranational regime *that is clearly not a state*, as a sign of a highly desirable divorce of the principle and values of citizenship from the organizational form, not just of the nation-state, *but of the state as such*. European integration, as I read what to me is the core of his argument(4), may well have been primarily about the accommodation and promotion of cross-border mobility. But to accomplish this it had to make national systems of citizenship extend to foreigners from other European countries - but perhaps ultimately from everywhere - much the same rights that they have in the past come to extend to nationals. In this way, while leaving the national basis of citizenship in principle untouched, integration makes national citizenship less parochial and more universalistic than it used to and would otherwise still be. This it does because any discrimination on the basis of national origin, of people or commodities, and of course also of people as commodities, obstructs the common internal market. States willing to build such a market - but also unwilling to dissolve into a common state - must therefore accept restrictions on their sovereign power to discriminate against foreigners, be they workers or traders, investors and employers. While citizenship may remain nationally based, and indeed in the absence of a supranational state *must* remain so, it must also cease to be nationalist, for which purpose it must be brought under supranational regulation through the organized collectivity of European states, the European Union.

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Eliminating national parochialism from national citizenship can truly be regarded as civilizational progress. Weiler goes, however, several steps further. For him the fact that in the case of European integration such progress was not associated with the formation of a new super-state *is progress in itself* (Weiler 1991, 2478 f.). In particular, Weiler does not at all regard it as a deficiency that the European Union was not allowed by its member states to evolve into a supranational state capable of

serving as a common source of common European rights and obligations of citizenship. Nor does he consider the present, indirect method of making national citizenship regimes conform with universalistic rules of non-discrimination as a second-best solution, however fortuitously effective. Instead Weiler celebrates the European Union and its unique citizenship regime as evidence that a universalistic extension of citizenship beyond its traditional, nationalist limitations is not conditional on attendant growth of a bureaucratic-coercive state apparatus, with all the pathologies this has in the past clearly involved. Especially the way in which the European Court of Justice managed to make national systems of citizenship conform to universalistic principles of non-discrimination - essentially by a creative reading of human rights into market freedoms - indicates for Weiler that expanded rights of citizenship can be anchored in common values rooted in a common civil society, and can be had without expanded state capacity and power. The stark conclusion, with highly optimistic implications, is that growth of citizenship today can be decoupled from progress in state formation; that there is not just a non-national but also a non-statist basis for citizenship; and that obligations of citizenship can be institutionalized as obligations to a peaceful civil society integrated by common values, rather than to an exclusivist and potentially nationalist state kept together ultimately by coercion.

In contrast to Weiler, this paper emphasizes the *limitations of citizenship separated from state power and state capacities*. As I will argue, such limitations apply also to a construction like the European Union that undertakes to reorganize national citizenship by *supranational regulation*,(5) as an alternative to vesting it in a supranational state. While citizenship may indeed often have been distorted by its association with the state, it is my view that it is also the case that crucial rights and obligations that are part of an advanced concept of citizenship are probably enforceable only in such association, and must become less enforceable if the latter is severed. As citizenship becomes grounded in stateless supranationalism, it may therefore very well become more value-based. But the values in which it will then be based are ones that can be enforced by a supranational non-state on national states, and *not* ones that would need to be enforced by a sovereign state on - some of - its subjects.

More specifically, I wish to argue that a supranational regime that requires national states to make their citizenship regimes allow for unimpeded mobility across national borders, is likely to weaken national powers of enforcement of *obligations* of citizenship without being able to replace them at supranational level. Intervention in national states by a supranational non-state aimed at making national citizenship more other-regarding may thus change the *content* of citizenship, tipping the balance between involuntarily accepted obligations and voluntarily accepted liberties in favor of the latter. In fact, as supranational regulation leaves the national basis of citizenship unchanged, it may at the end of the day not even make national systems much less parochial, as they will still be able to use their remaining sovereignty to defend their integrity. The result would then be an uncertain impasse between re-regulation and deregulation of national citizenship systems that can be expected to play itself out in a variety of complex and often paradoxical ways, depending on the issue at stake.

A perspective of this sort arises if the conceptual apparatus that informs an analysis like Weiler's is expanded to take into account that *the persistent plurality of national citizenship regimes in Europe is embedded in a common market economy*:

1. Supranational re-regulation of national citizenship may well increase mobility as much as supranational state formation would. Unlike the latter, however, and in its absence, the very same measures that are to make citizenship regimes more universalistic also expose them to *competition*. In the European Union as it has evolved, the national polities that continue to be the seat of citizenship exist side-by-side in an economy integrated, not least, through supranational obligations for nation-states to allow for cross-border mobility, collectively imposed and enforced by national polities on themselves. Governance of the integrated economy then resides, not in an integrated state coterminous with it, but in a number of nation-states coupled with each other through a complex

variety of international and supranational arrangements, partly limiting and partly safeguarding their individual sovereignty. Unlike the European economy, that is to say, which is for all practical purposes integrated, state capacity and the rights and obligations of citizenship aligned with it remain *fragmented* the way European integration today proceeds. However effectively national systems of citizenship may therefore be coordinated by supranational obligations enhancing cross-national mobility, they continue to be embedded into and restrained by, not just a stateless supranational-intergovernmental institutional order, but also a free market much more encompassing than each of them.

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In an *integrated market governed by fragmented sovereignty*, the wielders of that sovereignty compete with one another, in part for the respect of their citizens and those of other countries entitled to cross their borders, but most importantly for the allegiance of mobile production factors. National systems of citizenship, and of public power generally, that are part of a political-economic order of fragmented sovereignty lose their monopolistic status. What rights and obligations they extend to their citizens will depend, not just on internal considerations, for example their internal balance of power or their collective political will, and not only on whatever international obligations may apply, but also on the anticipated consequences for a country's competitive position in the common market. Such competition between states may well enhance citizenship by forcing state authority to become more responsive to citizen needs. But it is also possible that it will militate against those elements of citizenship that involve obligations, especially for fractions of the citizenry that are not only highly mobile but also in command of resources crucial to a country's competitive position in the common economy.(6)

States that have become embedded in a larger economy, and as a result lose their monopoly of governance, may find themselves constrained to respond to pressures from resourceful and potentially mobile citizens by changing the terms of citizenship in their favor. To protect themselves from this, all states located in a common market would without exception have to agree on an international regime binding them to common minimum standards, in addition to and above non-discrimination of foreigners, thereby exempting a floor of citizen rights and obligations from inter-state competition. Such a regime would clearly differ from one of national commitments to free movement across borders. Rather than unleashing competition, it would restrict it by building a cartel of sovereign states against market pressures, for the purpose of collectively restoring state capacity and authority. A regime like this, one of *positive as opposed to merely negative integration* (Streeck 1989; 1992; Scharpf 1994; 1996), would obviously be highly demanding to build and maintain; whether it would ever come about and on what subjects would seem a wide open question. It is important to note that complexities of this sort would be absent in a mode of integration that would replace fragmented national with unified supranational citizenship.

2. What is being integrated in Europe is not just a society but, primarily, an *economy*, and what moves across national borders are not just citizens but also *production factors*, especially labor and capital. As citizens workers and employers may or may not adhere to identical values; as participants in economic exchange they also have *different interests*. As citizens they have rights and obligations in relation to the state; as participants in production they create rights and obligations *for each other*. And while as citizens they are equal, their position in the economy is *highly unequal*. Advanced forms of citizenship take account of differences in interest and capacity, as well as of asymmetrical („class") relationships within civil society, by attaching *differential status rights and obligations*(7) to different economic positions - what Marshall (1964) has called *industrial citizenship* - and adding them to the civil and political rights awarded to all citizens alike.

Rights and obligations of industrial citizenship are *reciprocal*. Rights of workers, for example to collective bargaining, information, consultation and co-decision-making, are reflected in corresponding duties of employers, such as to bargain in good faith, inform truthfully and in good time, listen open-mindedly, and refrain from acting on specific matters without the agreement of the workforce. They are also *asymmetric*, as they are designed to balance the underlying, pre-existing asymmetry in economic power between employer and employed. Moreover, protected by means of public authority, they are supposed to be *non-negotiable* between the labor market participants to which they apply, insulating them against the impact of differences in bargaining power. For example, just as workers cannot sell their right to bargain collectively, or agree to work for less than the minimum wage, employers are not allowed to buy themselves out of their obligation to consult.

With open borders and competing sovereignties, however, industrial citizenship is likely to become *increasingly contractual*, which in turn must shift its balance of obligations and rights to conform more closely to market conditions. If employers are free to choose between alternative industrial citizenship regimes that impose differently burdensome obligations on them, they will *ceteris paribus* migrate to the regime that they find least demanding. For jurisdictions competing for economic resources inside an international system of fragmented sovereignty, lowering employer obligations and, with them, worker rights may offer itself as an effective strategy for attracting migrant capital. In fact, for industrial citizenship to erode actual migration may not even be necessary. States, but also workers, that are faced with the possibility of employer exit may agree to reduce employer obligations, i.e., worker rights, to prevent such exit, or they will refrain from using rights or calling upon obligations even though these may - still - be on the books. Mobility and the attendant decline of state monopoly will thus encourage a *de facto* re-negotiation of, supposedly, non-negotiable terms of industrial citizenship, in favor of employers as these are more mobile and command more indispensable resources. In the process the rights and obligations of industrial citizenship are bound to become *less public* in character and *more private*, *less status-like* and *more contractual*, and overall *less like institutions of citizenship* and *more like arrangements of the market*.

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3. Rights of citizenship refer not just to equal treatment by the state; to free participation in market exchange; or to an equitable balance of rights and obligations in employment. They also include *social rights* to a minimum standard of living regardless of market condition and productive contribution. Rising cross-border mobility and declining state monopoly under fragmented sovereignty affect such rights as well. If generated by a national polity located within an international free market, social rights are also *costs* that may give rise to competitive disadvantage and, to the extent that they require taxation of employers operating under international competition, may trigger migration of capital to less costly jurisdictions, or the threat of such migration.

In national states obliged under international rules to open their borders, the benefits of social rights must be extended to all workers, including foreigners deciding to migrate in, whereas the costs can be imposed only on employers that not only reside in the country but also decide not to migrate out, which in principle they easily could. Non-discrimination as a supranational regulatory norm governing national citizenship thus tends to add foreigners to those entitled to a social minimum, while allowing nationals unwilling to pay the bill to go elsewhere. This imbalance between a potentially rising number of beneficiaries and a potentially shrinking number of payers, and in fact already the anticipation of such imbalance, is bound to exert pressure on national systems to cut back or, at the very least, not to expand their provisions of social citizenship, in effect returning to the market the determination of a growing share of their citizens' income and welfare.(8)

The purpose of this paper is to show that there is little justification in Europe today for exalted hopes

for a non-statist expansion of citizenship, provided citizenship is to be more than the civil right of individuals freely to enter into contractual relations.(9) To demonstrate this I will explore in some depth a prominent area of European Union social policy, the institutionalization of workplace participation rights, in particular through the 1994 Directive on European Works Councils.(10) The picture that will surface differs from Weiler's: it is one of *weak supranational rights weakening strong national rights of social and industrial citizenship*, and indeed facing considerable limitations even in what allegedly is the principal strength of the European quasi-constitution, the enforcement on national systems of equal treatment of foreigners. In the European Union's system of fragmented sovereignty, I argue, attempts to make national systems of citizenship more other-regarding often do not get beyond a very elementary stage, if at all, while in the process they call forth pressures for a reversal of the historical evolution from civil to industrial and social rights. Small gains in civil rights, smaller than one might expect, are likely to be paid for with considerable losses in social and industrial rights. While only marginally extending citizenship across national borders, European integration as we know it tends to weaken it within them.

II. The Case of the „European Works Councils"

Industrial citizenship, as defined by Marshall, combines elements of civil, political and social rights. Its origin was the recognition of the right to collective bargaining, which in turn was the result of the labor movement learning to use political rights to collective organization for economic purposes. Through the new *hybrid institution* of collective bargaining „social progress was being sought by strengthening *civil rights*, not by creating *social rights*; through the use of contract in the open market, not through a minimum wage and social security" (Marshall 1964, 93; my emphasis). Freedom of contract, however, was exercised *not individually but collectively*, and was therefore "not simply a natural extension of civil rights (but) represented the transfer of an important process from the political to the civil sphere" (Marshall 1964, 94). In this way, as Marshall puts it, the union movement created "a secondary system of industrial citizenship, parallel with and supplementary to the system of political citizenship" (1964, 94).

Rights of industrial citizenship take different forms in different countries. But in most European welfare states, they have come to include rights to *collective participation of workforces at their place of employment*, through information, consultation and co-decision-making, together with corresponding obligations of employers to respect such rights and enable their effective use.(11) Legally, such rights and obligations are inseparably attached to socio-economic status: the former come with being employed, the latter with being an employer. Moreover, just as workers cannot sell their rights, employers cannot buy themselves out of their obligations, even if they considered this to be in their best interest. This is because industrial citizenship constitutes part of the public machinery for the social regulation of labor markets and employment, as an institution of *public* rather than private governance. Created to balance the fundamental asymmetry of power involved in relations of employment, it would cease to be what it is if it were open to renegotiation in the shadow of this asymmetry.

To insulate industrial citizenship rights to workplace participation from market pressures, postwar European welfare states typically institutionalized them in statutory law, which in effect inserted them as compulsory elements in any individual employment contract regardless of the will of the contracting parties, and if necessary against their will. Technically workforce participation rights came to be written either in company law or in labor law. Rights based in company law ensure collective participation of workforces in a firm's economic decision-making; as they touch upon the exercise of property rights, they represent a stronger version of industrial citizenship that is politically

more demanding to institute. Rights based in labor law are more concerned with the workplace as such, or with the plant as distinguished from the enterprise. While company-law participation rights interfere with the rights of owners in the firm, labor-law participation rights modify managerial prerogative in the day-to-day governance of the employment relationship. The two kinds of participation rights are not always entirely separable, and some issues can in principle be addressed under either company or labor law. Indeed in a country like Germany where both modes coexist in strong versions, there is often considerable functional overlap between them.

II.A. Europeanizing Workplace Participation

Capital mobility across jurisdictional boundaries, as promoted by economic integration without political integration, affects nationally based industrial citizenship as it exposes it to competition. As rights of industrial citizenship exist in most European countries, although in different forms and different strength, economic integration raises the question of how to protect and where to locate such rights in the political economy of united Europe. From the beginning, and long before the emergence of the cross-nationally integrated production systems of today, the subject arose in the context of three different projects:(12)

1. *The project of a unified European industrial citizenship*. An important initial motive, linked to a European federal state-building agenda, was to eliminate differences in industrial citizenship between European countries, on the premise that a united Europe had to provide for equal rights for all its citizens. This required a general European model of workplace participation to be installed in all member countries, resulting in „harmonization" of national systems and taking industrial citizenship out of economic competition. In the political and economic environment of the early 1970s, with the various *autunni caldi* of the preceding decade still fresh on everybody's mind, harmonization was deemed possible only at the highest national level. Generally there was a widely shared presumption that a European model of industrial citizenship, and in particular of workforce participation, would have to be roughly like the German one.
2. *The project of a unified European company law*. From early on in the integration process, a unified European company law was seen as both beneficial for and required by economic integration. By enabling firms to incorporate in just one legal system for all their European operations, a common company law would offer them an opportunity to economize on the („transaction") costs of incorporating in a multitude of national systems. At the time, a unified European company law without strong provisions for workforce participation was considered politically impossible. Institutionalization of industrial citizenship rights in corporate governance was regarded as the price European business had to pay for the economic benefits of company law harmonization. It was also regarded as the best way of protecting multinational companies from having to deal with a variety of different national participation regimes.
3. *The defense of the integrity of national legal systems and of an integrated free market.* With increasing numbers of multinational firms, more and more plants and workforces in Europe are managed by company headquarters located in foreign jurisdictions. To the extent that decisions affecting such firms' local industrial citizenship obligations are made centrally, the participation rights of local workforces are potentially threatened: with management exterritorial to the legal system governing the local plant, subjecting it to legal sanctions is difficult in a regime of sovereign nation-states (Eser 1994, 93). For example, a multinational firm might try to evade consultation obligations in a host country by claiming that decisions are made at headquarters, with local management neither involved nor informed. While local management could therefore not be held responsible, central company management would remain beyond the reach of the host country's law enforcement. The issue this raised was one of *equal rights* of workforces, albeit *not across national boundaries but within them*. It also could be construed as one of *fair competition*, in that foreign firms might be advantaged over

domestic firms who had to play by local rules whereas the former had not.(13)

Generally the rising importance of multinational firms put to a test the capacity of national governments to uphold their respective „law of the land". Countries could have dealt with the problem through a web of bilateral treaties. Alternatively they could have tried to write national legislation allocating statutory responsibility for compliance with local labor regimes to agents they could hold responsible in national law. But while the former would have been cumbersome at best, the latter would have raised difficult questions of exterritorial enforcement of national law liable to trigger discord between sovereignty-conscious nation-states. This suggested a collective, integrated response. However, legal integration for the collective defense of national sovereignty in an international economy requires instruments that are effective without requiring a supranational European state. As will be seen, the solution that was ultimately found for this was extremely complicated, precisely because it had to be compatible with continued fragmentation of sovereignty and citizenship.

While all three projects were pursued simultaneously by different agencies in Brussels, different member states and different social groups inside them, over time the emphasis moved from unified citizenship to the defense of national regime integrity in an international economy, and its compatibility with free competition in the „internal market". This coincided with, and found expression in, a change in the *approach to integration* which evolved in three stages, from attempted *harmonization* of national systems to their *incorporation* as building blocks in an internally diverse supranational system to, finally, their *coordination* through a supranational regime.

1. *Harmonization.* This phase began in the early 1970s, with ambitious projects promoting the rise, and ultimately dependent on the emergence, of a European *supranational welfare state*. The leading objective was harmonization of industrial citizenship arrangements, by means of statutory intervention superseding or homogenizing national systems and proceeding primarily in the realm of company law.
2. *Incorporation.* In response to lasting lack of success, a modified strategy emerged that tried to incorporate the diverse national systems as building blocks in a common European system. Policies continued to pursue common European industrial citizenship, but in a variety of - presumably equivalent - institutional forms reflecting and arising out of national traditions. Increasingly attention shifted *from company to labor law*. Moreover, proposed European legislation began to offer *menus of alternative solutions* for actors to choose from, as a substitute for politically unrealistic uniform solutions, indicating a movement from mandatory towards more voluntaristic approaches.
3. *Coordination.* In the third phase policies began to be aimed at *supranational regulation of national systems*, as in Weiler's model of national citizenships coordinated under a common European regime. Form and extent of nationally constituted industrial citizenship rights were no longer questioned. The leading objectives of European policies were to ensure that fragmented citizenship did not interfere with the integrated market, and to protect the integrity of national systems against some of the externalities arising from economic integration. Company law as a tool for instituting workplace participation was sidelined, and European-level policy became *entirely confined to labor law*. Also, as much as possible policy gave *precedence to voluntary agreement* and refrained from statutory prescription.

Movement through the three phases was caused by powerful opposition against positive integration and supranational state formation from both national and business interests. The path of withdrawal from the 1970s project of integrated European industrial citizenship was continuous and linear. As

time passed, the issue came to be seen as an international problem of *external effects undermining the governability of national industrial relations systems,* and its solution was sought as a condition of the effective functioning of the *internal market*, and in particular of *diversity of national institutions coexisting with cross-border mobility of capital and,* increasingly,*diversity of corporate cultures.* In the process, workplace participation was relegated from the domain of company law to that of *labor law*, and the design and implementation of industrial citizenship was increasingly turned over from public authority to the *voluntarism*, first of national governments, and later of multinational firms.(14)

II.B. Phase One: Harmonization

The first initiatives for a European system of industrial citizenship(15) aimed at Europeanization of the German model, with a combination of parity co-determination at company level and of legal rights of works councils or unions to information, consultation and co-decision-making at plant level.(16) Two paths were simultaneously pursued:

(1) In the early 1970s the Community regarded differences in national systems of company law as "restrictive conditions on the freedom of establishment within the Community" (Article 54 of the Treaty of Rome), deriving from this a mandate to pursue "approximation and harmonization" of such systems. For this purpose, the Commission drafted a number of directives on company law. One of these - the *"Fifth Directive"*, first issued in 1972 - dealt with the governance structure of public limited liability companies. Its passage would have meant that all member countries would have had to rewrite their company law in accordance with it. Responding among other things to the then social-liberal German government, it proposed a two-tier board system with an obligatory supervisory board that would include employee representatives.

(2) Parallel to its efforts at harmonizing national company laws, the Commission also proposed a *European Company Statute*. Firms based in at least two member countries would be given the option to incorporate under that statute, as an alternative to incorporation in national law. A firm incorporated as a "European Company", or *Societas Europea*, would have the advantage of being *ipso facto* considered incorporated in all Community countries, making it unnecessary to seek incorporation in different national systems. The first drafts of the Statute were presented in 1970 and 1975 and required European companies to have a supervisory board that included employee representatives with full rights to information and co-decision making, as well as a European Works Council. This combination of company- and workplace-level co-determination was the closest the Community came to a wholesale adoption of the "German model".

Harmonization of national systems, if it goes far enough, makes a separate European company law as dispensable as special legislation on participation in multinational firms. It also eliminates regime competition. The latter does not necessarily hold if a new layer of European company law is added to national laws. Not only would competition between national legal systems continue. Without strong elements of industrial citizenship, a European company law may cause *legal exit* from national company law that includes such elements. At the same time, if European law did include strong citizenship rights, firms from countries where industrial citizenship is weak might hesitate incorporating in it, jeopardizing the objective to accelerate economic integration. Whether or not a European Company Statute with strong workplace participation rights would be accepted by firms would ultimately depend on how they value the economic benefits of incorporation in a common legal system. Unlike Fifth Directive-style harmonization, a European Company Law approach to industrial citizenship depends to an important extent on voluntarism.

Neither the Fifth Directive nor the European Company Statute ever came close to adoption. The main reason for this was their linkage to the issue of industrial citizenship. For national governments, the political costs of changing their national systems of corporate governance in a German direction loomed ever larger the more time had passed since the labor revolts of the late 1960s. Employers, for their part, had always been opposed to any Community social policy that went beyond non-binding general principles. European legislation on German-style workforce participation in particular was rejected as "inflexible" and destructive of "the variety of information and consultation procedures evolved by companies to suit their particular circumstances" (Hall 1992, 9). Objecting to industrial citizenship being anchored in company law were not just employers unfamiliar with co-determination, but also the German employers - who preferred the pressure of regime competition on their national system over a statutory „leveling of the playing field". With time employers also seem to have concluded that multinational firms could if necessary live with different national company laws. In any case, the costs of this came to be regarded as lower than those of Europeanized industrial citizenship on the German model, and pressures from European business for company-law harmonization subsided.

As to European unions, Community legislation on workforce participation in company law threatened to force them to decide between nationally and ideologically sacrosanct principles like union-based and union-independent forms of industrial democracy; legal co-determination and voluntary collective bargaining; and bargaining at company and sectoral level. Such decisions were and continue to be beyond the political capacities of European union confederations. Also, a unified European system of industrial citizenship would have required most unions, except those on whose national system it was modeled, to change their mode of operation, resulting in possible advantages of unions from some countries over unions from others. Fears of this kind gave rise to *institutional nationalism* even among unions that were otherwise far from happy with their national institutions.(17) While the conflicting preferences of European unions were not always visible - especially when legislation seemed unlikely to be actually passed - employers and governments successfully used them to argue that strongly normative proposals like the first drafts of the Fifth Directive and the European Company Statute were "unrealistic" and did not have undivided support even from the union side.

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II.C. Phase Two: Incorporation

To break the deadlock, the Commission in subsequent years offered a series of concessions to nation-state concerns over sovereignty; to union institutional nationalism; and to employer pressures for protection of property rights and more „flexibility". The action shifted to labor law, although some rear-guard battles continued place on company law. Legislative proposals, while still envisaging a unified European system of industrial citizenship, attempted to institutionalize it in different forms in different countries, in anticipation of the later discovery of „subsidiarity." Attempts were made to ensure that different national versions of European workplace participation were equivalent; where this was not possible, equivalence was heroically assumed. Although the concessions offered approached a point where the objective of a common European system, of company law as well as of workplace participation, seemed in danger, they did not go far enough for legislative progress.

It was only after the initiatives on company law had come to nothing that workforce participation came to be dealt with as a matter of labor law. In 1980 the then Commissioner for Social Affairs, Henk Vredeling, issued a broadly written draft directive on information and consultation rights for

workforces, which came to be known as the *"Vredeling directive"*. The initiative tried to utilize the momentum of the Community's Social Action Program of 1972, which had resulted in passage of a number of social policy directives. Two of these, the Collective Redundancies Directive of 1977 and the Transfer of Undertakings Directive of 1979, provided for workforce information and consultation in connection with the specific events they addressed. The Vredeling draft was an attempt to generalize the information and consultation rights member countries had accepted for firms undergoing economic restructuring, bypassing the issue of corporate governance by bringing workforce participation within the ambit of Community labor law.

The 1980 Vredeling draft was largely agnostic on structure. While it specified in great detail a wide range of *information* on financial, economic and employment issues to which workforces were to be regularly entitled, and in addition established legal *consultation* rights on decisions likely to have "serious consequences" for employees, it assigned the exercise of the new rights to "existing employee representatives by law or practice". Another defining feature of the draft was that it focussed on *companies with subsidiaries*, and on access of workforces in branch plants to information held by management at headquarters. Two aspects of the draft were particularly notable:

1. The draft addressed two different situations at the same time: where headquarters and subsidiary are located in the same and where they are based in different Community countries.(18) While the first condition can in principle be handled by national legislation, the directive would have mandated a common floor for all national systems, and would to this extent have harmonized them. The second condition suggests itself as a classical case for supranational regulation of transnational externalities hat undermine the governability of national systems.
2. In case a multinational company failed to enable its local management at a foreign subsidiary to comply with its information and consultation obligations under the directive, the Vredeling draft gave workers the right to deal directly with the central management, ultimately by taking it to the local courts of the host country (Danis and Hoffman 1995, 185). More then anything else, it was this „bypass" provision of the draft that incited the opposition of business. It can be assumed, however, that it also appeared less than reassuring to sovereignty-conscious member states.

The draft Vredeling directive met with unprecedented hostility from business, European and extra-European (DeVos 1989). Although the Commission in 1983 watered it down significantly - by confining its jurisdiction to firms with at least 1,000 employees and reducing the range and frequency of the information to which workforces would be entitled - it was unable to save it. A last-minute offer to limit the directive to multinational firms, dropping its harmonization component(19), failed to turn the tide. Under heavy fire from business and with a British veto certain, the Council in 1986 formally suspended discussion of the directive.

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After its defeat on Vredeling the Commission returned to company law. Already in 1983 it had presented a new version of the Fifth Directive, offering both countries and companies a choice between *four alternative models* of workforce participation: the two-tier board system of the first draft, with between one third and one half of supervisory board members coming from among the workforce; a single board with the same proportion of employee representatives as non-executive members; a company-level representative body of employees only (something akin to a works council without, however, being so called); and any other participation structure provided it was agreed between employer and workforce and conformed to specified minimum standards. To prevent regime shopping by firms, the draft tried to ensure that access to information and rights to

consultation and co-determination were equivalent in all models. In addition, national legislators were given the possibility to limit the choice of firms based in their country, in the extreme case to just one of the four models.

When progress on the Fifth Directive failed to materialize, the Commission in 1989 issued a revised version of the European Company Statute, which was further amended in 1991. Unlike earlier drafts, which responded primarily to German concerns about German firms escaping from co-determination by emigrating into European law, the new proposals seemed to be more concerned with fears in other countries and by employers of being forced into a "German model". To this end, they offered the same menu of alternatives for board participation as the 1983 draft of the Fifth Directive. Provisions on a works council were no longer included, separating company law from labor law. Foreshadowing subsequent developments, discussion of works councils was referred to the „social dialogue" between unions and employers (Zügel 1994, 139). Moreover, whereas the initial drafts had emphasized co-management and co-determination, the 1989 version stressed information and consultation, moving closer to the revised Fifth Directive as well as to Vredeling, and worker participation was described as an instrument of stable labor relations contributing to the success of the firm (Eser 1994).

Not surprisingly, a central issue in the debate became the choice of alternatives the new draft proposed to allow. While the Commission insisted that its different models were equivalent, this seemed more than doubtful to many observers, especially German ones (Addison and Siebert 1991, 622). Moreover, given the great diversity of the models, it seemed questionable whether the original objective of a unified European company law was still being served (Eser 1994). In any case, to reassure national legislators, the drafts, just as the 1983 version of the Fifth Directive, granted them the power to limit the range of models from which national firms could choose. Where firms were given a choice by national law, they had to consult with their workforce; the final decision, however, was to rest with management as otherwise it was considered unlikely that a firm would be willing to incorporate in European law.

Another significant change was that the Commission divided the original draft into two, one on the statute of the European company and another on worker participation in it (Eser 1994). According to the Commission, this was not to sever the link between the two issues and enable passage of European company law without European rules on worker participation. Arguing that it was unacceptably cumbersome for multinational companies to be subject to different participation regimes in different countries, the Commission Insisted that the two proposals be passed at the same time. The reason for dividing the draft was to facilitate legislation by changing its treaty base: instead of drawing on Art 235, which would have required unanimity, the Commission now drew on Art. 100 a for the European Company statute and on Art. 54 (3 g) for worker participation(20), *under both of which decisions could be taken by qualified majority* (Eser 1994). This was widely seen as an attempt to make it impossible for Britain to veto the insertion of worker participation rights in the European Company. What was less noticed was that it also ruled out a future German veto of European Company law without worker participation equivalent to German co-determination. Still, for the next half decade the European Company statute and failed to make legislative progress.

II.D. Phase Three: Coordination

The European Works Councils Directive, which after long agony was passed in 1994, is widely regarded as a classic example of the Union's post-Maastricht „policy innovations" of the 1990s. Indeed in the euphemistic language that has spread from the Commission to large parts of the community of students of European integration (see Hall 1992), the Directive is depicted as a model of the new European Union virtues of decentralization, subsidiarity, respect for national and cultural differences, and an intelligent use of legal patchworking techniques for creating a diverse, pluralistic, non-statist and even post-Hobbesian social order.

On this background, it is useful to remember that compared to its hapless predecessors, the Directive is extremely modest in its ambitions (McGlynn 1995). All it does is create an obligation in international law that member states make it obligatory in national law for nationally based firms with significant employment in other European Union countries to negotiate, with a body representing their entire European workforce, on a European-wide workforce information arrangement. If no agreement is reached, firms must set up a „European works council" with representatives from all their European plants, and member states must endow such councils with a common minimum of legal rights. In line with Weiler's model of national citizenship regimes bound by international law to extend rights to non-citizens, the Directive thus indeed requires national systems to include non-nationals. But apart from this it does very little(21):

1. Like Vredeling, the Directive stays away from company law and remains strictly in the realm of labor law, avoiding any suspicion that the industrial rights it undertakes to create might interfere with civil rights of property.
2. Moreover, unlike Vredeling, the Directive relates exclusively to multinational firms. Workplace participation in firms with no foreign plants remains fully controlled by national systems. The latter the Directive does not touch, not even in multinational firms. All it does is graft an international on the national representation arrangement at a multinational company's headquarters, relying for the recruitment of representatives on the national systems of its various plants. In this way the Directive not only avoids harmonization, but also sidesteps any judgment on the equivalence or non-equivalence of participation rights in different countries; it merely *coordinates* these within a select number of firms.
3. Participation rights under the Directive amount to no more than the provision of *information* on a yearly basis and in exceptional emergencies. There is no obligation for management to consult, if the concept means that management can act only after workforce representatives had an opportunity to present a considered opinion.(22) There are also no rights to co-determination, under which works council consent would be a condition of management going ahead with a decision.
4. Finally, the Directive goes to great lengths to preserve a wide space for *contractual voluntarism*, leaving it almost entirely to negotiations between management and labor in individual firms to determine the structure and rights of their European works council. Although the Directive does provide for a compulsory fall-back solution, great care is taken to ensure that it never applies.(23) First, management and labor remain free to agree not to have any workplace participation arrangement at all. They can also decide to set up an „information procedure" for existing national workforce representatives, instead of a European body entitled to receive information. Furthermore, agreed-upon rights of workers under the procedure, or the rights of a European works council if one is set up, may remain below the fall-back option, difficult as that may seem. Agreements that are negotiated before the Directive takes effect - which it does only after its transposition in national law by all countries concerned, which is expected in early 1997 - are considered valid, even if the body that negotiated them on behalf of the workforce was not representative.(24) Finally, the obligatory solution comes in force only after three years of negotiations, from the day of the Directive taking effect. Workers that want to have a European works council before the end of the century may as a consequence have to agree to rights that are inferior even to the statutory minimum.

If nationally fragmented citizenship is to be *coordinated rather than integrated*, critical questions of institutional design must arise. If the objective is *equal treatment* of workforces in non-domestic subsidiary plants, the standards of either the host or the home country of the employing firm could be

applied. In the first case, the rights of subsidiary workforces would equal those of workers of other employers in their country; in the second, subsidiary workforces would be given the same rights as workers in the firm's country. However, host country equality would fragment industrial citizenship rights within multinational firms, affording different national segments of a company's workforce different rights to participation at its supranational headquarters. Being impracticable and inimical to economic integration, this solution was never pursued. Equality in terms of the company's home country standards, on the other hand, would fragment industrial citizenship in host countries, as the rights of a potentially growing share of national workforces would be determined by a multitude of foreign legislators, and could therefore widely differ.

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Further problems arise for the operation of the integrated market. If home country standards exceed host country standards, making multinational firms grant home country rights to foreign workforces may place such firms at a local competitive disadvantage compared to host country firms, or to multinationals from third countries with lower standards also investing in the host country. If, on the other hand, host country standards are higher, limiting host country workers to home country rights would give advantage to foreign over domestic firms in the host country. Difficulties like these are endemic to arrangements of fragmented citizenship and must inevitably accompany any attempt, motivated by political expediency or by respect for national diversity, to live with a *coordinated patchwork of national citizenship regimes* as an alternative to unified citizenship in a supranational state.

Trying to avoid the complex puzzles of equality and inequality under fragmented citizenship, the Directive managed to be passed by creating a *separate system of uniform weak European rights for foreigners*, to exist alongside the *pre-existing systems of differently strong rights for nationals*. Responsibility for whether or not national rights, in home or host countries, are below or above the European rights of subsidiary workforces is thereby handed to national legislators. Fair competition is secured in that all multinational companies, wherever they and their subsidiary plants may be based, have to comply with the same rules concerning the information rights of non-domestic workforces. In this sense, European legislation, taken by itself, does remain competitively neutral. At the same time, national rights remain exposed to competitive pressure, as it is left to the discretion of national policy-makers whether they want their domestic standards to be above or below the European standard or, for that matter, the standard of other countries.

Working out the details of the coexistence between national and supranational participation rights is, again, left to national legislation and to the voluntarism of the marketplace. Here, too, what in fact was an admission of defeat by the unsolvable technical complexities and political dilemmas that follow from fragmentation of state capacity and citizenship, is presented as an inventive practical application of the new creed of decentralization and „subsidiarity". Indeed even with respect to the substance of European rights, the Directive goes out of its way to turn industrial citizenship, from an *institutional condition* of negotiations between employers and workforces, into their *result.* While it does not prevent firms from agreeing to councils with consultation or even co-determination rights, no firm has done so as yet, and all known agreements have remained at or below the statutory minimum of participation rights (Bonneton et al. 1996).

This does not rule out that some firms may in the future institute participation procedures, very likely decentralized ones, that go further than the Directive. However, voluntary participation arrangements are of a different quality than obligatory ones, as firms enter into them only if they promise to be pro-competitive. Their presence and structure depends on technological and market conditions, and perhaps on managerial strategy. They can therefore be expected to vary widely, making worker

access to participation highly unequal in different countries, sectors and companies. Legal regulation is precisely to prevent such inequality by neutralizing the impact of markets, establishing participation as a *universal right* rather than a contingent and particularistic benefit of favorable market conditions. To the extent that works councils are institutions of industrial citizenship bringing non-competitive „social" interests to bear on managerial decision-making, the mostly voluntary European works councils are works councils only in name.(25)

III. The Deficiencies of Coordinated Citizenship

The European Works Councils Directive does not establish integrated European citizenship rights, let alone contribute to supranational state formation, and in the end was no longer intended to. But what does it accomplish in terms of supranational regulation of national industrial citizenship regimes, especially with respect to equal treatment of non-nationals? And to what extent does its studied non-interference with national regimes actually protect these, given their continued exposure to regime competition? History and results of the long conflict over industrial citizenship in Europe impressively confirm the claim that there is *no substitute for unified state capacity* as an institutional condition of advanced forms of citizenship in an integrated economy.

III.A. Incomplete Inclusion

In the firms to which it applies, the Directive creates a *dualism* of representative bodies, by adding a European works council to existing national councils. The structure of the former and its relationship to the latter are left to negotiation. In these the representatives of a firm's home country workforce are likely to play the leading role, not only because they will usually represent the majority of the workforce but also because of their longstanding bargaining relations with central management. European works councils can therefore be expected to be heavily *colored* by the national system of a company's home country. In fact, European works councils in French-based firms are more similar to French works councils than to European works councils in German-based firms, which above all resemble German works councils.(26)

Rather than European institutions proper, European works councils are in reality *international extensions of national systems of workplace representation*. In line with Weiler's model of internationally pooled citizenship, the Directive makes multinational firms include representatives of their foreign-based workforces in an extended version of their domestic representation system. Such inclusion does *not*, however, take place *on equal terms*. The inevitable dominance of home country representatives in the negotiations on the structure and status of European works councils offers them rich opportunities to protect their privileged access to central management. Indeed one reason why so many voluntary agreements on European Works Councils were concluded before the Directive took effect seems to be that up to this time they could be negotiated directly by national unions and workforce representatives in a company's home country, acting also on behalf of the non-national workforce.(27) This may explain why some of these agreements remain below the fall-back standards of the Directive, which would have automatically applied only a few months later (although only after a delay of three years; see Hall et al. 1995, 31).

The special negotiating body prescribed by the Directive must include representatives from all affected plants. It will therefore typically give higher proportional representation to foreigners than to home country nationals. Still, given the minimal statutory rights the Directive creates, the effective strength of a European works council in relation to central company management is likely to

continue to depend on whether home country workers and unions are willing to invest their political capital in it. It also depends on management, whose resistance to formalization of rights above the legal minimum may in itself be enough to preserve the asymmetry of access between nationals and non-nationals. All in all, the Directive does little to check or change the interest of home country workforces, potentially shared with management, in containing the impact of the European works council on industrial relations at headquarters. Indeed it presents them with a temptation to make concessions on the rights of foreign workforces in return for continued privileged access to information and collaborative relations. The unchanged existence, parallel to the European works council, of national representation systems to which only nationals have access further serves to limit the stake of the latter in European-level participation. Here as always, voluntarism does not favor the weaker party.(28)

The consequences of *voluntarism at multinational and institutional dualism at national level* can best be observed in a country like Germany where national participation rights are strong. First, since the Directive founds European participation rights only in labor law and disregards company law, workforce representation *on the board* of a large German company will remain confined to its German workforce which, under German co-determination law, elects one half of the members of the supervisory board from among their ranks. As board-level co-determination exists in national law only, this holds even if the vast majority of a company's workforce is employed outside Germany.

Second, European works councils in German companies will typically coexist with a central works council in German law (*Gesamtbetriebsrat*) which has extensive legal rights to information, consultation and co-determination (Lecher and Platzer 1996; Niedenhoff 1996). In large firms, all members of the central works council will be full-time, and as a body they are likely to have use of a professional staff. The central works council will be meeting regularly in short periods, perhaps once every two weeks. It will be in daily contact with central company management, and its leading members will at the same time serve as elected workforce representatives on the company's supervisory board. The central works council is also likely to be in close contact with the industrial union that organizes the company, and will be receiving advice from it on a current basis. Unless management wants it otherwise, meetings of the European works council will thus be not much more than extended special sessions of the central works council, especially since most of the members of the latter will also sit on the European council. Usually the agenda of European works council meetings will have been structured by the German central works council in previous contacts with central management, and what management will say at the meeting, under its residual European obligations to inform, will long be known to the German participants.

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Generally, the contrast between uniformly weak supranational rights and differently strong national rights may give rise to complex politics. On the labor side, conflict may emerge between workforce representatives in the company's country of origin and from foreign subsidiaries, especially if these try to use their new position aggressively. Where national participation rights are stronger in the country of origin, such conflicts are likely to take a different course than in the reverse case. Generally, subsidiary representatives from countries with strong representation rights would seem to stand a better chance of making themselves heard in European works councils than those from countries where workplace participation is weak, on account of the former's superior resources and experience. Home country representatives confronted with the possibility of well-endowed non-nationals wielding too much influence on a European works council would, therefore, seem to have an incentive to keep the rights of the latter limited, in particular if their own, national rights are strong. Another factor in this context is likely to be the numerical relationship between the company's home country and subsidiary workforces.

All of this reflects the fact that the European works councils of the Directive are in fact no more than European extensions of national systems. Within them, the distinction between nationals and non-nationals remains fundamental. While non-nationals are represented only through the European works council, nationals are represented through it and, in addition, their respective national representation system where, in all countries except one, rights are much stronger. As it remains *nationally fragmented*, the European system of workplace representation provides for no more than *second-class industrial citizenship* for non-national workforces.

III.B. Continuing Competition

Regime competition persists under the Directive and, indeed, is likely to increase, in a variety of ways.

1. Precisely because the Directive leaves national participation regimes unchanged, it does nothing to take them out of competition. The increase in bargaining power within national systems that economic integration confers on employers, by enabling them to extract concessions from workforces with threats to relocate work to countries with weaker regimes (Mueller 1996), remains unchecked. To the extent that this leads to a „hollowing out" of national rights, as a result of workforces abstaining from using them, this trend continues unabated(29).
2. Another way in which national fragmentation fosters regime competition is by implementation of the Directive being left to national legislation. National implementation laws vary with respect to the rights they assign to European works councils and the obligations of employers in relation to these. While such differences are slight, there seem to be tendencies among firms that have a choice - especially firms from outside the European Union - to designate their *Belgian* operations as their European headquarters for the purposes of the Directive, affording themselves the advantages the Belgian works council regime offers to management.(30) Accordingly, the German debate on the implementation of the Directive was in part structured by the issue of *competitive advantage*, with firms and employers associations clamoring for legal minimalism in line with a strict reading of the Directive, to protect German multinationals from having to fulfill more demanding obligations in relation to their European works councils than their foreign competitors.
3. Furthermore, the dualism between weak European and strong national systems may induce multinational companies to seek a stricter distinction between *national issues* that must be dealt with under national participation regimes, and *European issues* that can be discussed with the European works council.(31) Here, regime competition is between the national and the supranational regime coexisting within the same firm, and over the allocation of substance matter between them. Where a European works council exists, demands from home country workforces to be consulted on the company's international business may be more legitimately rejected by management. Indeed the Europeanization of participation as instituted by the Directive may accelerate tendencies in companies to split into a multinational „holding" with a European works council, and national production companies that remain subject to national participation regimes. To the extent that the latter are stronger than the European regime - which all but one of them are - such change would reduce participation rights on balance.

Given the fragmented character of European industrial citizenship, management efforts to transfer substance from strong national to weak multinational participation may meet with the support of non-domestic workforces, which stand to gain from any increase in the significance of the weak

multinational system, as they have no status in the strong national system in the company's home country. By siding with central management, foreign workforces may thus be able to improve their access to information, at the expense of the national workforce's access to consultation or co-determination. While this may contribute to evening out the difference between national and multinational participation rights, it would do so by preempting the former rather than reinforcing the latter.

4. European works councils are accepted by firms to the extent that they can be regarded as *efficiency-enhancing.* That they can indeed be so regarded was an important reason why a number of European employers were in the end no longer opposed to them and urged their association, UNICE, to mute its opposition. European works councils seem to offer European multinational companies an opportunity to develop a multinational corporate identity and comprehensive, non-parochial human resource management. As their „customized" institutional design is subject to negotiation in the shadow of the market, they are unlikely to become vestiges of anti-competitive social protection or redistribution, as indicated by the fact that unions have not been able to gain a single European works council agreement providing for participation rights above the legal minimum (Krieger and Benneton 1995).(32)

III.C. Beginning Erosion

As the Directive essentially extends national systems of workplace representation beyond national borders, its impact must differ by country, making it difficult at first to assess its overall effect.(33) Especially in countries with high national standards, however, like Germany and the Netherlands, the Directive must be expected to reinforce tendencies towards erosion of such standards.(34)

In the German case, this is beginning to happen as a consequence of the European move from company to labor law as the site of industrial citizenship. In late 1995 the European Commission issued a consultative document (Com(95)547) which, along the lines of the 1989 and 1991 revised proposals of a European Company statute, recommended to resolve the deadlock on European company law by eliminating from current proposals all provisions for workplace participation. In their stead, the Commission suggested, in characteristically opaque language, to adopt a single new instrument on national-level information and consultation. Alternatively, it proposed to designate the European Works Council Directive as that instrument, as all European multinational companies were already covered by it. If successful, this initiatve would end for good the quest for integrated European industrial citizenship in corporate governance, in favor of the European Works Council regime of „pooled" national citizenship based in labor law. While there is as of now no evidence for this, it may be suspected that employer toleration of the Works Councils Directive was conditional on the Commission's subsequent undoing of the political nexus between the Europeanization of company law and the incorporation in it of participation rights for workforces.(35)

With the European works councils in place, prospects are that German unions will not for long continue to be able to secure the support of the other European unions for their resistance to European Union company law without strong provisions for co-determination. Increasingly isolated in the ETUC, the DGB may also lose its hold on the German government position on this matter. In fact, anticipating defeat it is presently beginning to lower its sights. Rather than continuing to seek organizational provisions for workforce representation written into the constitution of European corporations (*Organmitbestimmung*), the tendency now is to demand rights for unions to negotiate company-specific participation arrangements for a legally specified list of subjects. Just as under the European Works Council Directive, the concrete form of such participation would be left to the parties at the workplace (Küller 1996).

Whether a satisfactory solution will at all be possible along these lines must be more than doubtful given recent experience. But from the perspective of German unions and the German government, it

would avoid a long struggle for an, inevitably highly complex, provision in European Company statutes allowing the German legislator to bind German companies to German co-determination even if they chose to incorporate in European law. Given the way European „pooled sovereignty" works, it is likely that German demands for a special national arrangement would not go unheard. But inevitably that arrangement would be far from watertight. Not only would the unions have to accept compromises and expend valuable political capital in the national arena to get the necessary national legislation passed. It would also be difficult, and probably impossible, to extend the provisions of such legislation to new firms, or to prevent existing firms from moving their seat to more liberal political jurisdictions. The result would inevitably be company-level co-determination turning into a „grandfather system", like the coal-and-steel version of co-determination in Germany already is.

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Remarkably, then, the voluntarism of the European Works Councils Directive is beginning to find its way even into the national system that more than any other relied on statutory law to create strong rights and obligations of industrial citizenship insulated as best as possible from market pressures. That participation arrangements in Germany will slowly become more negotiated and more pro-competitive is now widely regarded as inevitable among German unionists; hopes to export German co-determination to Europe in order to preserve it have effectively been given up.(36) Correspondingly, employer objections to company-law co-determination in Germany now center mainly on the fact that the system will remain unique in Europe, and may therefore constitute a competitive disadvantage both for German firms and for Germany as an investment site.

Still insufficiently understood is the possibility of an eventual conflict between the voluntarism of the European participation regime and the uniquely German distinction between legally based workplace participation and collective bargaining. Such conflict would become acute if European works councils were to turn into vehicles of some sort of European collective bargaining, dealing with subjects that in Germany are regulated by industrial agreement. This, of course, is exactly the future that unions in other European countries would find attractive. Even short of it, European works councils are likely to assist multinational firms in building company-centered human resource management regimes, helping them loosen their ties with national industrial relations systems, especially those that try to bind them into obligatory sectoral or national regulation. In Germany, this could reinforce the erosion of industry-level collective bargaining and contribute to further divergence of wages and conditions between workers in different firms, especially international and local ones.(37)

In a world of competitively interdependent national industrial orders embedded in an internationalized market economy, regime erosion in countries with high standards is likely to be followed by regime erosion in countries with lower standards. Hopes that the alternative to harmonization at the highest level would be some sort of convergence at a middle level, averaging out national systems by redistributing participation rights from the strong to the weak, seem unfounded given the weakness of European-wide redistributive institutions and the operation of regime competition. Precisely to the extent that participation regimes are not merely market-driven devices for increasing productivity, but are to limit managerial prerogative, not least in order to protect workforces from excessive intensification of work, erosion of a strong regime may *enhance the competitiveness of the firms subject to it*.(38) This explains why firms under competitive pressure tend to seek such erosion. But it also suggests that weaker regimes must then lower their standards in response, or become more productivity-enhancing, to compensate for their loss of *relative competitiveness*. Rather than making national systems „meet in the middle", if European fragmented sovereignty fails to protect strong national regimes from competitive erosion, it is likely to weaken all regimes, beginning at the top and continuing down to the bottom.(39)

IV. Concluding Remarks

The subject of this paper were the broad institutional conditions that fragmented citizenship under „pooled sovereignty" (Keohane and Hoffmann 1991) creates for politics in economically integrated Europe. As long as Europe is governed by a constitutional construction under which most Europeans remain foreigners to most other Europeans, and common policies are not backed by the power of a common state, outcomes seem likely that do not fit the optimistic image of inexorable progress towards advanced forms of citizenship divorced from state coercion and based in the common values of a stateless European civil society. Regulating national citizenship through a supranational non-state regime does open up national systems to foreigners, but only in a very limited way. And the price for this seems high as regime competition must be allowed to continue, undermining strong national regimes and, in the longer term, probably all others.

In the perspective of „policy analysis", workplace participation is just one „policy area" among others. What the character of integrated Europe as a polity is can therefore be determined, if at all, only by surveying all such areas and somehow aggregating the results. Workplace participation may also be seen as an „industrial" issue of declining significance in a „postindustrial" society in which, allegedly, consumer interests take precedence over producer interests (Majone 1993). None of these positions is taken here. Since workplace participation regimes regulate, or may precisely fail to regulate, the extent to which the organization and intensity of work may be governed by market pressures, and since social regulation of the „effort bargain" at the workplace may be anti-competitive, they present a strong test for the ability of a polity to mediate the impact of competition on social life. Not all „policy areas" are equally instructive when what is at stake is the relationship, not between institutions, but between politics and markets. Moreover, as markets expand and their competitiveness increases, what institutional resources a society has or has not at its disposal to regulate its „labor process" would seem to become more rather than less important.

What responses creative human action may devise to new institutional constraints and opportunities, and what it may accomplish in relation to the problems and probabilities these pose, can never be predicted with certainty. All this paper tried to do was explore the *institutional potential* of what Weiler calls the Community, as opposed to the Unity, model of European integration - not to offer a strategic recipe of how to deal with the exigencies of a two-level polity that separates rights of citizenship from state capacity. Indications are that a non-state regime of industrial citizenship rights that is forced to rely heavily on national and managerial voluntarism must accept considerable inequality, as it must allow participation to vary with firms' national origin and corporate strategy. It also seems likely that the industrial order that it will bring about will be more market- and efficiency-driven, more private and less public, and much more internally diverse than the national regimes of the postwar period, with potentially far-reaching consequences for the structure of European societies and their social cohesion. On the other hand, while social science may sometimes be able to understand the conditions of action, its imagination is too limited to preempt its results.

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Endnotes

(*) Earlier versions of this paper were presented at a conference on *Social and Political Citizenship in a World of Migration*, European University Institute, European Forum, 1995-96 Project on Citizenship, Florence, Italy, February 22-24, 1996, and to a plenary session of the 1996 meeting of the European Consortium for Sociological Research (ECSR) in Berlin, August 27, 1996.

(2) Not to mention the „scientific" respectability that is gained by shifting to a liberal world view

capable of providing analyses with a proper „micro-foundation".

(3) The way I use the terms, „international" refers to relations between states; „transnational", to phenomena that exceed the boundaries of any one state; and „supranational", to institutions above states that are designed to govern these.

(4) Leaving aside his more specific concern with the Maastricht ruling of the *Bundesverfassungsgericht* (Weiler 1995). I also concentrate on the relationship between, in Weiler's terms, state and citizenship, at the neglect of a third pole that figures importantly in his argument, ethnos or *Volk*.

(5) I am using the term, „regulation", in the sense of Majone (1993; 1994).

(6) The mechanism at work was identified as early as the eighteenth century, by none less than Adam Smith who, as quoted by Streit (1995), points out in the *Wealth of Nations* that „the proprietor of stock is properly a citizen of the world, and is not necessarily attached to any particular country. He would be apt to abandon the country in which he was exposed to a vexatious inquisition, in order to be assessed a burdensome tax, and would remove his stock to some other country where he could, either carry on his business, or enjoy his fortune more at ease. By removing his stock, he would put an end to all the industry which it had maintained at the country he left... A tax which tended to drive away stock from any particular country, would so far tend to dry up every source of revenue, both to the sovereign and to the society. Not only the profits of stock, but the rent of land, and the wages of labor, would necessarily be more or less diminished by its removal."

(7) On „status" in the present context see Streeck (1990).

(8) See the present situation in almost all European countries, which are facing both an erosion of their tax base and rising demands on their welfare budgets, forcing them to cut back on citizen entitlements.

(9) And it is only this that the paper will show. In particular, it does not try to predict the extent of „social dumping" in Europe, nor is it to announce a „race to the bottom". While the first of these concepts inexplicably limits the impact of regime competition to the migration of production and „jobs" from high to low-standard regimes, the second treats time essentially the way economists do: as non-existent. But time matters, and the historical world is sticky and slow-moving. A "creeping to the bottom" is all one can expect, and it would be bad enough.

(10) Exactly the same point can be illustrated drawing on other acts of European social policy, for example the Posted Workers Directive. I will deal with this case elsewhere.

(11) See Sturmthal 1964; Rogers and Streeck 1995. This does not apply in Britain where industrial citizenship remained limited to a right of workers to be represented by trade unions through collective bargaining. In most countries of the European Continent, collective bargaining came to be supplemented by rights of workforces to participate through union-independent workplace representatives in the management of the firm where they are employed. Because of peculiarities of the British legal system, rights to collective bargaining in Britain were never safely enshrined in law, although at the time Marshall was writing they were widely considered as so immovable a fact of industrial life that Marshall could conceive of them as of rights of citizenship. In the Roman law systems of the Continent such rights became much more formally established. This protected them better against changes in political and market power - see the different impact of the changes of the 1980s on industrial relations in, for example, Britain and Germany.

(12) On the early history of European workplace participation policy, see Nagels and Sorge (1977),

Zügel (1994).

(13) Initially the European Works Councils Directive of 1994 was introduced, in 1990, not as social policy legislation, but under Article 100, as „vital to the removal of unfair competitive advantage" (McGlynn 1995, 79).

(14) On voluntarism in European social policy see Streeck (1995).

(15) On the history see Eser (1994) and Kolvenbach (1990).

(16) On workplace participation in Germany see Müller-Jentsch (1995), Streeck (1984), Thelen (1991), Turner (1991).

(17) On „institutional nationalism", see my chapter in Marks *et al.* (1996). Danis and Hoffman (1995, 180), among others, point out that the German features of the proposed legislation did not endear it with non-German unions.

(18) In fact it dealt with a third situation as well, where the headquarters is located outside the Community. This became politically important as it mobilized the vigorous and successful opposition of U.S. multinationals. It can, however, be disregarded for present purposes.

(19) And thereby effectively reducing European participation rights to a mere annex to national participation systems. This prefigured the 1994 Directive; see below.

(20) Article 54 deals with the removal of barriers for companies choosing their seat!

(21) The text of the Directive is found in Blanpain and Windey (1994, 118 ff.) and in Hall et al. (1995, 49 ff.).

(22) Which it still meant in the Vredeling draft. Under its 1983 version, managements would have had to obtain a view from workforce representatives on planned measures that were likely to have „severe consequences" for employees. Workforce representatives had 30 days to state their view; within this period the measure in question could not be enacted and litigation could have prolonged the period to 60 days (Zügel 1994, 49). By comparison, while the 1994 Directive does speak of consultation, it defines it simply as „exchange of views and establishment of dialogue" (Article 2 (f)). In the Annex, where the statutory fall-back provisions are spelled out, it is made explicit that even in „exceptional circumstances affecting the employees' interests to a considerable extent", the requirement to inform the workforce „shall not affect the prerogatives of the central management" (para. 3). This is clearly below the standard even of the 1989 Social Charter - which is, of course, not legally binding (Danis and Hoffman 1995, 87).

(23) According to the responsible EU Commissioner, Padraig Flynn, „the success of the directive ... will reside in the fact that its provisions will never need to be implemented" (quoted in TUC n.d., 16).

(24) In this way, an agreement can stand even if negotiated exclusively by the central works council or the union representing the workforce at company headquarters.

(25) In the debate on European works councils, unusually muddled even by European standards, the voluntarism of the Directive is sometimes defended with reference to the „Nordic model" of workforce participation, which is based on national industrial agreement, as distinguished from the German, or even: „Germanic", model based on, inevitably, „rigid" legislation. Critique of the voluntarism of the Directive can then be dismissed as expression of an idiosyncratic national

preference for law over negotiations, or worse as an imperialistic attempt to impose one „national culture" on the others. The fact of the matter is, of course, that from the perspective of the individual firm, a strongly normative and effectively enforceable national agreement of the Scandinavian sort is for all practical purposes the same as legislation, as it exempts high standards of participation from inter-firm competition. This is very different in the case of the Directive where the voluntarism takes place, not between powerful associations, but exclusively at the level of the individual enterprise. On the relationship between the voluntarism of the Directive and the minimalism of European works councils as representative institutions, see Schulten (1996).

26) French European works councils are labor-management forums whereas German European works councils are labor-only bodies. See Bonneton et al. (1996).

(27) The frustration on the part of the TUC about the British opt-out seems to be related to the fact that it made British employers less willing to negotiate advance voluntary agreements with British unions only, and indeed with unions as opposed to freely elected workforce representatives (TUC n.d.).

(28) Potentially balancing the influence of home-country workforces and unions are the sectoral European union confederations. For these the voluntaristic elements of the European Works Councils Directive represent the first opportunity to insert themselves in bargaining with employers, especially and precisely when councils are created. It is not by accident, however, that unlike the German Works Constitution Act, the Directive never mentions unions (Däubler 1995, 156). It remains to be seen who will prevail in the emerging conflict over their respective roles between external (European) unions and internal (national) workforce representatives. For an unusually honest account of some of the tensions that have already arisen, see Gerstenberger-Sztana (1996).

(29) For examples see Mueller and Purcell (1992).

(30) In Belgium the Directive was transposed in national law by an agreement between the social partners, in accordance with national practice. „While the agreement, of course, follows the obligations laid down in the Directive, it adds nothing, and seeks to provide as much flexibility as possible (...) in the areas which are left to member states' discretion. Commentators attribute this to a wish on both sides to avoid complex or burdensome requirements and provide an attractive environment for foreign investment and multinationals wishing to establish their European headquarters in Belgium." (European Industrial Relations Review, 266, March 1996, p. 4)

(31) For an initial view on this see Lecher (1996, 267).

(32) The vast majority of the European works councils that existed in 1996 were joint labor-management bodies chaired by a representative of the employer (Rivest 1996).

(33) In other words, this effect is governed by Stanley Hoffmann's (1966) „logic of diversity".

(34) As yet little is known on the way supranational regulation and international regime competition together affect national social policy, and in particular how the voluntarism of supranational social policy „softens" the hard obligations on which it is typically based. Very likely, one reason for the liberalizing impact of supranational governance on national regimes is that integration under fragmented sovereignty amounts to a supranational extension of national political arenas - which seems to offer more oportunities to forces and tendencies of liberalization than to their opponents. National regime change would then have to be explained as a consequence of a *dynamic interaction* between the specific political selectivities of national and supranational institutional constraints and opportunities, adding to the effects of interdependence between national systems competitively embedded in an encompassing common market.

(35) Already in January 1995, a high official of the German labor ministry had promised German employers that „the issue of co-determination at European level would be put to rest with the passage of the (European Works Council) Directive" (Hornung-Draus 1995, 90).

36) European works councils themselves tend to be regarded by German unions, not as vehicles for internationalization of interests, but as substructures of international „networks", not costly as they are funded by multinational companies and the European Commission and usable for limited purposes of information gathering and, above all, international relations among organized worker interests. That European works councils are perceived mainly from a national perspective reflects their correspondence as an institution to a „logic of national diversity"; exactly the same can be observed in all other countries.

(37) The above is not meant to be an exhaustive discussion of the future of industrial relations or workplace participation in Germany; it merely serves to illustrate how certain institutional properties of the emerging European participation regime may erode high national standards. As pointed out, to understand the full dynamic of this process one would have to look in detail at the interaction between ongoing „endogenous" trends at national level and the dynamics of supranational institutional development. One would also have to factor in the impact of direct regime competition.

(38) While strong workplace participation regimes in European countries have turned out to be far from incompatible with firms being competitive *in some respects*, they are also clearly anti-competitive *in others*. For example, German co-determination admits and indeed supports competitive strategies based on product innovation, customization and the use of skilled labor, while making it difficult for firms to achieve competitiveness through process innovation or downsizing. In this way, it serves significant although largely latent social and employment policy functions. Employer dissatisfaction with co-determination is not because it makes firms uncompetitive, which clearly it does not, but because it limits their „flexibility" under market pressures to explore competitive strategies for which consensus is more difficult to get. Regime competition erodes primarily those elements of national participation regimes that are anti-competitive; the others remain in place or re-emerge on a voluntary basis. This is another reason why regime erosion is likely to proceed mainly gradually.

(39) To the extent, of course, that national regimes are stronger than the supranational regime. This is the case in all European countries subject to the Directive. It is not the case in Britain where, however, due to the Maastricht opt-out the Directive does not (yet) apply. If it did, Britain would be the only major country where there would be no dualism between the national and the European system of industrial citizenship, as the former does not, or not any more, exist. It is also, and for this reason, the only country where the European Works Council Directive might raise national standards.

Building on this an argument for the general benevolence of European works councils would, however, be somewhat excessive. The main reason for the high regard in which British unions hold European social policy, including the Works Councils Directive, is their own *extreme weakness*. It was only after the destruction of their shopfloor power under the Thatcher government that British unions have sought some sort of legal underpinning of their status. The British political system, however, cannot really provide this as there is no written constitution, and any Parliament can with simple majority undo any law made by its predecessor. This is why, in the absence of a domestic possibility for labor rights to be legally locked in, the British union movement has historically not bothered to seek such rights, and has rejected legally based co-determination through works councils even in periods of political strength when they might have been possible to get.
„Europe," which they have always also rejected, British unions came to embrace only when Thatcher had left them desperately in need for legal rights of organization and recognition - rights that they could secure for themselves regardless of the Conservative majority and that would remain beyond

the reach of the „Westminster system" of Parliamentary sovereignty. It was for this objective, and *only for it*, that British unions developed an interest in supranational legal regulation of their national industrial relations - a distinctly *national* interest that has little to nothing to do with Europeanizing industrial relations or, for that matter, workplace participation. It also happens to be the case that the voluntarism of the European works council regime meshes well with British traditions, just as the latter are not incompatible with minimal legal rights to union recognition. The fact that no strict distinction is made in the Directive between union and workforce representatives, or between co-determination and collective bargaining, further adds to its affinity with the British system. Moreover, company-based industrial relations are by now the rule in Britain.
