



Reconstituting European Democracy

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Abstract

Europeanization and globalization are frequently held to undermine national democracy; hence raising the question of the prospects for democracy in the multilevel constellation that makes up the European Union. The article presents three new models for how democracy can be reconstituted: through combining representative national democracy and an EU functional regulatory regime based on audit democracy; through establishing the EU as a multi-national state based on a common identity(ies) and solidaristic allegiance strong enough to undertake collective action; or through the development of a Europe-regional democracy with an explicit cosmopolitan imprint. The models have been developed through applying the basic requirements of a democratic order to the complex, multilevel structure of European governance. We find that this is best accomplished through developing three original configurations. The ensuing three-model framework offers a conceptual-democratic map to help orient the debate and to clarify the stakes for democracy in Europe.

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I. Introduction

The popular rejections of the Constitutional Treaty in France and the Netherlands in 2005 reignited scepticism and self-doubt as to whether Europe's experiment, the attempt to forge supranational democracy, is at all viable. This question speaks to the challenge of *forging* democracy at the supra-national level; but the integration process also brings up the challenge of *sustaining* national democracy within an altered European and global context. The European Union's political-institutional development, as this unfolds within a wider global(izing) context, has direct bearing on both sets of challenges.

The constitutional impasse occurred after a lengthy period of almost uninterrupted and rapid integration that greatly widened the territorial reach of the Union and to some extent also deepened it. The EU at present consists of 27 member states and wields influence over states and citizens through supranational institutions such as the Commission, the European Court of Justice and the European Parliament, as well as through so-called inter-governmental institutions, such as the Council of Ministers. The EU, which was initially a creature of the member states, has contributed to transform them, directly through legally binding actions, and more indirectly, through unleashing processes of mutual learning and adaptation. The upshot is that European states' identities and even state-ness have come to resonate with their *European-ness*, as national law has become so entangled in EU law practice that the states are no longer conventional 'nation states'. To dismantle the EU in order to forge a Europe of *independent* nation states today will represent a transformative project of near-revolutionary proportions.

The EU has – over time – extended its agenda, and obtained more power; it formally embraces democratic principles and procedures (cp. Art. 6.1 TEU). The Union draws on these factors to bolster its claim to the effect that it can no longer be understood as a mere international organisation with legitimacy solely deriving from the member states

– the Masters of the Treaties – but should instead be understood as *a polity in its own right* with direct links to its citizens. The assertion is that legitimacy initially established through domestic channels, through national democracy, has been supplemented with direct chains of influence from citizens to their supranational institutions. Supporters of integration argue that supranational democracy is necessary to handle the problems of *interdependence*. Nation states have opted for integration as they cannot solve the problems they face on their own. Many critics counter this assertion by arguing that European integration is the problem, as it contributes to the hollowing out of national democracy. The sceptics, then, see the issue as one of *rescuing* national democracy from the threat posed by European integration.¹

Can the EU be counted on to somehow ‘upload’ democracy to the European level? The standard solution is for the EU to develop into a federal European state, where the nation states are transformed into member states akin to the (German) *Länder* or provinces. Transnationalists and cosmopolitans challenge this by arguing that Europe’s experiment *challenges* democratic orthodoxy, which has the nation state as *the* institutional-communal mainstay of democracy.² The question they pose is whether democracy can be disassociated from its putative nation-state foundation.

We posit that the democratic challenges facing Europe can only be properly addressed by *reconstituting* democracy in Europe. Today’s Europe is marked by *complex interdependence embedded in a multilevel governance configuration*. Europe’s conundrum is that it cannot simply do away with this structure, without facing democratic losses. But neither can it simply rely on this structure to resolve its democratic problems. The solution is to reconstitute democracy, which entails modifying the present structure. This solution takes as its point of departure the recognition that only a political system that is able to address the complexities and contradictions brought forth by the process of continental integration – which has been step-wise through several rounds of

¹ For a selection of Euro-sceptical writings, see Holmes 1996.

² See for example Bohman 2007; Cohen and Sabel 1997, 2003; Dryzek 2006.

enlargement – can ensure a viable democracy in Europe today. But without a clear conceptual-theoretical ‘map’ that is properly calibrated to the European experience, what are viable options remains shrouded in uncertainty. There are many different theoretical conceptions of the EU,³ with various democratic proposals, but there is no work that properly bridges these with the mainstream debate on democracy, so as to make clear what is at stake for democracy in Europe. The relative disconnect between general democratic theorising and the European case is also apparent in that many of the innovative proposals to capture the EU’s complex character are not properly attuned to democracy. Hence, proposals such as *consortio* and *condominio* (Schmitter 2000), *deliberative supranationalism* (Joerges and Neyer 1997), *cosmopolitan empire* (Beck and Grande 2005: 81ff.), republican empire (Offe and Preuss 2007), *empire* (Münkler 2005: 245ff), and forms of *multilevel governance* (Hooghe and Marks 2003), such as *hierarchical and plurilateral* (Zielonka 2007), are merely descriptive categories.⁴ None of the forms of *consortio*, *condominio* or *empire* is democratic, and adding ‘cosmopolitan’ or ‘republican’ to the latter makes it an oxymoron. Further, how deliberative supranationalism or multilevel governance can be democratic, remains to be demonstrated. Their democratic point of reference is either absent, or underdeveloped. What would a democratic Europe look like in today’s interconnected world? This question, we contend, can only be answered by taking the multilevel constellation that makes up the EU properly into account.

Our objective in this article is to contribute to theoretical clarification through establishing and assessing different configurations for reconstituting democracy in Europe. We propose a yardstick for establishing a polity’s democratic character, and

³ Abromeit 1998; Beck and Grande 2005; Beetham and Lord 1998; Bellamy et al. 2006; Gerstenberg 2002; Grimm 1995; Haas 1968; Joerges and Neyer 1997; Majone 2005; Schmitter 2000; Siedentop 2000. See also Hooghe and Marks 2003; Jachtenfuchs and Kohler-Koch 1996; Middlemas 1995; Milward 1992; Moravcsik 1998; Morgan 2005; Olsen 2007; Scharpf 1999; Schmidt 2006; Weiler 1999.

⁴ The most sophisticated assessment of the EU’s democratic quality to date, Christopher Lord’s book on auditing democracy in the EU (2004), assesses ‘modified’ consociationalism and concurrent consent. Neither of these complies wholly with the democratic idea of freedom as collective self-determination.

apply this to different contexts (state-based and cosmopolitan). This yardstick is derived from deliberative democracy, which lends itself to our investigation, as it is not confined to the nation-state template and its presuppositions of sovereignty, demos, territory, and identity; it can therefore also be applied to the study of alternative forms. Deliberative democracy holds that democratic legitimacy requires public justification of the results to those who are affected by them. This constitutes the normative thrust of the democratic principles of *congruence* and *accountability*. By congruence is meant the basic democratic principle that those affected by laws should also be authorised to make them. This criterion posits that publicly authorized bodies of decision-making react adequately in the determination of the political community's development insofar as the citizens can be seen as acting upon themselves. Accountability designates a relationship wherein obligatory questions are posed and qualified answers required. It speaks to a justificatory process that rests on a reason-giving practice, wherein the decision-makers can be held responsible to the citizenry, and that, in the last resort, it is possible, to dismiss, incompetent rulers (Held 1995: 16; Bovens 2007: 107).

In order to substantiate our claim to the effect that there is a need for theoretical clarification, we establish the core components of deliberative democracy, and set out the basic requirements for a democratic polity. When we apply these basic requirements to the complex and contested (in the sense that there are widely different conceptions of what the EU is and should be) multilevel EU configuration – made up of intergovernmental, supranational and transnational principles and structures as it is – we do not get at one single viable solution, but *three models* of European democracy. Each of these represents a possible solution to the democratic challenge facing Europe. Each model is original and is developed through applying the democratic principle to a set of organisational parameters. Taken together these three models offer a comprehensive framework for assessing Europe's democratic challenges.

The first model-solution posits that democracy can be reconstituted as a combination of audit democracy at the Union level and representative democracy at the member state

level. The second model posits that democracy can be reconstituted through establishing the EU as a *multinational* federal state. The third posits that European democracy can be reconstituted through the EU serving as a regional *post-national* Union with an explicit cosmopolitan imprint. We consider which of these is the most robust in relation to the fundamental requirements of a democratic order. The presumption is that each model can ensure the conditions for self-government among equal citizens under a common law; that is, equal membership for everyone in the sovereign body that is responsible for authorizing the use of power. We provide a brief assessment of their democratic salience and empirical veracity.

II. Democracy: legitimation principle and organisational form

Democracy is a contested concept, and notably so in a rapidly changing world. Every democratic system harbours an inevitable gap between principle and practice. Every actual institutional arrangement that claims to be democratic is at most an approximation. Real democracy has never been realised. The idea of democracy as a system of self-governing citizens does not come wrapped up in an explicit and exclusive institutional package, and democratic orders always contain non-democratic elements; hence, the quest for democratisation through constant trial and error of institutional forms, rather than for conclusive settlement through embrace of one particular institutional form of democracy.

We therefore need to make a distinction between justifying reasons for political orders, and forms of institutionalisation. This can be generalised into a distinction between democracy as a *legitimation principle* on the one hand, and democracy as an *organisational form*, on the other. Only by adhering to democratic procedures can power holders justify their decisions, and the citizens subject their rulers to critical tests; only by employing the democratic procedures can collective goals be achieved legitimately; and only through these procedures can laws be changed and new laws enacted correctly. In

other words, democracy is not identical with a particular organisational form, but is rather a principle, which specifies what it means to get political results right. The democratic principle is operative as an ever-present critical standard. The *credo* of government by the people preserves its critical status as the principle through which proponents and opponents can come to understand each other's claims. Understanding democracy foremost as a legitimation principle, but one whose effective operation has to take an organisational form, makes us attentive to the democratic principle's taking *several* possible forms of institutionalisation. This also helps explain why democracy has, historically, come in many different forms and shapes, even within the state-based frame (direct or participatory democracy, and indirect, representative forms, such as parliamentary and presidential democracy).

Under modern conditions, representative democracy has been held up as key, since, democratic legitimacy cannot be based on the direct participation of all the citizens in the making of all the laws, as the people, is never present to make the choices. However it is difficult to pin democratic legitimacy to voting, as it is virtually impossible to find a democratic method that allows for the just aggregation of individual preferences to a collective decision. The principle of majority vote represents the winners, not the common will. It does not guarantee full political equality as the prevalence of permanent minorities testifies to. The counting of votes is an effective method for reaching decisions, but this is a method that does not test the quality of the preferences. It is a poor substitute for deliberation (Goodin 2005: 12).

Representation is part of the modern democratic order, but relies on deliberation to produce cogent results. Deliberative democracy comes in several forms and trappings. In its epistemic variant, it holds that deliberation is a cognitive process for the assessment of reasons in order to reach just decisions and establish conceptions of the common good (Cohen 1997; Estlund 1993). From this perspective, the main argument for deliberative democracy is to be found in the presumption that a free and open discourse brings forth qualitatively better decisions, and that the decisions are justified

to the affected parties. A form of *political autonomy* is constituted, when actors have to seek justification in relation to what others can approve of, that is, everyone who is subject to collective decision-making must be able to find an acceptable basis for such decisions. Deliberation thus carries moral weight, as a political system that guarantees conditions for autonomous public deliberation, gives us better reasons to believe that its decisions are correct or right. The theory of deliberative democracy is then an answer to the requirement that political decisions should be right.

For reasons of scale, scope and complexity, a modern democratic political order, to be legitimate, must *reconcile* the need for rational deliberation and decision-making, with proper representation of affected interests. Public discourse, inquiry, and criticism improve the knowledge basis, increase the level of reflection, as well as the responsibility and accountability of the decision-makers, and are, together with party-competition and periodic elections, the best way for realising popular sovereignty (Gutmann and Thompson 1996: 144).

A democratic political order

Does deliberative democracy presuppose the exclusive type of territorial control and recourse to force that we associate with the modern state? Or can deliberative democracy be ensured within a more general notion of political system, akin to for instance Easton's (1971: 134) definition as 'the authoritative allocation of values for society as a whole'? As an organisational form, modern democracy, at a minimum, requires both a *polity* and a *forum*:

- authoritative institutions equipped with an organized capacity to make binding decisions and allocate resources; and
- a common communicative space located in civil society, where the citizens can jointly form opinions and put the power holders to account.

The *public sphere* located in civil society holds a unique position, because this is where

everyone has the opportunity to participate in the discussion of how common affairs should be handled and where decision-makers can be held to account. It signifies that equal citizens assemble into a public. It is constituted by a set of civil and political rights and liberties, where the citizens set their own agenda through open communication, and address an indefinite audience. Public discourse is the medium, through which members can reflexively address themselves, and form collective opinions. It connects to the polity through different channels of communication. The attendant configuration is a legally entrenched system of *representation*; *identity*; and *legitimacy*.

A set of institutions and procedures equipped with the ability to convert goals into practical results is required. In modern polities, public deliberation is wed to systems of representation, as no system can accommodate the participation of all relevant stakeholders. Representation refers to procedures and processes for citizens to influence political decision making and the actions of public officials in manners generally considered to be legitimate. The modern conception of representation can be said to be parasitic on deliberation, as no person can consider herself to be legitimately represented unless the mandate and accountability terms are spelled out, and the represented are offered acceptable justifications for decisions taken on their behalf. Representation may be seen as a precondition for political rationality, as it secures institutional fora removed from local pressure, in which elected members of constituencies can peacefully and co-operatively seek alternatives, solve problems and resolve conflicts on a broader basis.⁵

To sustain a governmental entity a range of functions must be carried out. Such are resource acquisition and territorial control.⁶ For ensuring *exclusive territorial control*,

⁵ This principle of parliamentary representation can be stated as follows: ‘no proposal can acquire the force of public decision unless it has obtained the consent of the majority after having been subjected to trial by discussion’ (Manin 1997: 190). See Pitkin 1972; Mansbridge 2003.

⁶ Consider Stein Rokkan’s model of state-formation and nation-building which is modelled on these two dimensions (Rokkan 1975; Flora et al. 1999). Schmitter (1996) was the first to apply these to the EU. See also Bartolini (2005) for a more detailed attempt to apply Rokkan’s model to the EU.

military and police powers are required. The core tenets of congruence and accountability presuppose territorial-functional contiguity, but need not sum up to *exclusive territorial control*. However, the importance that many democratic theories attach to *demos*, nation, a ‘symbolic we’ – directs us to the requirement of a common sense of identity. The political function of collective or shared identity is its ability to transform a collection of disjunct individuals and groups into a collective that is capable of common action. This is due to its deeper ties of belonging and trust that make ethical-political processes of deliberation possible. Identity speaks to criteria and conditions for membership in a given community, as well as to the collective’s interpretations of itself (or the collective’s self-understandings). Deliberative democracy posits that trust and solidarity can be harnessed through legal-institutional means; type of identity and degree of attachment will then also depend on systemic factors such as degree of imposition, degree of inclusion, functional range of operations, etc.

By legitimacy we do not simply mean the acceptance or support for an order, but that there are good reasons to be given for *why* a political order deserves obedience. Legitimation serves to make sure that a polity is fit to make binding decisions on behalf of a *demos*; that is, the policies and decisions chosen protect the integrity of the society and realise its vital values and goals in an adequate manner, and that therefore the citizens have a duty to comply. A system of power is not legitimate only because actors believe in its legitimacy, but because it can be justified in terms of their beliefs (Habermas 1976: 276ff). In democratic states there is a presumed link between the normative validity of a political order and the social acceptance of this order. Many students of modern politics today subscribe to the tenet that democracy is the sole remaining legitimation principle of political domination.⁷

To function, a modern democratic polity requires popular legitimacy, collective identity, representation and governing capacity. The question of democratic quality

⁷ Of the long-established authorities, religion, law, state and tradition, it is only democratically enacted law that has survived the corrosion process of modernity (Frankenberg 2003). See also Dryzek 2000.

hinges on the communicative and justificatory relationship between the polity and the forum; on the character of this structure; and on citizens making use of it. In addition to the notions of legitimacy, identity and public sphere that pertain to the civic-democratic aspects of a political order; a modern democratic polity relies on functional requirements pertaining to sovereignty, coercive ability, authorisation of collective decision-making, resource allocation, membership/border setting, and thresholds for territorial exit. (Table 1) Taken together these basic requirements would ensure a polity's compliance with the criteria of congruence and accountability.

Properly reconstituting democracy in Europe presupposes that the functional and normative requirements are fulfilled. But a major lesson from the European debate is that these can be combined in different institutional ways. In other words, when we apply the basic requirements of a democratic order to the complex 'constitutional essentials' of the multilevel constellation that makes up the EU, we find scope for variation. The constellation's essentials are made up of intergovernmental, supranational and transnational governing structures, and they differ with regard to the main locus of the democratic unit. Intergovernmental structures point to the national level; supranational to the European level; and transnational to structures of civil society and cosmopolitanism. The composite EU contains institutional arrangements that are reflective of different ways of realising democratic values, within different global-structural contexts. The last, transnational, locates democracy closer to the forum – in civil society and the protection of human rights – within a cosmopolitan global context. Conversely, the first, intergovernmental, locates democracy more closely to the polity.

The upshot is that we need to take a second step, namely to adapt the basic normative and functional categories (that together make up democracy as a legitimisation principle and an organisational form) to the complex EU setting, which results in three models of European democracy.

III. Three models for reconstituting European democracy

The EU is a dynamic and contested entity; hence how well the three models of European democracy that we have come up with match with present-day European reality requires further examination.

Model 1 – Audit democracy

The first model envisages democracy as being directly associated with the nation state. The presumption is that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well developed collective identity, the citizens can participate in opinion-forming processes and put the decision-makers to account at regular intervals, as well as continuously through public debate. In this model, the emerging structure in Europe is seen as a regulatory regime deeply embedded in extensive institutional arrangements of public (or semi-public) character (Eberlein and Grande 2005: 97). The EU is envisaged as a functional regime that is set up to address problems, which the member states cannot resolve when acting independently. The model posits that the Union be mandated to act within a delimited range of fields. The relevant determinant for establishing which fields resides in the EU's ability to offload and compensate for the declining problem-solving ability of the nation state in a globalising context. This pertains, in particular, to the ability to handle cross-border issues (such as economic competition, environmental problems, migration, terrorism and cross-border crime, etc.). The model presumes that the member states delegate competence to the Union, a competence that can in principle be revoked (cp. Pollack 2003). Although this entails a form of self-binding on the part of the member states, such delegation can come with a powerful set of controls imposed by the member states, in order to safeguard that they remain the source of the EU's democratic legitimacy. The member states both authorise EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties,

as well as through a set of institutions that permit each and every member state to exercise the power of veto. The model can thus be understood as a way of addressing the democratic incongruence that complex state interdependence and globalisation bring forth through establishing European institutions that are accountable to the national democratic systems. The presumption is that such accountability can compensate for this incongruence.

To comply with the democratic tenets of this model, the EU will have to be reformed in such a way as to ensure that its legitimacy is derived from the democratic character of the member states. The Union's *own legitimacy* would be based on its ability to produce substantive outcomes (Scharpf 1999: 237). According to Giandomenico Majone (1998, 2005), such a regulatory regime does not need popular legitimation proper, as politically independent institutions, such as specialist agencies, Central Banks, judicial review, and the delegation of policy-making powers to independent regulatory commissions, would provide the required legitimation of a unit constructed to resolve the perceived problems of the members.

Some scholars understand democratic authorisation by member states to take the form of intergovernmental bodies in which the contracting partners strike bargains on behalf of nationally fixed preferences and interests (Moravcsik 1998). This leaves open the problem of *agency drift*: what assurances do member states have that the Union – whose decision-makers need decisional autonomy to solve problems rationally – operates in accordance with their interests? The other problem is that of EU integration-fostered technocracy and executive dominance: under such conditions democratic institutions at both the Union and Member State level would be by-passed.

We therefore find that the proper application of the democratic principle to this institutional configuration requires the presence of an EU-wide representative body. But to ensure the continued prominence of national democracy, its democratic purpose would be delimited to serve as an agent of *audit democracy* not representative democracy. The representative body – the European Parliament – would, together with

transnational and/or supranational institutions (such as a court and an executive), be set up to help member states supervise and control the Union's actions. These would be specifically mandated to hold intergovernmental decision-making bodies to account. They would be constitutionally barred from legitimising and authorising law-making, as well as from expanding Union competencies.

In accordance with the logic of democratic delegation, that is, which issues can be delegated without severe loss of democratic self-governing ability, the EU's conferred competences would be foremost in the operation of the Common Market. The scope for common action in other policy fields would be quite narrow, as would be the scope for redistribution. Further, the EU would have a very limited scope for foreign and security policy, and it would be entirely subject to member states' preferences. The EU's fiscal base would be limited; it would be based on member state contributions, not EU taxing powers (see Table 1).

The EU-level would be based on a problem-solving strategy and a consequentialist notion of legitimacy. A problem-solving, derivative entity (from the member states) handles problems of a rather mundane, technical-economic nature and preferences that do not invoke moral claims or affect identities. Thus conceived, the EU would be a contractual order, an institutionally unique type of international organisation or regime, where the member states are the contracting parties. The states not the citizens make up the 'constituencies', and are the sole sources of legitimacy. They act internationally, either on their own, or through their conferring powers on the Union through delegation. The 'constitutional arrangement' is a contract with the 'pouvoir constituant', structured as a juridical relationship among separate parties. It would be akin to a 'gentlemen's agreement', which presupposes individual membership and sovereignty. The signatories represent individual modalities of government, not a social pact among citizens. Contractually based orders do not put up normative criteria of political legitimacy (Frankenberg 2000: 260f).

Beyond audit democracy

Is the European Union based on this model's notion of democracy? The model's core presumption is member-state based and institutionally entrenched democratic will-formation approximating the criteria of congruence and accountability. For this to work member states must have the last word; they must be placed on the same line and have the right to veto. The requirement of unanimity prevails; there are neither trumps nor a supreme third party to resolve conflicts.

The European integration process has now proceeded beyond this core model requirement. The institutionalisation of a 'High Authority' – later the Commission, with some regulatory competence as a third party distinct from the contracting parties – was an early indication of a legal-constitutional process that has gained momentum over time. The legal structure of the EC thus early on assumed supranational character (began with the acceptance of a constitutional reading of the founding treaties, implicitly in the 1950s, and explicitly in the 1960s),⁸ which transformed the EC from an international regime to a quasi-federal legal system based on the precepts of higher law-constitutionalism. This was synthesised by the European Court of Justice in the combined doctrines of direct effect⁹ and supremacy of Union law¹⁰. It has been coupled with a significant increase in the number of EU provisions and Court rulings, where the Court acts as a trustee of the Treaty, and not as an agent of the member states. The substantive contents of these developments also matters: the EU has become focused on fundamental rights as a founding principle of Union law (Weiler 1999; Alston and Weiler 1999: 6). The Union also confers citizenship rights, and Europeans are

⁸ See the leading cases 26/62 *Van Gend en Loos* and 6/64 *Costa*. On the supranational character of EC law, see Alter 2001; Menéndez 2002; Stone Sweet 2004; Weiler 1999.

⁹ Which affirms the full legal character, under certain conditions, of EC norms – first explicated in relation to Treaty provisions, later said to apply also to directives in the 1970s – and consequently implies that such norms might grant rights to European citizens *qua* Europeans.

¹⁰ It was first explicated by the European Court of Justice in 1964, and stated that national norms must give way to Community ones if an irreducible conflict arises within *the scope of application of the Treaties*.

represented in the directly elected EP. Through co-decision with the Council, the EP is set up to serve as a direct expression of the wills of European citizens. This is *confined* to the first pillar,¹¹ but this pillar has widened and has added a range of other policy areas. Within pillars two and three, the EP's presence is too weak to qualify as audit democracy proper.

In overall terms, though, the Union's supranational character has increased and so has its democratic ambition, understood as part and parcel of the commitment to a Union based on *direct legitimacy*, which exceeds well beyond this model's notion of audit democracy. This development reflects the difficulty in striking a viable balance between congruence and accountability within any setting of delegated democracy: Heightened interdependence among states means that to ensure congruence, the scope of the constituency must be increased. But this comes at the expense of accountability: Effective democratic auditing requires supranational institutions that are able to 'open up' and render transparent the workings of intergovernmental executive bodies. At the same time, confining supranational bodies to the role of agents of delegated democracy, based on a bound mandate, is notoriously difficult. The members of a supranational body will need autonomy and discretion in order to facilitate cogent decision-making. The European Parliament started out as a body of national parliamentarians, and hence bore some semblance to a European-based agent of national audit democracy. Since direct elections were introduced in 1979, however, the EP has emerged as a legislative body proper, a body whose authority to act is not bound up in and confined to acts of delegation by the member states. The EU's legal-institutional developments have thus resulted in a polity with (a) an institutional arrangement with certain representative qualities; (b) a material constitution with basic rights protection; (c) transparency provisions and popular consultative mechanisms; and (d) some sort of an intermediary

¹¹Pillar I is the European Community; together with Pillar II, the Common Foreign and Security Policy; and Pillar III, Police and Judicial Co-operation in Criminal Matters (which are outside of Community law) make up the European Union. But note that JHA-related legislative acts such as the Biometric Passports Regulation are now 'First-Pillar' measures.

structure of civil and political organisations. Further, the functional scope of integration has expanded well beyond low-salience issues; reflecting the problem that many of the issues that nation-states cannot solve on their own cannot be delegated to supranational bodies without loss of democratic oversight and control. This development has taken place *together with* the retention of a comprehensive intergovernmental system, located in the complex Council structure. What are the more precise implications of these developments for *nationally based democracy*?

The EU affects the citizens in their capacities as customers, clients, users of public and private services, and in their role as political actors: voters and participants in public discourses. The Union's legal developments have also affected the identity of the member states, which have become exactly that, and are no longer solely Nation States (understood as a state responding exclusively to 'its' nation). The EU controls a significant amount of public funds; it takes decisions of major economic and social importance; it commits the member states through international agreements with third countries; and it makes laws and directives with direct effect on the member states and their nationals. The increase of decision-making power and scope combined with the expansion of (qualified) majority voting at the European level affect the long-established national institutions of citizenship, representation and accountability, and disturb national balances of powers. The EU is frequently held to favour executive over legislative power. It is also seen to empower the national judiciary arm – at the behest of the national legislative one – to privilege interaction with interest groups and NGOs over that of political parties (Craig 1999: 24; see also Weiler 1999; Moravcsik 1998; Schmitter 2000).

Union transactions are not merely functional problem-solving – they have turned 'political'. The presence of market-correcting or positive integration measures, such as certain redistributive schemes and means of standard-setting; the increased use of qualified majority voting; and the constitutionalization process, testify to the EU as

revolving around more than the politics of the lowest common denominator.¹² The European integration project, as many have pointed out, cannot be understood simply as a win-win situation, nor is this project merely about solving the perceived problems of the member states in line with the Pareto criterion.¹³

These observations suggest that a structure has been set up at the European Union level that affects the conditions for autonomous self-government at the national level. National democracy is faced with the challenges of creeping juridification (the expansion of jurist-made norms to new social domains), executive dominance, and technocratic governance. To ensure public scrutiny and democratic control of the EU the member states will have to upgrade their own political and legal institutions. However, if the member states are to comply fully with the criteria of congruence and accountability, the EU will have to go through a *major downscaling*. It will have to roll back much of the legal order. Such a rolling back need not rescue democracy. It entails removing much of the protective apparatus of human rights and the constraints on aggressive nationalism that have been established in the post-war period. Moreover, a down-scaled order would lack the organized capacity to make binding decisions, such as majority vote and court rulings. It would not be very effective in resolving conflicts and achieving goals, and it would be unable to reallocate resources. The internal democracy of the nation states may increase, as the formal conditions for sovereignty would be re-established, but the states would have little control over the *external* factors that shape their range and freedom of action – as congruence between the actual decision-makers and the recipients would decrease. Without *input congruence*, that is participation in the making of the decisions that affect someone, there can be no self-determination; and without *output congruence*, that is, overlap between the polity and the

¹² See e.g., Egan 2001; Joerges and Vos 1999. See Stone Sweet (2004) for the role of the European Court of Justice with regard to positive integration.

¹³ This states that only decisions that no one will find unprofitable or that will make parties worse off, if not accomplished, will be produced, and hence lend legitimacy to international negotiations (Scharpf 1999: 237).

territory it controls, there can be no effective participation. As the nation state is held to have become 'too small for the big problems, diversification and federation appear more and more necessary' (Smart 1992: 41)

The upshot is that the EU is not set up according to delegated democracy, and the act of rolling back the EU's democratic structures would in fact not rescue national democracy under conditions of (economic) globalisation where the nation-state's autonomy is diminished. Thus the model of audit democracy would at most ensure procedural accountability, not substantive accountability, as issue-complexity and issue-linkage would always leave discretionary room for delegates. Audit democracy would also be prone to input-output incongruence, as the citizens would not be able to participate in all the decisions that affect them. Since the fate of national democracy is intrinsically linked to developments at EU level, another strategy is that of reconstituting democracy at the European level.

Model 2 – Federal multinational democracy

The democratic credo posits that all political authority emanates from the law laid down in the name of the people. The legitimacy of the law stems from the presumption that it is made by the people or their representatives – the *pouvoir constituant* – and is made binding on every part of the polity to the same degree and amount. This is so to say inherent in the legal medium itself, as it cannot be used at will, but has to comply with principles of due process and equal respect for all. A legally integrated community can only claim to be justified when the laws are enacted correctly, and the rights are allocated on an equal basis. The conventional shape of such a community is the democratic constitutional state, based on direct legitimation, and in possession of its own coercive means.

A federal European state would be institutionally equipped to claim direct legitimation, and entrench this in legally binding form. Federal state structures not only heighten accountability but can also greatly reduce the incongruence that globalisation and

complex interdependence produce.

A legally integrated state-based order is often seen as premised on the existence of a sense of common destiny, an 'imagined common fate' induced by common vulnerabilities, so as to turn people into compatriots willing to take on collective obligations to provide for each other's well-being. This constitutes the solidaristic basis of the nation state, as well as of the welfare state (Offe 1998). To comply with this and to be authoritative and legitimate, an EU organised as a federal state would need a symbolic collective 'we'. A European identity is required to sustain an ability to make collective decisions over time (Grimm 1995; Miller 1995). A common European identity would provide a sound basis for citizen-ship, for specifying the rights and duties of the members, and for setting the terms of inclusion/exclusion. It would be a means of drawing bounds, by defining who are Europeans and who are not. The EU's legitimacy basis, from this perspective, would be based on the community of values that emanates from the revival of European traditions. Such common values, expressed through ethical-political self-interpretation processes, would underpin, and render collective decision-making at European level, possible. They would establish the preconditions for the unity of the law and the requisite basis for redistribution.

This conception of a European federal state which most Euro-federalists subscribe to, will not be deemed legitimate within the complex European setting. The Union today is made up of former nation states (which matters to the scope of European allegiance that is available). The EU is marked by almost unprecedented cultural pluralism and institutional heterogeneity. There are huge discrepancies in the size of the member states (from Germany to Luxemburg); significant vertical institutional incongruence, through federal (Germany, Belgium and Austria), quasi-federal (Spain and the UK) and various forms of unitary arrangements at the member-state level; and a great amount of horizontal institutional heterogeneity, at the Union level through different systems of representation and accountability (entrenched in supranational and international structures), and far more so at the member-state level (various forms of presidential

systems and parliamentary systems). The EU's integration process may converge or overlap with, or it can run up against rival and competing nation-building/sustaining efforts from member states and regions. The Union is made up of democratic states, the sum of which amounts to a *multitude* of nation-building/sustaining projects. The federal model must therefore be modified to accommodate to the fact that nation-building at the EU level would be taking place *together with* nation-building at the member state (and partly even regional) level. The modified version would be a *multinational federal Europe-an state*. In its institutional design, such an entity would have to coordinate the self-government aspirations and the rival nation-building projects that would occur within the European space (Norman 2006: 96). In constitutional terms, a multinational federation presupposes that the principle of formal equality be supplemented with particular constitutional principles. These are intended to provide some form of 'recognitional parity', for national communities at different levels of governance (in the EU at Union and member state levels). Wayne Norman (2006: 163-9) cites seven such principles: (a) partnership; (b) collective assent; (c) commitment and loyalty; (d) anti-assimilationism; (e) territorial autonomy as national self-determination; (f) equal right of nation-building; and (g) multiple and nested identities. This model is premised on the tenet that a uniform national identity is *not* a core precondition for the democratic constitutional state (Habermas 1998, 2001). The multinational federal state requires citizens' allegiance in the form of a *constitutional patriotism*, which portrays loyalty in political terms; it hinges on the validity of legal norms, the justification of policies, and the wielding of power in the name of fairness.

The multinational federal model of democracy, as set out here, implies that the EU will be distinguished by a commitment to direct legitimacy founded on basic rights, representation and procedures for opinion and will-formation, including a European-wide discourse. The basic structural and substantive constitutional principles of Union law, as well as coercive measures required for efficient and consistent norm enforcement and policy implementation will be institutionalised at both core levels of government (member state and European). Schooling, symbolic measures and social

redistributive means at both levels so as to render the process of socialising the people of Europe into ‘Europeans’, compatible with citizens retaining distinctive national identities will be established; as will be a set of clearly delineated criteria for who are Europeans and who are not. There will be onus on positively identifying Europe, and on distinguishing Europeans from others so as to make up the requisite social basis and ‘we-feeling’ for collective action – for regulatory and redistributive measures, and for a common European foreign and security policy. The EU will be legally recognized as a *state* with the right to police and military force for territorial control and protection of sovereignty, and with provisions for legal secession of any sub-unit from the Union (see Table 1).

The EU – less than a state

Is the EU based on federal state-based democracy? The model’s core tenet is for the Union to entrench in state-based form legally binding democratic will-formation. This requires authoritative institutions at the Union (and member state) level, organised along federal lines and equipped with final word on those matters that fall under each level’s respective jurisdiction.

EU integration, when considered in terms of territorial control and functional reach and continuity, is still well short of statehood. As community, the EU was from the outset, founded on the need to overcome the destructive effects of aggressive nationalism. It is within a set of universal, not national, primordial principles that the EU seeks to locate its identity and legitimacy. Its *normative foundation* is the core (universal) principles that animate the democratic constitutional state, namely, democracy, rule of law, and human rights. Whereas the EU draws on symbols and language generally associated with nationalism – it has a flag, an anthem, and a common currency – it is nevertheless foreign to nationalism as doctrine. Many analysts also argue that the EU helps *redirect* national identitarian projects in a post-national direction (Delanty 1995; Delanty and Rumford 2005; Habermas 2001; Viehoff and Segers 1999).

How effective such a redirection will be, is difficult to tell. Most of the member states insist on retaining their national identities, and the EU is also formally committed to retain such (Article 6.3 TEU). Further, the EU has a significantly weaker socialising ability than does any multinational state. Although the EU by now affects most policy areas, it is nevertheless true that the member states still retain the most important traditional mechanisms for socialising their citizens (school systems, a national vernacular, etc.). The post-Maastricht (1992) politicization of the integration process has, if anything, been driven by *resistance* against Brussels-driven ‘homogenization’, propelled by a fear that draws some of its impetus from the experience with nation-building processes in member states. Europe’s recognition of diversity is reflected in a subtle shift in the Union’s credo: from the ‘ever closer Union’ of the Rome and Maastricht Treaties to Laeken’s ‘united in diversity’.¹⁴ The latter is a rhetorical vaccination against homogenization and the stark image of ‘Fortress Europe’.

The EU is not a state. Its coercive measures are far weaker than those of states. This is not to say that the EU lacks power. The EU’s influence and *effects* are quite substantial, since the member states carry out its decisions. But the EU’s own institutions for territorial control are *at their weakest* in the core state functions: military security, taxation, and police. The EU is still first and foremost a humanitarian-type power, as its own military capabilities are almost non-existent (although the member states possess very significant military capabilities) (Sjursen 2006a).

The EU also deviates from the statist tenet of territorial-functional contiguity; there are important elements of functionally variegated control of territory. Consider border control: the UK and Ireland are associate members, *not full members* of the Schengen-based system, whereas the non-member states Norway and Iceland are.¹⁵ Far from all

¹⁴ This latter term entered the Union’s vocabulary around 2000. See the Europa website at <europa.eu/abc/symbols/motto/index_en.htm> (accessed 1 March 2007).

¹⁵ For details on the character of the countries’ different forms of affiliation see ‘The Schengen acquis and its integration into the Union’, at <europa.eu/scadplus/leg/en/lvb/l33020.htm> (accessed 1 March 2007).

member states have adopted the euro. The EU is also far more institutionally diverse than the most diverse federal state (Schmitter 2000). The institutions at the EU-level are programmed along two modes of decision-making, generally labelled the Community Method and the Intergovernmental Method, which inject an important element of *poly-centricity* into the Union's workings. It is only the former that is based in a system of European-wide representative institutions, that is, the European Parliament. The EP's core remit of action is the Common Market, but whereas it has expanded beyond this, it has little bearing on the core state functions of military security, police and taxation.

The EU's peculiar, and distinctive, institutional structure, has profound effects on its democratic legitimacy. In the EU, there is no real chance for an all-inclusive public debate among all citizens, as the civic-institutional infrastructure is deficient (Trenz 2005; Grimm 1995; Peters 2005). The 'European people' is represented in 'pseudo elections' (often also referred to as second-order elections)¹⁶ – with low turnout and without a proper European-wide party system – and a parliament that is not a fully-fledged and sovereign legislator. The upshot of all this is that the EU deviates clearly from the nation state. In its present form the EU has some traits of a *multinational non-state-based federation*, with the important provisos that its 'federalism' is organised around other issues and methods of territorial control than is the case with every state-based federation, and that the EU's own vocation is *post-national* as it is set up to fight aggressive nationalism.

For the EU to comply with the tenets of this model, it would have to be reconstituted as a polity. That would not only entail *increased* competencies, but also institutional revamping, including the *establishment of direct*, representative, links with the citizens in *all* relevant functional domains. However, any further move in such a statist, national direction, is bound to encounter strong resistance, as many are vehemently opposed, to

¹⁶ The main difference between first and second order elections is that there is less at stake in the latter. Since European elections do not produce executive changes, they are really second-order national elections (Reif and Schmitt 1980).

a federal 'super-state'. In today's Europe, the resources required for such an order, for forging a common identity and for making us all good Europeans are in short supply. The upshot is that the model's presumption that increased congruence through lifting tasks to the European level has taken place in an uneven rather than in a coherent manner; has not been properly democratically authorized; and has not been matched with adequate measures of democratic accountability.

How close to statehood the EU will need to come to comply with the federal model, requires attention to the character of the states system, as this model is premised on a system of democratic states. The multinational federal state model posits a democratically tamed Westphalian states system, but where the democratic controls are still mainly internal to each state. In today's deeply interwoven world, where states are becoming increasingly interdependent, 'democracy in one country' is not sustainable. The issue is whether democracy can be sustained through (horizontal) pressures from the system of states, or whether supranational bodies (above the state) that citizens can appeal to when their rights are threatened are necessary. In today's world, a range of such bodies have emerged. The EU, albeit deficient, is the most elaborate case of supranational democracy.

To sum up, the EU's commitment to universal principles suggests that it has a communal vocation that is broader and more universal than even that of the multinational state. The question that the EU brings up is whether the state model can still be seen as an adequate harbinger of democracy and solidarity in today's world. This pertains to which mode of allegiance, as well as to which institutional-structural make-up democracy requires in a globalized world. Can a move beyond Westphalia, towards cosmopolitanism offer a better, more suitable, version of democracy?

Model 3 – Regional-European democracy

Cosmopolitans and transnational governance scholars envisage democracy *beyond* the template of the nation state and the states' system. Europe is held up as a particularly

relevant site, for the emergence of cosmopolitanism (Archibugi 1998; Beck and Grande 2005; Delanty and Rumford 2005). This multidisciplinary cast of scholars draws variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a 'civilian power' (Rumford 2005; Manners 2002). Even though cosmopolitanism 'is not part of the self-identity of the EU' (Rumford 2005: 5), scholars nevertheless recognise the EU as a part of, and as a vanguard for, an emerging democratic world order.

Little systematic effort has been put on specifying *how* a European Union imbued with cosmopolitan norms can comply with the core democratic principles of congruence and accountability. In our view, such a Union must be set up as *a non-state entity*, and be framed in such a manner as to serve as a regional subset – or more appropriately serve as *the* foremost – regional promoter of a larger cosmopolitan order. This implies that the Union will be a post-national government, a system whose internal standards are projected onto its external affairs; and further, that it will be a system of government that subjects its actions to higher-ranking principles – to 'the cosmopolitan law of the people'.

In a globalising world, the nation states suffer democratic deficits, as their citizens are in so many ways affected by decisions taken outside their borders, beyond national control. The agenda over which the body of citizens exerts exclusive control is greatly diminished. *Decreased output congruence* underpins the case for supranational government.

The EU has obtained competencies and capabilities that resemble those of an authoritative government, which we may define as the political organisation of society, or in more narrow terms, as the institutional configuration of representative democracy and of the political unit. The idea is that since 'government' is not equivalent with 'state', it is possible to conceive of a non-state, democratic polity with explicit government functions. Such a government structure can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or collective identity that is needed for

comprehensive resource allocation and goal attainment. Such a governmental structure is based on a division of labour between the levels that relieves the central level of certain demanding decisions. The problem is how such an entity can be effective – implementing decisions against a dissenting minority, in the absence of state-type coercive measures. When it is the member states that keep the *monopoly of violence in reserve*, such an order can only be effective to the degree that actors comply on the basis of voluntary consent. How to ensure compliance in a polity that lacks the enabling conditions of sovereignty that confer stability on social relations in the form of a ‘centralized authority to determine the rules and a centralized monopoly of the power of enforcement’ (Nagel 2005: 116)? Proponents of this model may contend that such an order can ensure compliance and consent through a series of ‘soft’ mechanisms, ranging from a world-wide moral consensus on the protection of human rights; via consultancy and deliberation in transnational structures of governance and their concomitant civil society mechanisms of shaming and blaming; to the institutionalised procedures for authoritative decision-making in intergovernmental and supranational institutions, which are similar to the ones that at the national level confer legitimacy upon results. When decisions are properly made, when they follow the authorized procedures of the constitutional state, the likelihood that they be respected is high (Tyler 1990). When norms or rules are contested, formal compliance mechanisms fail at the international level (Zürn and Neyer 2005). Collective decision-making and implementation in the EU take place within a setting of already legally institutionalised and politically integrated orders, which can help ensure compliance.

This model thus, posits that the Union’s democratic legitimacy can be based on the credentials of criss-crossing public debate, multilevel democratic decision-making procedures and the protection of fundamental rights to ensure an ‘autonomous’ civil (transnational) society. This is the clearest manifestation thus far of democracy as a principle based on a post-conventional form of consciousness, one seen to have been generated by the struggles and processes that produced modern constitutions. Whereas such an entity holds traits that undermine the distinction between states and

international organisations; it can-not do away with the modern legitimating principles that were established through democratic revolutions. Modern constitutions can be disconnected from the state form, insofar as they remain linked in with the project of modernity, whose normative telos is to make the addressees of the law also their authors (Frankenberg 1996). A true republic presupposes democracy, but democracy need not presuppose the state. A non-state entity can make up a system of government insofar as it performs the functions of authorised jurisdictions. The concept of government highlights the *moral authority* of the procedures entrenched in the democratic *Rechtsstaat* – as a legitimating and compliance-generating mechanism.

Two implications follow from applying this model to the EU: first, that reconstituting democracy in Europe entails decoupling government as the democratic form of rule, from the state form – as a co-ercive system of power relations that is sovereign due to the codes of international law. International law has however changed, and the EU has pooled sovereignty within a territory that it does not fully control. These developments have come to reflect a multi-dimensional and disaggregated conception of sovereignty (Morgan 2005; Slaughter 2004). State sovereignty has become conditional upon citizens' sovereignty. A cosmopolitan-type EU would be based on non-violent settlement of disputes, the entrenchment of institutions, rights and legal principles that subject actors to the constraints of a higher-ranking law – the cosmopolitan law of the people – and that empowers the citizens to take part in law-making processes at different levels. Policy-making, implementation and law enforcement would then take place through a variety of organisations, and the EU would be a sub-set of a cosmopolitan order that does not hold the means of legitimate violence in reserve, but is rather embedded within a system of multilevel commitments and constraints.

Second, the model posits that the borders of the Union are not drawn on essentialistic grounds. The EU can, therefore, only justify itself through drawing on the principles of human rights, democracy and rule-of-law – even when dealing with international affairs; hence, it underscores the cosmopolitan law of the people. In such a perspective,

the borders of the EU are to be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity, and with regard to the support and further development of similar regional associations in the rest of the world – namely, with regard to the viability of the African Union, MERCOSUR, ASEAN, etc. In this perspective, the EU's borders would be drawn with reference to functional requirements both for itself and for other regions, all within the framework of a democratised, rights-enforcing UN. The ensuing order would not aspire to become a world organization, but would be cosmopolitan in the sense that its actions would be subjected to the constraints of a higher-ranking law and be committed to the fostering of similar regions in the rest of the world.

Regionally situated authoritative government within a cosmopolitan, non-state-based framework raises questions pertaining to institutional design and make-up. One particularly tricky issue is how to ensure democratic congruence and accountability within such a system. The short answer is that this requires a polity with a pyramidal conception of congruence and accountability, i.e., where the global level contains certain fundamental legal guarantees, the EU level handles a limited range of functions over which it has final authority, and the member states the rest. Congruence has a different status in this model than in the previous ones, as it cannot simply refer back to a delimited democratic constituency but must always balance the requirements of a given constituency with the universal principles embedded in cosmopolitan law. The accountability issue is also very complicated here. The 'many accounts' that such a system necessarily fosters presupposes a more central role for civil society and the public sphere in demanding and ensuring proper justificatory accounts; hence locates democracy more explicitly in civil society/public sphere than is the case in the previous two models.

Democracy constrained

This model's core presumption is that European citizens will be able to consider themselves as self-legi-slating citizens within the functional domain that is the exclusive

preserve of the European government, that is, human rights protection, risk regulation, environmental policy, and social security (see Table I). One obvious problem is to sustain this functional domain – and sustain this only – at the European level. The EU is functionally differentiated and without agreement on the demos, in other words, it lacks popular agreement on the criteria for inclusion/exclusion. Any such system will be highly vulnerable to both centripetal and centrifugal pressures (to widen/deepen or narrow/delimit its operational scope).

A related problem is that cosmopolitanism holds individuals as morally ultimate in both domestic and global contexts; they are the main legitimacy basis of political orders. But democracy presupposes some form of distinction between members and non-members. Democratic sustainability requires some form of identity, and identity thrives on exclusion, boundary-drawing and distinction. Identities are a condition of and a constraint on justice. Boundary construction, the dual processes of inclusion and exclusion, aims at establishing a particular balance between contextualized identities, democratic practice and global justice. Further, the outline of a given functional constituency must be considered in light of a collective identity's key role in instilling allegiance and loyalty. What is basic to us, what we share with one another and not with all the others, is what makes us special; something that arouses feelings and emotions, that we are committed to and that can motivate us to collective action, trust and solidarity. Collective identity stems from membership in a community of compatriots. Such is rather weak in an all-inclusive society. The world citizens do not have much in common apart from shared 'humanity' (Habermas 2001: 108).

The distinction between members and non-members is weaker within a regional cosmopolitan entity, in the sense that people would be members of different functional constituencies. But for a viable European democracy along cosmopolitan lines to emerge, it is necessary to ensure a form of re-balancing of the membership in a community of compatriots with the inclusive requirements of the cosmopolitan society. What form of inclusion and what kind of rights protection does this then require at

EU-level?

On membership, whatever reminiscences of primordial ties there are in Europe, these are weakly reflected at the European level, and a similar argument holds for collective identity. Today, there is a debate on where to draw the borders of the EU. This debate pits cosmopolitans against communitarians, where some of the latter argue for the need to confine the Union to European Christendom. The debate on Turkish membership offers one important take on the Union's value-basis (Sjursen 2006b).

On rights, it is clear that today's Europe does not contain the balance between economic rights and social protection that this model sees as required for effective citizenship: to approximate such a balance there is a need for retrenching market integration and drawing clear bounds on the operation of the market; whilst extending social guarantees across Europe. In this sense the cosmopolitan model presupposes clear bounds on integration, whereas the Union is marked by problems of democratically unauthorized 'creeping competence' (Pollack 1995) and *juridification*.

The EU might also be too institutionally weak to serve as a proper *government*. It has inordinately weak enforcement mechanisms; as it relies mainly on the administrations of the member states to implement its policies. It is especially weak in the classical state-type functions: it has neither a police force, nor an army of its own, and there are no European prisons. This reduces both European legislators' and courts' leverage at the supranational level. This is a democratic problem insofar as it raises questions about the Union's ability to uphold a system of rule which can be made effectively binding on every one to the same amount and degree. On the other hand, the self-proclaimed democratic system of law-making and norm interpretation at the European level, constrained by the member states, has built-in assurances that the EU not become an unchecked entity – an eventual 'world despotic Leviathan'.

From these observations we see that the EU holds traits suggestive of a nascent sub-type of cosmopolitan order. Its effectiveness in pursuing cosmopolitan principles hinges not

only on internal resonance but also on external. There are no equivalent orders established in the world. Hence, as the sole agent for a cosmopolitan world order, the EU faces the problem of becoming overburdened with tasks and normative expectations. In this connection it is also noteworthy that the cosmopolitan *model* is democratically weaker than the two previous models, both in terms of identity-foundation and in terms of self-rule. Increased EU cosmopolitization might therefore not necessarily entail further democratization. Further, cosmopolitans have thus far not offered a clear answer to the following thorny issues: How can goals be realized and rights protected *without* the sanctioning capacity of the state? A second critical question relates to the problem of achieving legitimacy for such an order that depends not only on a post-national identity but also on a public discourse with a global reach. How can the formal and informal conditions be made available at the transnational and global levels? When functional constituencies become deeply entangled, the relevant distinctions break down and lines of accountability suffer. This is a problem that neither cosmopolitan theorists nor the EU has thus far adequately addressed.

IV. Conclusion

This article started from the widely expressed notion that the European integration process challenges democracy. The EU's role as we have sought to demonstrate is ambiguous: it poses challenges to democracy but it also represents possibilities for coping with interdependence and diversity. The European integration process helps solve a number of the problems facing the nation states; hence reversing this process reintroduces these problems. The question facing Europe is therefore not to rescue national democracy, but to *reconstitute* democracy within a complex multilevel and pluralistic European setting. We have formulated three answers to how democracy can be made possible under such conditions. Each of these models is original in that it is an innovation on existing scholarship. One implies retrenching the EU in order to re-equip the member state as the stalwart of democracy within an intergovernmental context. This option takes Europeanisation into account and refers to the need for

reconstituting democracy, through installing a system of *audit democracy* at the EU-level rather than unravelling integration in order to rescue nation-state democracy. This option still carries obvious risks: If pursued to the full model prescriptions, it would still entail a major transformation of the current European political landscape. Even if such a transformation were to be successfully achieved, what is to guard against Europe becoming privy to the democratic limitations inherent in nationalism and the Westphalian order? Hence, Europe might be saddled with the problem that helped spark the European endeavour in the first place.

The option, we have tried to demonstrate, need not be to abandon the vocabulary and normative standards associated with the democratic constitutional state. The state is required to constitute and protect the demos. But it must be suitably modified to find acceptance in Europe. We found the *multinational federal state* a possible democratic alternative; however Europe's institutional diversity, the asymmetries built into its institutional configuration, coupled with its polycentric character, end up exceeding what this model can accommodate. The Union in its present form has entrenched a set of institutions that deviate from several of the key tenets of the nation-state model, even in its multinational trappings. The EU is neither a state nor a nation, and European citizens are not prepared to accept a European 'superstate'.

The quest for democracy in today's Europe has to take into consideration that there are different kinds of political allegiances and communities – thick and thin – corresponding to different levels of governance and their adjacent allocation of responsibilities. In the complex European system of multilevel governance, the rights and duties vary, as do the requirements for allegiance, that are conducive to the generation of obligations. In Europe we see the emergence of an institutional division of labour for the assignment of rights and duties across levels.

In line with this, and with reference to the Union's universalist vocation, we proposed an alternative *non-state regional model* that was set up to help tailor democracy to these conditions. Its relevance is rooted in the post-war legal developments in the wake of

the UN, which have made state sovereignty conditional. It can draw on a world-wide consensus on the norm-set associated with human rights and democracy. The model comes with its own problems and challenges, such as weak coercive means. How can such an order 'deliver'; how can it bring about changes required by justice? How can it ensure equal access and public accountability in the complex multilevel constellation that makes up the EU? Any attempt to set up such a system in one corner of the world, only, with Europe as a vanguard, may be an unsustainable construct, given that it will have to be sustained in a world system that is still largely made up of nation states.

The Union of today holds traits from all three models. As such, it reflects the many paradoxes, aporias and dilemmas that haunt Europe, and global processes, more generally. For example, they reflect the problem of overcoming nationalism without doing away with solidarity, with establishing a single market in Europe without abolishing the welfare state; of achieving unity and collective action without glossing over difference and diversity; of preserving identity without neglecting global obligations; of achieving efficiency and productivity without compromising rights and democratic legitimacy; and of ensuring law-based rule as well as popular sovereignty.

We have argued that the proper response to the challenge facing democracy in Europe is to *reconstitute* democracy. We have also demonstrated that, in an interdependent world, this can take the EU in a statist or in a cosmopolitan direction. Contemporary Europe poses important challenges to democratic theory; not in the sense of abandoning the core democratic standards of nation states, but rather in ascertaining how these standards can be best entrenched in legal-institutional form within a complex and deeply interwoven setting. The way forward is to further wed democratic theorizing and contextually sensitive empirical and comparative research.

References

- Abromeit, H. (1998) *Democracy in Europe: Legitimising Politics in Non-State Polity*, New York: Berghahn Books.
- Alston, P. and J. Weiler (1999) 'Introduction', in P. Alston (ed.) *The EU and Human Rights*, Oxford: Oxford University Press.
- Alter, K. (2001) *Establishing the Supremacy of European Law*, Oxford: Oxford University Press.
- Archibugi, D. (1998) 'Principles of Cosmopolitan Democracy', in D. Archibugi, D. Held and M. Kohler (eds) *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, Cambridge: Polity Press.
- Bartolini, S. (2005) *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union*, Oxford: Oxford University Press.
- Beck, U. and E. Grande (2005) *Das Kosmopolitische Europa*, Frankfurt: Suhrkamp.
- Beetham, D. and C. Lord (1998) *Legitimacy in the European Union*, London: Longman.
- Bellamy, R., D. Castiglione and J. Shaw (eds) (2006) *Making European Citizens: Civic Inclusion in a Transnational Context*, Basingstoke: Palgrave Macmillan.
- Bohman, J. (2007) *Democracy Across Borders: From Dêmos to Dêmoi*, Cambridge: MIT Press.
- Bovens, M. (2007) 'New Forms of Accountability and EU Governance', *Comparative European Politics*, 5: 104-120.
- Cohen, J. (1997) 'Procedure and Substance in Deliberative Democracy', in J. Bohman and W. Rehg (eds) *Deliberative Democracy*, Cambridge: MIT Press.
- Cohen, J. and C. F. Sabel (1997) 'Directly-Deliberative Polyarchy', *European Law Journal*, 3(4): 313-42.
- (2003) 'Sovereignty and Solidarity: EU and US', in J. Zeitlin and D. M. Trubek (eds) *Governing Work and Welfare in the New Economy: European and American Experiments*, Oxford: Oxford University Press.
- Craig, P. (1999) 'The Nature of the Community: Integration, Democracy, and Legitimacy', in P. Craig and G. de Burca (eds) *The Evolution of EU Law*, Oxford: Oxford University Press.
- Delanty, G. (1995) *Inventing Europe: Idea, Identity, Reality*, London: Macmillan.
- Delanty, G. and C. Rumford (2005) *Rethinking Europe*, London: Routledge.
- Dryzek, J. (2000) *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford: Oxford University Press.

- (2006) *Deliberative Global Politics*, London: Polity Press.
- Easton, D. (1971) *The Political System*, 2nd edn, New York: Alfred Knopf.
- Eberlein, B. and E. Grande (2005) 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State', *Journal of European Public Policy*, 12: 89–112.
- Egan, M. (2001) *Constructing a European Market: Standards, Regulation and Governance*, Oxford: Oxford University Press.
- Estlund, D. (1993) 'Making Truth Safe for Democracy', in D. Copp, J. Hampton and J. R. Roemer (eds) *The Idea of Democracy*, Cambridge: Cambridge University Press.
- Flora, P., S. Kuhnle and D. Urwin (1999) *State Formation, Nation-building, and Mass Politics in Europe: The Theory of Stein Rokkan: Based on his Collected Works*, Oxford: Oxford University Press.
- Frankenberg, G. (1996) *Die Verfassung der Republik – Autorität und Solidarität in der Zivilgesellschaft*, Baden-Baden: Nomos.
- (2000) 'The Return of the Contract: Problems and Pitfalls of European Constitutionalism', *European Law Journal*, 6(3): 257–76.
- (2003) *Autorität und Integration*, Frankfurt: Suhrkamp.
- Goodin, R. E. (2005) *Reflective Democracy*, Oxford: Oxford University Press.
- Grimm, D. (1995) 'Does Europe Need a Constitution?', *European Law Journal*, 1(3): 282–302.
- Gutmann, A. and D. Thompson (1996) *Democracy and Disagreement*, Cambridge, MA: The Belknap Press of Harvard University Press.
- Haas, E. B. (1968) *The Uniting of Europe: Political, Social, and Economic Forces 1950–57*, Stanford, CA: Stanford University Press.
- Habermas, J. (1976) 'Legitimationsprobleme im modernen Staat', in *Zur Rekonstruktion des Historischen Materialismus*, Frankfurt: Suhrkamp.
- (1998) *The Inclusion of the Other: Studies in Political Theory*, Cambridge MA: MIT Press.
- (2001) 'The Postnational Constellation and the Future of Democracy', in *The Postnational Constellation: Political Essays*, Cambridge, MA: Polity Press.
- (2004) 'Why Europe Needs a Constitution', in E. O. Eriksen, J. E. Fossum and A. J. Menéndez (eds) *Developing a Constitution for Europe*, London: Routledge.
- Held, D. (1995) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge: Polity Press.
- Holmes, M. (ed.) (1996) *The Eurosceptical Reader*, Basingstoke: Macmillan.

Hooghe, L. and G. Marks (2003) 'Unraveling the Central State, but How? Types of Multi-level Governance', *American Political Science Review*, 97: 233–43.

Jachtenfuchs, M. and B. Kohler-Koch (eds) (1996) *Europäische Integration*, Opladen: Leske & Budrich.

Joerges, C. and J. Neyer (1997) 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', *European Law Journal*, 3: 273–99.

Joerges, C. and E. Vos (eds) (1999) *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart.

Lord, C. (2004) *A Democratic Audit of the European Union*, Basingstoke: Palgrave Macmillan.

Majone, G. (1998) 'Europe's "Democratic Deficit": The Question of Standards', *European Law Journal*, 4: 5–28.

– (2005) *Dilemmas of European Integration*, Oxford: Oxford University Press.

Manin, B. (1997) *The Principles of Representative Government*, Cambridge: Cambridge University Press.

Manners, I. (2002) 'Normative Power Europe: A Contradiction in Terms?', *Journal of Common Market Studies*, 40(2): 235–58.

Mansbridge, J. (2003) 'Rethinking Representation', *American Political Science Review*, 97(4): 515–28.

Menéndez, A. J. (2002) 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union', *Journal of Common Market Studies*, 40(3): 471–90.

Middlemas, K. (1995) *Orchestrating Europe*, London: Fontana Press.

Miller, D. (1995) *On Nationality*, Oxford: Oxford University Press.

Milward, A. (1992) *The European Rescue of the Nation State*, London: Routledge.

Moravcsik, A. (1998) *The Choice for Europe*, London: UCL Press.

Morgan, G. (2005) *The Idea of a European Superstate: Public Justification and European Integration*, Princeton, NJ: Princeton University Press.

Münkler, H. (2005) *Imperien*, Berlin: Rowohlt.

Nagel, T. (2005) 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33(2): 113–47.

Norman, W. (2006) *Negotiating Nationalism: Nation-building, Federalism and Secession in the Multinational State*, Oxford: Oxford University Press.

Offe, C. (1998) "Homogeneity" and Constitutional Democracy: Coping with Identity Conflicts

through Group Rights', *Journal of Political Philosophy*, 5: 163–82.

Offe, C and U. K. Preuss (2007) 'The Problem of Legitimacy in the European Polity; Is Democratization the Answer?', in C. Crouch and W. Streek (eds) *The Diversity of Democracy: Corporatism, Social Order and Political Conflict*, Cheltenham: Edward Elgar

Olsen, J. P. (2007) *Europe in Search of Political Order*, Oxford: Oxford University Press.

Pitkin, H. F. (1972) *The Concept of Representation*, Berkeley, CA: University of California Press.

Pollack, M. A. (1995) 'Creeping Competence: The Expanding Agenda of the European Community', *Journal of Public Policy*, 14(2): 95–145.

– (2003) *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU*, New York: Oxford University Press.

Reif, K. and H. Schmitt (1980) 'Nine Second Order National Elections: A Conceptual Framework for the Analysis of European Election Results', *European Journal of Political Research*, 8: 3–44.

Rokkan, S. (1975) 'Dimensions of State Formation and Nation Building: A Possible Paradigm for Research on Variations within Europe', in C. Tilly (ed.) *The Formation of National States in Western Europe*, Princeton: Princeton University Press.

Rumford, C. (2005) 'Cosmopolitanism and Europe: Towards a new EU studies agenda?', *Innovation* 18(1).

Scharpf, F. W. (1999) *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press.

Schmidt, V. (2006) *Democracy in Europe: The EU and National Politics*, Oxford: Oxford University Press.

Schmitter, P. C. (1996) 'Imagining the Future of the Euro-Polity with the Help of New Concepts', in G. Marks, F. W. Scharpf, P. C. Schmitter, and W. Streeck (eds) *Governance in the European Union*, London: Sage.

– (2000) *How to Democratize the European Union ...And Why Bother?*, Oxford: Rowman and Littlefield.

Siedentop, L. (2000) *Democracy in Europe*, London: Penguin.

Sjursen, H. (2006a) 'What Kind of Power? European Foreign Policy in Perspective', *Journal of European Public Policy*, 13(2): 169–81.

– (ed.) (2006b) *Questioning EU Enlargement: Europe in Search of Identity*, London: Routledge.

Slaughter, A.-M. (2004) *A New World Order*, Princeton: Princeton University Press.

Smart, B. (1992) 'Europe Today and the Post-modern Paradox', in B. Nelson, D. Roberts and

W. Veit (eds) *The Idea of Europe*, Oxford: Berg.

Stone Sweet, A. (2004) *The Judicial Construction of Europe*, Oxford: Oxford University Press.

Treaty on European Union (TEU) (1992) Consolidated version of the Treaty on European Union, Official Journal C 321 E/5–36, 29 December 2006.

Trenz, H.-J. (2005) *Europa in den Medien: Die europäische Integration im Spiegel nationaler Öffentlichkeit*, Frankfurt: Campus.

Tyler, T. (1990) *Why People Obey the Law*, New Haven: Yale University.

Viehoff, R. and R. T. Segers (eds) (1999) *Kultur, Identität, Europa: über die Schwierigkeiten und Möglichkeiten einer Konstruktion*, Frankfurt: Suhrkamp.

Weiler, J. H. H. (1999) *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, Cambridge: Cambridge University Press.

Zielonka, J. (2007) ‘Plurilateral Governance in the Enlarged European Union’, *Journal of Common Market Studies*, 45(1): 187–209.

Zürn, M. (1998) *Regieren jenseits des Nationalstaats. Globalisierung und Denationalisierung als Chance*, Frankfurt: Suhrkamp.

Zürn, M. and J. Neyer (2005) ‘Conclusions: The Conditions of Compliance’, in M. Zürn and C. Joerges (eds) *Governance and Law in Postnational Constellations: Compliance in Europe and Beyond*, Cambridge: Cambridge University Press.

Table 1. Requirements for Three Democratic Orders in Europe

Requirements	Audit democracy	Federal multinational democracy	Regional-European democracy
Sovereignty	The Member States are formally sovereign entities The Union is derived from the Member States	The Union is recognized as a sovereign state, in accordance with international law	Polity sovereignty is multi-dimensional and shared among levels, subject to cosmopolitan principles of citizens’ sovereignty

Coercive capabilities	<p>The Union level has no own coercive capabilities</p> <p>Military and police forces are controlled at the Member State level</p>	<p>The Union level has state-type military and police capabilities</p> <p>The Member States have police functions</p>	<p>Military and police authority shared among all levels.</p>
Authoritative decision-making	<ul style="list-style-type: none"> • Constitutional limits on Union-level competencies • Union-level: Problem-solving on the basis of delegated authority; • Union-level: Decision-making and sanctioning ability confined to Common Market matters • Member-States: Sustain final authority in all matters, in accordance with national constitutions 	<ul style="list-style-type: none"> • State-based constitution delineating the competencies of the Union and the Member States. • Institutions for authoritative decision-making at both core levels (Union/member states) within their respective areas of competence • Sanctioning ability available for norm enforcement and policy implementation, at both core levels of government (member state and European) 	<ul style="list-style-type: none"> • Constitutionally entrenched delineation of powers and responsibilities along both horizontal and vertical lines, • Union sanctioning ability is limited; • Union subjects its actions to higher-ranking principles • Authoritative law-making through democratically regulated deliberative procedures
Resource acquisition and allocation	<ul style="list-style-type: none"> • EU-level: no independent taxing powers and limited scope for redistribution • Member States decide autonomously over tax and redistribution within their territories 	<ul style="list-style-type: none"> • EU-level: redistributive measures; independent fiscal policy and taxing ability • Member-state level: redistributive and taxing powers 	<ul style="list-style-type: none"> • EU level: no independent taxing powers and limited redistributive powers • All levels: committed to global redistribution
Membership/ border-setting	<p>The Union is open to all European states that qualify in functional terms</p>	<p>The Union's borders are set in accordance with designation of Europeanness</p>	<p>The Union's borders are drawn in accordance with democratic criteria for a self-sustainable democratic entity and with regard to the development of similar regional associations.</p>

Territorial exit	Provisions for exit – subject to approval from Union (majoritarian support required)	Provisions for legal secession of any sub-unit from the Union – subject to constitutional provisions	The Union has provisions for territorial exit for sub-units (subject to the constraints of cosmopolitan law)
Mode of legitimation	Audit (derivative) democracy at Union level Representative democracy at Member State level	Popularly elected bodies based on representative democracy at all levels; competencies divided in bi-polar federal manner	Popularly elected bodies within a system of legally 'hierarchicalized' competences
Identity formation and sustenance	<ul style="list-style-type: none"> • EU-level: weak and with legal constraints on Union's scope of action • Member-state-based: strong but 'Europeanised'; subject to each member state's own provisions 	<ul style="list-style-type: none"> • EU-level: strong and founded on constitutional patriotism. • Member-state level: provisions for citizens' retention of distinctive national identities • Mechanisms for mutual recognition of European and national identities 	<ul style="list-style-type: none"> • EU-level: post-national and based on universal norms, fundamental rights and democratic procedures • Member-state level: respect for diversity; significantly constrained by European and cosmopolitan norms and values
Public sphere	Public sphere confined to the nation state	European-wide public sphere	Multiple overlapping (European and global) discourses