



How to Reconstitute Democracy in Europe?

Proceedings from the
RECON Opening Conference

Erik Oddvar Eriksen (ed.)

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Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 19 partners in 12 European countries, and is coordinated by ARENA – Centre for European Studies at the University of Oslo.

RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

The present report is part of RECON's work package I 'Theoretical Framework', and presents the proceedings from the opening session of the project's kick-off conference held in Oslo, 26-27 January 2007.

Erik Oddvar Eriksen
RECON Scientific Coordinator

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Introduction

How to Reconstitute Democracy in Europe?

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Europe is in transition. During the last fifty years we have witnessed the emergence of a multi-level political, legal and administrative order. This consists of a set of European-level institutions and 'Europeanised' member and affiliated states. The multi-level Union has propelled economic integration, with significant spill-over effects, so that today, few if any, policy areas remain the exclusive preserve of the member states. Historically, the process of European integration could rely on modes of accommodating unity and diversity which permitted concomitant 'widening' and 'deepening'. Today, after two rounds of enlargement including 12 new member states, and heightened uncertainty as to its constitutional future, the Union is faced with fundamental questions pertaining to the direction, dynamics and very sustainability of the emergent European order.

The widening and deepening of the EU integration process has brought to the fore the question of identity and where to draw the borders of the Union. It has also made pertinent the question of whether democracy is possible at the European level. Can democracy be disassociated from its putative nation state foundation? Can European integration proceed further without jeopardizing the democratic nation state? The latter issue is given added salience through the EU's development into *a multi-level polity with an explicit democratic vocation*. The EU asserts that it can no longer be understood as an international organization whose legitimacy derives solely from the member states but should be seen instead as a polity in its own right with direct links to the citizens. This also means that we cannot establish the member states'

democratic legitimacy without properly taking the effects of the Union into account. However, the EU is a polity that does not itself have direct control of a given territory; it lacks a collective identity; truly hierarchical principles of law and an undisputed organizational capacity to act. It has over time expanded its realm of competence and has developed into a polity (however defined) in its own right. This development has brought with it democratic features, as revealed in:

- an institutional arrangement with representative qualities;
- a *material* constitution with basic rights protection;
- transparency provisions and popular consultative mechanisms;
- an intermediary structure of civil and political organisations.

These institutions and arrangements have emerged within a technocratic system of governance, which fosters juridification without adequate democratic control and oversight. Citizens have rights, but have not given them to themselves. Can such an entity develop into a democratic polity?

In this report from the kick-off conference of the RECON project we address some of these vital questions. Reconstituting Democracy in Europe (RECON) seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. This includes taking proper heed of the challenges to democracy at EU, national and regional/local levels. RECON spells out three different models for democratic reconstitution – national, federal and cosmopolitan – and assesses which approach to democratic reconstitution is most viable – in empirical and normative terms. This is done by analyzing the EU's constitutionalisation process; the institutional complex at the EU, member state, and regional/local levels; the role and status of gender within the enlarged Europe; the democratic quality and governing capacity of the Union within tax/fiscal and foreign/security policy; and the multilevel configuration of civil society/public sphere. It examines the effects of external transnationalisation on the EU and discerns democratic lessons from comparison with non-European complex multilevel entities. RECON also analyses the enlargement process: the transition and consolidation of democracy in the new member states and of the overall challenges posed by globalization to established democracies.

A two-day long conference marked the starting point of RECON on 26 and 27 January 2007 in Oslo. On the first day the theoretical framing paper of the project was presented by Erik O. Eriksen. Following this were lectures by John Dryzek and James Bohman who were invited keynote speakers. Hauke Brunkhorst and Rainer Forst rounded up the opening session by presenting their prepared comments for the key note speeches. This report collects the papers and comments from the opening session of the kick-off conference.

The first chapter is a revised version of the framing paper of the RECON project by Erik O. Eriksen and John Erik Fossum¹. The claim is that Europeanization and globalization undermine national democracy; which raise the question of the prospects for democracy in the multilevel constellation that makes up the European Union. The authors present three models for how democracy can be reconstituted: (a) at the national level, as delegated democracy with a concomitant reframing of the EU as a functional regulatory *regime*; (b) through establishing the EU as a multinational *federal state* based on a common identity(ies) and solidaristic allegiance strong enough to undertake collective action; or (c) through the development of a *post-national Union* with an explicit cosmopolitan imprint. These are the only viable models of European democracy, as they are the only ones that can ensure equal membership in a self-governing polity. They differ, however, with regard to both applicability and robustness.

John Dryzek in Chapter 2 asks how democracy might be best conceived of under the complexity of multi-level governance. He lays out his own answer by reference to some reservations about the three RECON models. His reservations concern, firstly, the very idea of models of democracy; secondly, cosmopolitanism as an ideal; and finally the emphasis on constitutional architecture as the proper target of democratization efforts. On the latter point, he questions the importance of constitutions and asks if they are not merely superficial rather than fundamental. What if the constitution represents only the surface of political life, rather than its deep structure? In Dryzek's view, discourses can substitute for constitutions as sources of order, and he develops his own views on transnational democracy. The kind of discursive democratization he advocates can, it is argued, apply to all levels in complex multi-level governance, from the local to the global.

¹ Available as RECON Online Working Paper 2007/01, at http://www.reconproject.eu/main.php/RECON_wp_0701.pdf?fileitem=5456091

Hauke Brunkhorst in his rejoinder underlines that public discourses are not alternatives to constitutionalism simply because without a dense network of legal rules, legal formalism and legal institutions that secure the *equal value* of public freedom, national as well as trans-national publics are rather a source of generating informal domination than a source of expanding democratic inclusion. Only legal and constitutional formalism can emancipate us from informal domination and keep the legal principle of democratic inclusion alive. Informal domination is the unsolved problem of the emerging global, regional and, in particular European constitutionalism. Every step to formalize and legalize the growing informal power of the new transnational ruling classes in Europe is a step towards European and global democracy.

James Bohman in Chapter 4 picks up the thread from Dryzek and the transnational model of democracy hinging on networks and dispersed deliberation. Bohman first briefly considers the problems of political authority and democratic reform typical of formal transnational institutions, and offers a theory of democratization for transnational polities. Democratizing a polity such as the European Union requires two conditions: (a) the emergence of transnational publics that create social relationships based on mutually recognized communicative freedom, and; (b) the institutionalization of new normative powers of citizens that realize freedom as non-domination. In light of these conditions, the republican dimension of democratization can be made explicit in a conception of a democratic minimum, in which democratization depends upon the effective capacity of citizens to initiate deliberation. Current theories of cosmopolitan and transnational democracy (either from 'above' or from 'below'), he argues, cannot elaborate sufficient institutional conditions that make democratization possible in a multilevel polity such as the EU.

Rainer Forst in his reply to Bohman, however, questions whether the publics can be 'dispersed' if they are to generate communicative power. Can there be democracy without a general public sphere in which all affected parties can participate? He also questions how minimal the democratic minimum in fact is: The right not to be arbitrarily dominated is a quite demanding, not so 'minimal' right as it stems from the fundamental 'right to justification'. Further, the republican language of Bohman's chapter seemingly implies a bounded common life. This is at odds with the cosmopolitan language that stresses the 'expansion of membership' and that 'boundaries are porous'.

To sum up, the lingering question then is whether democracy requires a formal constitution and a powerful, state-like entity? The latter is held to be necessary in order to make rights real. But European integration takes place within already constitutionalized and democratized political orders. Under such conditions, we ask in this report, does democracy at the European level really require a state? Must the European Union develop into a state in order to be fully democratic or is it possible to reconstitute democracy within a less fully constitutionalized and empowered political order?

Chapter I

Reconstituting Democracy in Europe

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Introduction

The popular rejections of the Constitutional Treaty in France and the Netherlands in 2005 have 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 supranational 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 present 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 Parliament, as well as through so-called intergovernmental 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 stateness have come to resonate with their *Europeanness*, 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; and 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.

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 *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. 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 multi-level 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 starts from the recognition that only a political system that is able to address the complexities and contradictions brought forth by the (step-wise through several rounds of enlargement) process of continental integration, can ensure a viable democracy in Europe today. Such a reconstitution need not be confined to one solution, but without a clear conceptual-theoretical ‘map’ that is properly calibrated to the European experience, what are viable

options remains unclear. There are many different theoretical conceptions of the EU,¹ 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.), *empire* (Münkler 2005: 245ff), and forms of *multilevel governance* (Hooghe and Marks 2003), such as *hierarchical and plurilateral* (Zielonka 2007), are descriptive categories devoid of normative content. None of the forms of *consortio*, *condominio* or *empire* speaks directly to democracy. Further, how *deliberative supranationalism* or *multi-level 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 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, which has been held up by the EU and analysts alike as a possible solution for the EU, 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. Accountability designates a relationship wherein obligatory questions are

¹Abromeit 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.

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 2006: 9).

In order to substantiate our claim to the effect that there is a need for theoretical clarification, we outline the three main axes of the debate on democracy in the multilevel European constellation. Then 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 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. The first model-solution posits that democracy can be reconstituted as a combination of delegation to the Union level and representative democracy at member state level. This entails a partial retrenchment of existing integration. 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 setting the EU up as a *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. We see these models as the only normatively valid and analytically coherent options – from the point of view of a stable, democratically legitimate polity – as only these models 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.²

Democracy in Europe revisited

The academic debate on European democracy is multifaceted. It can be understood as revolving around three core axes. Each axis cuts across ideologies and academic disciplines. The first, most widespread and dominant, axis, takes as its key premise that the nation state is the harbinger of democracy. The conundrum facing proponents of national democracy is that in today's Europe,

² 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.

a range of processes generally labelled under the heading of globalisation are seen to *undermine* the salience of the nation state as the embodiment of democratic government. Euro-sceptics, notably of a conservative bent, see European political integration as synonymous with the factors that drain out the essence of nationhood.³ Social democrats and communitarians claim that the European integration process sustains a neo-liberal supranational order, an order that undercuts both the systems of risk-regulation and the measures of solidarity that were such characteristic traits of the European welfare state.⁴ Taken together these factors are seen to sustain a system of multi-tiered democratic deficits. Many students of democracy go further and argue that the democratic deficit is not merely a contingent matter relating to the effects of globalisation, but refers to lack of core democratic components such as a common European public sphere (Grimm 1995; Offe 1998). Some underline the structural character of the problem: it highlights built-in limitations in the *scale* of representative democracy. Robert A. Dahl (1999), for instance, has argued that, beyond a certain scale, representative democracy cannot work; thus, extending representative democracy to the European level lengthens the democratic chain of legitimation and *heightens citizens' alienation*. The most obvious solution is to roll back integration. But can really the rolling back of European integration *rescue* national democracy under conditions of interdependence and globalisation?

The merit of this solution is disputed by other analysts who argue that the main challenge to national democracy does not emanate from European integration, but instead from *decisional exclusion*, as a result of denationalisation and globalisation under which international crime, environmental degradation, terrorism, and tax evasion thrive. Many of the decisions affecting national citizens are made elsewhere, or are not made at all. Indeed, these processes reveal decreasing steering capacities on the part of the nation state.⁵ When framed in this light, analysts such as Jürgen Habermas (2001, 2004) see European integration not as the nemesis of democracy, but as a means of *uploading* democracy to the European level.

³ For a selection of Euro-sceptical writings, see Holmes 1996.

⁴ See Greven 2000; Miller 1995; Offe 2000, 2003; Scharpf 1999; Streek 2000. Siedentop (2000) gives this argument a special twist. Whilst supporting a European federal state, he argues that the present integration process is an unhappy marriage of French *étatisme* and neo-liberal economism. This mixture threatens to undercut the prospect for democracy in Europe.

⁵ See Nielsen 2004. Bartolini (2004) sees this in weakened power of centres' ability to control peripheries. Against this view we find analysts who argue that European integration *strengthens* the state. See notably Moravcsik 1994; Milward 1992.

Both positions in this debate take the nation state as their frame of reference and discuss the prospects for democracy in these terms. Proponents of a European federal state (e.g. Mancini 1998; Morgan 2005) would for instance argue that instituting democracy at the supranational level is the best assurance for sustaining democracy also at the member state level. Within such a configuration the member states could no longer be sovereign nation states. But will they relinquish national identity, and can a European federation develop an acceptable and viable European identity? The answer hinges at least in part on how central to democracy is communitarian's claim to the effect that without a collective identity, there can be no democracy (Miller 1995).

The second axis of debate is made up of transnationalists and multilevel governance scholars who argue that the challenge facing Europe is neither to rescue the nation state nor to upload state-based democracy to the EU level. The EU is seen as a possible *alternative* to the nation state model.⁶ Further, some analysts hold the EU up as a type of polity that has prospects for developing democracy *beyond* the nation state.⁷ Ruggie (1993) sees the EU as a case of unbundling of state authority and with this a change in the constitutive principle of territorial sovereignty. Transnationalists and multilevel governance scholars portray the EU as made up of a host of new governance structures that combine to make up an alternative to a government above the nation state. To them, sovereignty resides with the problem-solving units themselves.⁸ Dense transnational networks and administrative systems of co-ordination have been intrinsic to the legitimacy of the EU, and some see these as amounting to a form of *transnational constitutionalism* (Fischer-Lescano and Teubner 2007; Joerges et al. 2004). They are based upon the private law framework of legal institutions 'that claim legitimacy beyond their own will or self-interest' (Möllers 2004: 329). This debate focuses on the conditions under which such issue areas can be deemed to be legitimate. If the self-governing collectivity is part of several communities – national, international and global – the locus-focus of democracy becomes a puzzling matter (Held 1995: 225).

Some, notably Cohen and Sabel (1997, 2003), and Bohman (2007), straddle the line between the second and third – cosmopolitan – axes of debate

⁶ Hooghe and Marks (2003) outline two models of multilevel governance, among which MLG II is the one closest to the non-state approach to governance.

⁷ See notably Schmitter 1996, 2000. See also Hoskyns and Newman 2000; Preuss 1996; Weiler 1999, 2001; Zürn 1998.

⁸ See for example Bohman 2007; Cohen and Sabel 1997, 2003; Dryzek 2006; Gerstenberg 2002.

through opting for a ‘cosmopolitanism restrained’ which blends elements of cosmopolitanism⁹ with (a regional notion of) transnational governance. They argue for the normative validity of a kind of polycentric system of directly-deliberative polyarchy (Bohman 2007). This entails a model of direct participation and public deliberation in structures of governance wherein the decision-makers – through ‘soft law,’ benchmarking, shaming, blaming, etc. – are connected to larger strata of civil society. The claim is that transnational civil society, networks and committees, NGOs and public forums, all serve as arenas in which EU actors and EU citizens from different contexts – national, organisational and professional – come together to solve various types of issues and in which different points of access and open deliberation ensure democratic legitimacy. Local problem-solving, the institutionalisation of links between units, and agencies to monitor decision-making both within and between units make this structure conducive to democratic governance. The EU is seen as a multilevel, large-scale and multi-perspectival polity based on the notions of a disaggregated democratic subject and of diverse and dispersed democratic authority.

The crucial question that this debate brings forth is whether the state form and a collective identity are necessary preconditions for democracy to prevail, or whether a leaner structure made up of legal procedures and criss-crossing public discourse can ensure democratic legitimation. In short, can democracy prevail without state and nation?

The third ‘cosmopolitan’ axis of debate focuses on Europe 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 ‘normative power’ or ‘civilian power’ (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. It is seen to connect to the changed parameters of power politics through which sovereignty has turned conditional upon respecting democracy and human rights. It is posited as one of several emerging regional-cosmopolitan entities that intermediate between the nation state and the (reformed) UN, and which become

⁹ Cohen and Sabel have expressed this cosmopolitan stance more explicitly in their most recent article (2006).

recognized as a legitimate independent source of law (Habermas 2001; Held 1992, 1995). The development of the UN (and regional entities such as the ECHR), whose global entrenchment has been re-enforced through multilateral arrangements for regulating economic international affairs (such as Bretton Woods, the GATT and the WTO), and their accompanying set of institutions, first delimited, and later redefined, the principle of state sovereignty. Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized. State sovereignty is in the process of becoming *conditional*; conditioned on compliance with *citizen's sovereignty*. Cosmopolitans thus assert that democracy can no longer stand for a national 'community of fate' that autonomously governs itself.¹⁰

The debate on European democracy makes clear that the core issue is to establish *what democracy can mean* when the nation state cannot be taken-for-granted as the foundation. Deliberative theory holds that only decisions that have been critically examined by qualified and affected members of the community through a reason-giving practice can claim to be legitimate (cp Gutmann and Thompson 1996: 55; Habermas 1996: 110; Rawls 1993: 137). At a minimum democracy then entails that binding decisions must be justified vis-à-vis the citizens who are bound by them and according to standards the citizens agree upon. In what sense can the complex European setting be made to comply with this principle so as to ensure that European citizens become self-governing? Should we abandon the nation state framework and instead focus on transnational or even cosmopolitan foundations? Or should we retain the nation state and seek to consider how it fares in a context marked by heightened pluralism, complexity and multilevel governance?

Back to basics

Democracy is a contested concept, and more 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 to the ideal of procedural democracy. 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

¹⁰ Cosmopolitans are much clearer on what they are against than what they are for, in political-institutional terms. Brock and Brighouse (2006) for instance note that the philosophical debate needs a better empirical grounding, that is, in concrete reforms and institutional arrangements.

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 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). The principle of majority vote, on its part, represents the winners, not the common will. It does not guarantee full political equality as the prevalence of permanent minorities testifies to.

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). This position underscores rationality, not participation, with regard to democratic legitimacy. 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, viz. 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. Justice, in this perspective, is not a pre-political value or a substantive principle, but an inter-subjective category. What is just is decided in processes of deliberation among affected parties; hence, the notion of *justice as mutual recognition* based on impartial justification (Habermas 1993; Scanlon 1998).

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.¹¹

To sustain a governmental entity a range of functions must be carried out. Such are resource acquisition and territorial control.¹² For ensuring *exclusive territorial control*, 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' –

¹¹ 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.

¹² 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.

directs us to the requirement of a common sense of identity. The political function of collective or shared identity is due to – its deeper ties of belonging and trust that make ethical-political processes of deliberation possible – its ability to transform a collection of disjunct individuals and groups, into a collective that is capable of common action. 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). Identities may be deep or shallow; coherent or fragmented; genuine or manipulated; inclusive or exclusive (Peters 2005). 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, 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.¹³ To function, a modern democratic polity presupposes popular legitimacy, collective identity, representation and governing capacity. The question of democratic quality 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.

Properly reconstituting democracy in Europe presupposes that the functional requirements are fulfilled. But these can be combined in different institutional ways. This means that there is scope for recalibrating these into different institutional configurations when we apply them to the extremely 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

¹³ 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.

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.

When we apply our bare-bones notion of democracy to the complex 'constitutional essentials' of the multilevel constellation that makes up the EU we do not come up with one single model of democracy. The multilevel constellation is made up of intergovernmental, supranational and transnational governing structures. These structures 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, places democracy closer to the polity.

When we apply the basic categories to the complex EU setting, we come up with three models of European democracy which in different ways and to different degrees comply with the criteria of congruence and accountability.

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 I: Delegated democracy

The first model envisages democracy as being directly and exclusively 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. The institutional-representative structure should in principle enable a reciprocal public justification process. 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).

In this model, 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 in principle can 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 EU's structure must be set up in such a manner as to ensure that the member states retain core decision-making powers within the Union's institutional structure. 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 legitimisation of a unit constructed to resolve the perceived problems of the members.

Democratic authorisation by member states can take several institutional forms. It can take the form of intergovernmental bodies in which the contracting partners strike bargains on behalf of nationally fixed preferences and interests (Moravcsik 1998). It can also take the form of a more supranational version with a Union-wide representative body. Its democratic purpose would however be delimited to serve as an agent of *audit democracy* not representative democracy. The representative body 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. Delegation works better in some issue-areas than in other: the general stipulation is to solve problems that the member states cannot handle alone, and to delegate control where such will not undermine national democratic arrangements.

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'; states 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 delegated democracy

Is the European Union based on this model’s notion of delegated 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),¹⁴ 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 effect¹⁵ and supremacy of Union law¹⁶. 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

¹⁴ 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.

¹⁵ 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.

¹⁶ 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*.

principle of Union law (Weiler 1999; Alston and Weiler 1999: 6). The Union also confers citizenship rights, and Europeans are 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,¹⁷ but this pillar has widened and has added a range of other policy areas.

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, even in its stronger, supranational, version. This development reflects the dilemma facing delegated democracy: 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 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*?

¹⁷ Pillar 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.

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.¹⁸ 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.¹⁹

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

¹⁸ 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.

¹⁹ 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).

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, such an 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 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. In this situation the model of delegated democracy would at most ensure procedural accountability, not substantive accountability, as issue-complexity and issue-linkage would always leave discretionary room for delegates. The model of delegated 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 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.

This model applied to the EU, entails a Union that is institutionally equipped to claim direct legitimation, and where this is entrenched in legally binding form. The model is premised on the tenet that the incongruence brought forth by globalisation and complex interdependence can be greatly reduced by federal democratic structures, which heighten congruence. This again is supposed to compensate for the lengthened chains of accountability that the establishment of a fully-fledged federal state entails.

It is widely held that a legally integrated state-based order is 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 is seen to be 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, the EU needs 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 citizenship, 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.

This model would then portray the Union as a political community based on institutions that are able to sustain an identity-building process. 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.

For this model to work properly within the complex European setting, we have to take heed of the existence of *multiple* nation-building/sustaining projects. This model can then also be modified to accommodate 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 European 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 is embedded in contextualised basic rights that ensure both an individual sense of self and a collective sense of membership.

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 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 contiguity, 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'.²⁰ 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

²⁰ 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).

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.²¹ Far from all 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 (EP). 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 (Grimm 1995; Peters 2005; Trenz 2005). The 'European people' is represented in 'pseudo elections' (often also referred to as second-order elections)²² – 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*.

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,

²¹ 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).

²² 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).

but also institutional revamping, including the *establishment of direct*, representative, links with the citizens in *all* relevant functional domains. Any further move in such a statist, national direction, is bound to encounter strong resistance, as many are vehemently opposed, to 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 is less than a state. Its vocation is post-national. . In value terms, its 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 cosmopolitanism offer a better, more suitable, version of democracy?

Model 3: Cosmopolitan democracy

The third model envisages democracy *beyond* the template of the nation state and the states' system. The model we discern here posits the European Union at the trans- and supranational level of government in Europe, and as one of the regional subsets 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.²³ 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)? The answer is 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

²³ The extreme case is that of nuclear weapons: all citizens in the world can be affected by the actions of a mere handful of actors.

decisions are properly made, when they follow the authorized procedures of the constitutional state, the likelihood that they be respected is high (Tyler 1990). The EU's decisions are implemented through authorized and democratically supervised national administrations. Collective decision-making and implementation in the EU thus 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 cannot 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 norm compliance 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 coercive 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 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. 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 at the global level?

Is the EU based on cosmopolitan democracy? This model's core presumption is that European citizens will be able to consider themselves as self-legislating citizens within the functional domain that is the exclusive preserve of the European government, viz., human rights protection, risk regulation, environmental policy, social security (See Table I) One obvious problem is to sustain this functional domain – and sustain this only – at the European level as the EU is functionally differentiated and without agreement on the demos, in other words, lacking in 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).

Another 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 cosmopolitan vocation (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 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. The implication of this observation for European democracy must take account of the fact that the cosmopolitan *model* is democratically weaker than the two previous models, both in terms of demos-foundation and in terms of self-rule. 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.

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 presents 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 possible answers to how democracy can be made possible under such conditions. 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, rather than unravelling integration and serving to rescue nation state democracy. This option still carries obvious risks: If pursued to the full (intergovernmental) model prescriptions, it would 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. If the less radical option, that of retention of nationally delegated supranational institutions, is chosen, Europe would still be facing massive accountability problems.

The option, we have tried to demonstrate, is not to abandon the vocabulary and normative standards associated with the democratic constitutional state. The state is required to constitute and protect the demos. 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 cosmopolitan 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 and which 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, is likely to be a fickle construction, 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 establish 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. As we have also demonstrated, within an interdependent world, this can take the EU in a statist or in a cosmopolitan direction. The Union's ability to pursue these directions hinges on internal factors and external ones, *including* macroscopic ones such as the future of the states' system. The European experiment may be the best bellwether for democracy's future.

Table I. Indicators for Three Democratic Orders in Europe

Criteria	Delegated democracy	Federal democracy	Cosmopolitan 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	The Union level has no own coercive capabilities Military and police forces are controlled at the member state level	The Union level has state-type military and police capabilities The member states have police functions	Military and police authority shared among all levels.
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	The Union is open to all European states that qualify in functional terms	The Union's borders are set in accordance with designation of Europeanness	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.
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	<ul style="list-style-type: none"> • Audit (derivative) democracy at Union level • Representative democracy at member state level 	<ul style="list-style-type: none"> • Popularly elected bodies based on representative democracy at all levels; competencies divided in bi-polar federal manner 	<ul style="list-style-type: none"> • 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

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Chapter 2

Transnational Democracy: The Formal and the Discursive

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The stated aim of the RECON project is that it ‘seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance’ – conditions that characterize the contemporary European polity. I will argue that democracy is possible under such conditions, but that some creative thinking is required about the different ways democracy can be pursued in this kind of setting. I will not offer any kind of design for European democracy, but rather some considerations relevant to the pursuit of democracy in complex, multi-level contexts that necessitate moving beyond democracy’s historical association with the nation state and its associated demos.

Eriksen and Fossum (Chapter 1 in this report) sketch three alternative models through reference to which democracy can be reconstituted in contemporary Europe. The first emphasizes democracy at the national level, treating the European Union itself mainly in intergovernmental terms. The second would see the European Union as developing in the direction of a federal state, with familiar state-like democratic mechanisms operating at this federal level. The third would treat the EU as a ‘post-national Union with an explicit cosmopolitan imprint’. Eriksen and Fossum favor the third of these three options, and I concur that of the three, the third is most defensible. Confining democracy to the level of the state essentially means turning our backs on the democratic challenge presented by European integration and the movement of authority away from the state level. In today’s world, legitimate political authority has to rest on democracy; and that applies to transnational

authority no less than national authority. The federal idea has straightforward democratic consequences because we already know what democracy can look like in a federal state. But currently this federal model does not seem feasible.

The idea of a post-national union takes more seriously the complexity of multi-level governance. Under such complexity, how might democracy best be pursued? I will begin my own answer through reference to my reservations about three seemingly attractive devices. These reservations concern, respectively, the very idea of models of democracy; cosmopolitanism as an ideal; and an emphasis on constitutional architecture as the proper target of democratization efforts. More positively, I then develop my own views on transnational democracy. The kind of discursive democratization I advocate can apply to all levels in complex multi-level governance, from the local to the global.

Skepticism concerning models of democracy

Models are devices that help us to think, and many of those who think about the theory and practice of democracy think in terms of the range of alternative models. With time, the number of available models of democracy proliferates. In his classic text *Models of Democracy* David Held identifies what is, by the time of the third edition (Held 2006), ten models of Democracy (with several sub-models) – deliberative democracy being the most recent addition.

Though models help in thinking, they also constrain thinking. The idea of a normative model of democracy implies a single set of specifications on which convergence is sought. In a complex multi-level polity, the idea that agreement on any set of specifications can be expected is a remote prospect. In a model, all the parts fit together; but what happens if one or two key parts are missing? What happens if the model is attractive but infeasible? Can we be confident that introducing bits of the model will actually be positive, without all the other bits? If alternative models vie from our attention, but none can be implemented wholesale, from which should we choose bits?

Thinking in terms of models of democracy is often less productive than thinking in terms of processes of democratization. We need to take seriously the idea that democracy is an essentially contested concept. Essential contestation does *not* mean simply that there are competing models that vie for our attention. What it means is that contestation over what democracy means is central to democracy itself. The process of democratization requires space for this contestation, and for the democratization path to be affected by it. The search for improving the democratic qualities of any polity is always

context-specific – and particular models may or may not be capable of providing useful insights in specific contexts. Democracy is actually an open-ended project that should not be thought of as converging on any single model.

If we set aside models of democracy, we can still think about criteria according to which democracy may be advanced. In *Democracy in Capitalist Times* (Dryzek 1996) I suggested that the relevant criteria would include scope, franchise, and authenticity. Scope refers to the range of issues under conscious collective control. Franchise refers to the effective number of participants who exercise influence over a collective decision. And authenticity refers to the degree to which that control is substantive rather than symbolic, engaged by competent and reflective actors. Authenticity connects closely to ideas about deliberative democracy. I suggested too that advance on any one of these three dimensions should never be sought at the expense of a retreat on any other – so for example we should not expand effective franchise by subjecting collective decisions to referenda dominated by money and advertising campaigns (of the sort we see in states that use referenda extensively in the United States). Such a step would involve retreat on authenticity.

In short, instead of asking ‘what model of democracy should we seek?’, we ask ‘what advances are currently possible on one or more of these three dimensions of democratization?’

Skepticism concerning cosmopolitanism

Cosmopolitan principles are by definition global, so they imply transcendence of national identifications and values not just within Europe, but also when it comes to Europe’s relationship with the rest of the world. In this way, Europe’s external face should also become democratic, as the rest of the world is engaged in egalitarian fashion.

Cosmopolitan values have a substantive content that is liberal in origin – for example, in a commitment to universal human rights. In today’s world, there are many who do not share these principles. East Asian regimes often see universal human rights as a Western construct that is not for them. Defenders of these regimes (most visibly, former Singapore prime Minister Lee Kwan Yew) defend an Asian emphasis on community over the corrosive individualism that the rights discourse seems to entail. Nor is anti-cosmopolitanism confined to East Asia. Especially since 2001, the United States has put a commitment to security above a commitment to reciprocity and the rule of law in international affairs, asserting its right to pursue a

national interest as defined by itself, with little concern for global norms as embedded (for example) in international conventions and institutions. The rights discourse has suffered as the government of the United States embraces torture and unlimited detention without trial in its 'War on Terror'.

How, then, should a cosmopolitan Europe seek to engage in democratic fashion those who do not share the specifics of cosmopolitan values? Even within Europe, there might be problems when it comes to non-liberal immigrant communities and ethnic nationalists. Moreover, when it comes to the newer members of the EU in East-Central Europe, the very term 'cosmopolitan' has negative connotations, a label for those who would sell out national interests and national culture. The problems multiply once we take cosmopolitanism as a label and as a set of substantive commitments beyond Europe, especially if we want to embed it in some kind of transnational democracy. Even in Western Europe, cosmopolitanism often has little resonance in ordinary political discourse.

The marriage of cosmopolitan values and democratic principles is currently most advanced in the model of cosmopolitan democracy proposed by David Held (1995) and his associates. Setting aside the problem that this is a *model* of democracy (see my earlier discussion), cosmopolitan democracy has a number of contentious and problematic features. There is a stress on the creation or strengthening of formal institutions of transnational governance, be they associated with the EU or the United Nations – a strengthening that must be accompanied by their democratization, involving direct accountability to the people of the world, and not just to national governments. However attractive such democratized international institutions might be in the abstract, currently they are not feasible, especially once we move beyond Europe. Existing global institutions such as the United Nations and its agencies, the World Bank, International Monetary Fund, and World Trade Organization are not at all democratic in this sense. There might be some accountability to national governments, especially the more powerful ones, and (increasingly) to civil society organizations, but none at all to any cosmopolitan citizenry.

In light of these problems at the global level, why not confine cosmopolitanism to Europe? The danger then is that a democratic 'fortress Europe' develops, unable to engage the rest of the world in reciprocal democratic fashion – an engagement which is explicitly sought in the third model advanced by Eriksen and Fossum. Europe might then face the same problem as the United States. Currently, the United States promotes a particular model of democracy with messianic zeal. The model is seen by US

policy makers as simultaneously American and universal; and the US finds it hard to understand when those at the receiving end of its democratization efforts fail to appreciate the applicability of the model to themselves.

Skepticism concerning constitutionalism

Among those who have seriously contemplated its alternatives, constitutional government is almost universally regarded as a good thing. Constitutionalism as a process is unobjectionable, inasmuch as it can involve healthy debate about the direction a polity should take. My objection is rather to any treatment of constitutions as the fundamental structures of politics. The metaphor here is a mechanical or engineering one: design a constitution, and every actor will play their allotted part to produce particular sorts of desired outcomes. The extreme form of this kind of thinking can be found among rational choice theorists in the field of constitutional political economy (see for example the journal *Constitutional Political Economy*), who insert *homo economicus* agents into their designs in order to predict what will happen when a particular design is adopted. In Beck's (1992) terms, this sort of thinking belongs to the semi-modernity of industrial society, requiring fixity, predictability, and a lack of reflexivity in the way people behave, such that constitutional engineering can produce predictable results. In a reflexive modernity, individuals will question the roles assigned to them, and the constitutional architecture that seems to require those roles. They may seek out novel forms of political action that either bypass constitutional avenues or make creative use of institutions in ways not intended by their designers (for example, by using courts as theatre).

What if constitutions are in some ways superficial rather than fundamental – what if the constitution represents only the surface of political life, rather than its deep structure? Marxism may be dead and I do not mourn its passing, but it at least had a healthy skepticism about liberal constitutions and what they concealed. To Marxists, the fundamental reality was the economic system and its mode of production. Liberal democratic constitutions were useful mainly in their capacity to conceal class domination in politics.

All this is not to say that constitutions do not matter at all. Bad constitutions in particular can produce catastrophic results. For example, the constitution of the former Yugoslavia defined its component republics on an ethnic basis, and gave them prominence over the federal centre. This did not matter so long as the Communist Party monopolized power. But once that monopoly ended, the constitution proved to contain a recipe for ethnic warfare. My point is simply that constitutions are not all that matters when it comes to the organization of a polity; nor are they necessarily more important than other

sources of order (or disruption). What other sources of order might then be available?

Discursive sources of order

A constitution is a shared set of formal rules; a discourse is a shared set of informal understandings. More precisely, any discourse consists of a shared set of concepts, categories, and ideas. Discourses construct meaning, establish relations across actors, define what is accepted as common sense. They can also embody power as their content serves the interests of some and represses the interests of others. They also embody power in a more Foucauldian sense, in that they can condition the behavior of those subject to them. Discourses are constituted by actions as well as the words accompanying actions.

Discourses can substitute for constitutions as sources of order. The two sources can also co-exist in variable proportions. Discourses can help constitute both governance and disorder, as well as being sources of influence on formal institutions (transnational and otherwise). From a democratic point of view, their capacities are especially interesting inasmuch as the contestation and engagement of discourses in the public sphere is central to discursive democracy (Dryzek 2000). Their role in constituting governance is especially important where formal institutions are absent or weak. I will return to this point below when I discuss the international system in particular.

Discursive democracy

If discourses matter in the way I have claimed, then the democratic question becomes one of determining how dispersed and competent control over their content, relative weight, and influence can be advanced. Concerning their content, matters are not straightforward, because discourses provide the context within which people think and act. Thus they are, like social structures in Giddens's terms, both enabling and constraining. Interventions from within the field of discourses that change the character of that field are still possible. Even routine actions can help reinforce a particular discourse (for example, abiding by the rules of war in a conflict). All that is required here is a degree of reflexivity on the part of actors: actions can be conceived in narrowly instrumental terms (in terms of goal attainment) or more broadly reflexive terms (considering the effect of an action on the content and relative weight of discourses). Of course this then begs the question of who might engage such action; intelligent reflexive action might be undertaken by the materially powerful with reinforcement of hierarchy and repression in mind, just as might be undertaken by the relatively powerless with redistribution and equality in mind.

Here the role of public spheres is important. A public sphere at its democratic best offers a broad arena of relatively unconstrained debate in which meanings can be contested and explored. Communication can be less constrained than within the formal institutions of government. This is where social movements and their associated critiques typically begin, and introduce dynamism into political life. Historically, liberalism, socialism, environmentalism, and feminism all had their origins in the public sphere, though all subsequently became incorporated into states. While some theorists (for example, Offe 1990) see this incorporation as the moment of payoff for a movement's struggle, when formal sources of order are weak, it may be equally or more productive to think in terms of the continually consequentially nature of the constellation of discourses itself. In international environmental affairs, for example, the relative weight of sustainable development and neo-liberal discourses matters enormously; as does the precise content of the sustainable development discourse, which over time has been bent in an increasingly business-friendly direction (Dryzek 2005). It is in the public sphere that such discursive contests are played out. Of course we need to attend to the conditions of communication within that sphere, which can be affected by propaganda, spin, advertising and other agents of deception and distortion.

The limits of constitutions

Discourses and constitutions are both capable of ordering the world. How, then, should we begin to think about what relative weight of these two sources of order is democratically most desirable in any particular context? I will begin here by contesting the standard presumption in favor of constitutional sources of order.

Constitutions by themselves are often not enough to secure a desired outcome. Constitutions that look fine on paper may fail if they lack a supporting discourse. So for example a constitutional structure of the sort that in the West was associated with reasonably lawful capitalist competition in several post-communist countries in the 1990s produced mafia capitalism. If reality proves recalcitrant in the face of what seems to be a good paper constitution then there may be a temptation to resort to coercion to bring reality into line. This is perhaps why market-oriented political reforms of the sort urged by constitutional political economy scholars are generally accompanied by a stronger, more coercive state (Gamble 1988).

Even constitutional provisions that seem to nurture communication in the public sphere may be suspect. Democratic theorists such as Habermas (1996) and Walzer (1991) unsurprisingly endorse such provisions and on the face of it deliberative democracy benefits, especially when it comes to government

protection of rights to free expression and association. However, the public sphere can sometimes be energized by *exclusion* from any share in political influence, because it is in oppositional public spheres that critique can best be developed (see Dryzek et al. 2003, discussing the comparative history of environmentalism). All this is to simply to say there is a fine line between protecting an arena of public debate and promoting it; protection is no problem, promotion may have its hazards.

In addition, there are forms of governance that are not easily captured by constitutions. There is now a massive literature on the rise of networked governance, where outcomes are produced in networks that transcend formal political jurisdictions and involve many kinds of actors, from both within and outside the formal institutions of government. Networks are not easily regulated by constitutional means; indeed, one of their defining features is that they evade constitutional formalities. Networks can, however, be regulated by discourses. A particular network might be coordinated in part by a shared discourse (for example, economic discourse might help bind transnational financial networks). Or a network might feature a discursive contest.

Transnational discursive democracy

Discourses are especially important sources of order where more formal kinds of order are weak. This can be seen most clearly at the global level. In the global system in particular, any project of deliberative or discursive democratization should focus in the first instance on the content and engagement of discourses in global public spheres (Dryzek 2006). If we look at today's world, important discourses in contemporary international affairs include the following.

Market liberalism is the dominant discourse in international economic affairs. The discourse dominates global economic institutions, in particular the International Monetary Fund and World Trade Organization; when applied by such institutions, it is described as the 'Washington Consensus'. But the discourse also pervades the understandings of many other actors in international financial and economic affairs, be they the economic and finance ministries of national governments, bankers, financial analysts, economic journalists, investors, or corporate leaders. The networked world of global business and finance is smoothed and coordinated by this shared discourse.

Sustainable development has since the 1987 Brundtland report been the dominant discourse in global environmental affairs, for example at the 2002

World Summit on Sustainable Development. At its core the discourse sees economic development, environmental conservation, and social justice within and between generations existing in potential harmony. Quite what this means in practice is contested, notably the degree to which contemporary economic systems need to be changed to achieve sustainability. There is also a continuing contest with market liberalism, which believes sustainability can either take care of itself, or is not a relevant value when it comes to ordering global systems.

Islamic radicalism currently energizes and coordinates the actions of a number of adherents in different countries. This discourse remains when any formal organizational structure or even networked structure is lost. Any 'war on terror' that sees the 'enemy' in terms of organizations that need to be attacked and destroyed may therefore be of limited success. This is recognized in Washington among those who propose a 'war of ideas' against Islamic radicalism; unfortunately that war of ideas is currently being lost, given the inept way it has been carried out on the American side.

Counter-terror is not just the opposite of terror. As a discourse, it highlights the threat of terrorism and legitimates all kinds of illiberal actions against those constructed as terrorists, be they eco-activists who destroy property (but never hurt people) in the United States, or armed independence movements in Third World countries. The opposite of counter-terror discourse is actually the international human rights discourse.

These are just some illustrations, there are many other consequential discourses present in international affairs.

International relations scholars who recognize the importance of discourses often subscribe to a hard line Foucauldian or post-structuralist position, in which discourses are seen in mostly hegemonic terms, as agents of oppression. These scholars are therefore skeptical when it comes to any more positive role that discourses have to play. As such, they continue the long tradition in international relations theory of all kinds that has nothing to say about democracy.

For better or for worse, the engagement of discourses can be found in international public spheres. The way this engagement unfolds can produce both advances and retreats when judged according to the three criteria of scope, franchise, and authenticity I introduced earlier. So for example when anti-globalization protestors began raising concerns about the consequences of globalization several years ago – very visibly in the 'Battle of Seattle' in

1999 – the eventual consequence was an advance on all three of these criteria. Concerning scope, the protestors established that a set of issues that were previously treated as technical matters to be decided in closed meetings of executive officials now belonged on a more public agenda. Joseph Stiglitz (2002) credits the protestors with this agenda-expanding achievement. Concerning franchise, influence over these issues was expanded to include a set of social movements previously excluded from negotiations – institutions such as the IMF and WTO began to organize civil society consultations. Concerning authenticity, a debate began where none had existed before. At the outset of this debate the protestors were ridiculed for raising contradictory concerns – seeking for example both to protect workers in developed countries and promote the interests of Third World countries in international production and trade. But these very contradictions meant that those who began to engage the oppositional discourse of anti-globalization had to think long and hard about how to reconcile competing interests and values. Overall, the global hegemony of market liberal discourse found a serious competitor, and so transnational discursive democracy was advanced. This change in the balance of discourses was consequential, inasmuch as global economic institutions took on a set of concerns they had previously ignored. Of course much remains to be done in order for competing values of social justice and environmental conservation to be taken anywhere near as seriously as economic values.

Conclusion

Democracy and democratization are matters of discursive interaction as well as the creation and operation of formal institutions. The engagement of discourses in the public sphere is an integral part of democracy at all levels: local, national, regional, and global. Recognizing that much is the easy part. The harder part is figuring out an appropriate balance between the formal and the discursive. It cannot be assumed simply that both should be endorsed and encouraged; for they interact in complex and sometimes counter-intuitive ways, so their easy co-existence cannot be assumed. I have already noted the degree to which exclusive formal institutions might inadvertently create space for the development of oppositional and critical public spheres.

As we move from the level of the state to a post-national union like the European Union to the global level, the relative importance of the formal and the discursive changes. As we ascend levels, the discursive grows in importance, simply because of the increasing weakness of alternatives to informal sources of order. Where, then, does this leave democracy at the EU level? As democratization via the constitutional route seems to have fallen on hard times, perhaps the informal and discursive route merits further attention.

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Chapter 3

Comment on John Dryzek's 'Transnational Democracy: The Formal and the Discursive'

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I agree with most of John Dryzek's rich and impressing paper and I am as sceptical as he is of 'models', 'cosmopolitanism' and 'constitutionalism'. However, I am so in a different way, and partly for very different reasons.

My first point is that models never work. Models miss what Thomas McCarthy (1994: 21) once called the 'normative surplus' of concepts such as democracy. Models are green table theory, democracy is practice, or as Dryzek states in his paper, an open-ended process or an open project. I would like to emphasize this point. We would miss the very point of modern democracy if we did not define it as an experimental project of expanding egalitarian inclusion – and this is completely different from all ideas of classical Athenian democracy and Roman republicanism.

Since the late 18th century the meaning of democracy has been centred around 'self-rule and equity'. This meaning can never be 'reduced to any particular set of institutions or practices', nor 'exhausted' by 'representative government' and 'national government alone' (Marks 2000: 2f, 103, 149f).

So far I agree completely with John Dryzek.

On the concept of cosmopolitanism, I argue that, from a democratic point of view, cosmopolitanism is nothing worth as long as it remains what Craig Calhoun (2002, 2003, 2005) has recently called 'cosmopolitanism of the few'.

Yet, cosmopolitanism is a good idea when it comes to, first, the hitherto negative cosmopolitanism of the many, and second, the question of cosmopolitan institutions.

The contemporary world is divided in two classes of people (Calhoun 2002): People with good passports, who enjoy the positive cosmopolitanism of the few, and people with bad passports, who are constrained to the negative cosmopolitanism of the many. If they stay at home they have to accept all the negative externalities of globalization as their destiny. If they go abroad they will most likely be second-rank citizens who run the risk of imprisonment, of having to take several low-paid jobs, and of living as illegal immigrants.

Negative cosmopolitanism of the many usually leads to passivity, apathy, resignation, and submission. It relies on external and internalized repression and is mostly bound to particularistic worldviews. Negative cosmopolitanism is a favourite subject of religious fundamentalists and parties of resentment. But in unusual situations the negative cosmopolitanism of the many can suddenly turn into a strong force of social change. It can engender communicative freedom, to talk with Jürgen Habermas (1996), and it can become the constituent power of people acting in concert and conflict, to talk with Hannah Arendt (1958).¹ So far I think John Dryzek and I are in accordance.

Nevertheless, when it comes to cosmopolitan institutions, I think, differently from Dryzek, and more in accordance with David Held (2004), that the concept of cosmopolitanism makes sense and that it is very important for globalizing democracy. This is so because democratic constitutional regimes are the only regimes, which – in principle – are able to again and again create new institutions that can cope with deep divide. Democratic institutions are necessary to handle deep conflicts of interest and value. This is so because democratic institutions rely strongly on legal formalism, and on constitutions that are designed to enable the people to change all existing institutions by formal procedures of legislation.² The capacity of democratically legitimated positive law and formal institutions to cope with conflicts of interest and

¹ This is the moment of truth that is entailed in Hardt and Negri's (2000) notion of 'multitude', in Foucault's (1972, 2005) concept of 'productive power', and similar ideas.

² Hirschman's (1997) fundamental opposition of two kinds of conflict, conflicts of interest, which are solvable, and conflicts of value, which are unsolvable, is deeply misleading, in particular because it misses the very point of democratic institutions. There can be deep conflicts of interest which are unsolvable – such as many class conflicts during the 19th century – as well as fundamentalist conflicts of value – such as those between Catholics and Protestants during the 16th century which were finally solved without repression of fundamental divide of value, due to the invention of democracy.

value is much higher than that of the informal public spheres, which are favoured by Dryzek.

At the level of the nation state a democratically designed system of legal institutions does not necessarily need a strong backing by national or nationalist habits of the heart. As we can see from the success story of all Western democracies after World War II, democratic nation states may even work better without such nationalist backing. They seem to be better off with an absent or a weak national sense of belonging than with a strong one. The same could be true with cosmopolitan institutions that are democratic. Once established, they are not necessarily in need of strong backing by a cosmopolitan *we-feeling* or a deep cosmopolitan consciousness and cosmopolitan habits of the heart. To run cosmopolitan institutions that are democratic, it needs no Beethovenian 'Bee embraced, you millions!', and it needs no Nussbaumian cosmopolitan education that transforms ordinary people into extraordinary virtuous cosmopolitans. What is necessary, however, to cope with deep divide, is an intelligent combination of individual rights and legal and political organization which are democratically accountable. A new global constitutional law of check and balances that is egalitarian is required. So are also political intellectuals such as James Madison and Emmanuel Joseph Sieyès.

On the third concept, I am, in accordance with Dryzek, I am sceptical of constitutionalism, and in particular of how it is perceived by German jurists. However, as opposed to Dryzek, I am not that sceptical of power founding democratic constitutions, and hence, I think that the global society can only become democratic if the already existing or emerging power that limits constitutionalism is transformed into a complex system of power founding constitutions that are democratically legitimated at all levels of the global society – from the sub-national, via the still very (maybe most) important national, to regional and global levels. I disagree with Dryzek's argument which reduces global and regional (European) constitutionalism to mere liberal power-limiting constitutionalism. This kind of constitutionalism is designed to limit the already existing undemocratic power of the current regionally and globally uniting executive bodies of states, together with other global players and winners of globalization, the owners and users of global economic and symbolic capital, in short: The emerging transnational ruling class.

Power limiting constitutionalism limits the power of the mighty. It enables them to stabilize and reinforce the cosmopolitanism of the few. But even if this (Marxist) insight in the limits of constitutions is true, constitutions are not

superfluous and a mere 'superstructure' – I also do not think that Marx thought them to be superfluous (Brunkhorst, forthcoming). Constitutions and constitutional textbooks do matter when it comes to strives and fights for democracy and 'more democracy' (Dewey 1927), and they matter when it comes to keeping democracy alive and reconstructing and extending democracy within already well-established democratic regimes.

Moreover, constitutions are double-edged. They might be designed by the ruling classes in favour of their own class-interest.³ However, legal textbooks and norms, and in particular constitutional ones designed in the interest of the ruling classes, 'can strike back' (Müller 1997). The French referendum over the European Constitutional Treaty in May 2005 was a legal act designed by the political-economic class of Europe to support their own symbolic power, and to keep people out of power. But as we have seen, the constitutional law of the referendum in this case strongly stroke back. Differently from John Dryzek, I believe in the power of law to change the world: All great European and American revolutions since the 12th century were legal revolutions, and all the great advances of modern democracy were legal advances (Brunkhorst 2005; Berman 2006: 1-29).

I agree with Dryzek that the informal realm of discourse, communicative influence and power, in short, all kinds of public spheres are indispensable for the life of democracy: They are the salt of the earth of democratic politics. However, public discourses are not alternatives to legal formalism, they are rather dependent upon such. Without a dense network of legal rules, legal formalism and legal institutions securing the equal value of public freedom, national as well as transnational publics are more a source of generating informal domination than a source of expanding democratic inclusion (Sunstein 1993). Only legal and constitutional formalism can emancipate us from informal domination and keep the legal principle of democratic inclusion alive (Möllers 2006). The emergence of more and more informal domination is the basic unsolved problem of the emerging global, regional and, in particular, European constitutionalism. Each step towards formalizing and legalizing the growing informal power of the new transnational ruling classes of Europe is a step towards European and global democracy.

³ The deeply realistic ruling classes of Europe were never sceptical of constitutionalism because they did not think that they were superfluous – with the purpose of keeping themselves in power (Allott 2003, 2006).

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Chapter 4

Democratizing the Transnational Polity: The European Union and the Presuppositions of Democracy

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Even as cosmopolitanism became a distinctly political rather than merely moral ideal in the eighteenth century, many cosmopolitans remained deeply suspicious of the world state, seeing it as a version of universal monarchy. Because of the deeply undemocratic character of current international political authority, many democratically-minded contemporary cosmopolitans have turned to the democratizing forces of transnational civil society in order to challenge the emerging globalized forms of power and domination. However important transnational associations and movements have been to many social struggles, they do not always promote the conditions for democracy; and when they do, they provide at best only one dimension of the process of transnational democratization. Instead, I argue here that the formation of transnational publics is more central than civil society to achieving the necessary conditions for democratization, precisely because they enable the emergence of the sort of communicative freedom across borders that could challenge potentially dominating forms of international authority. Some international institutions have incorporated democratic forms and practices, such as representation, voting and public hearings. But if democracy is at least in part to be defined in terms of inclusive and reflexive deliberation, then democratization requires more.

Why is democratization so central to the theory of transnational democracy? If we look at the EU, we find that democratization, understood as the capacity to reform itself democratically, has been limited. The impasse of the current constitutional convention shows in part the many difficulties that any polity inevitably confronts when creating legitimate institutions of democratic reform, all of which cumulatively lead to a potentially vicious circle: at any given time, a set of political arrangements may not be democratic enough to propose the means and ends for achieving its own democratization. The unresolved 'democratic deficit' of transnational institutions is to a large extent due to the inevitably political character of institutional integration, in which processes of law and rule making become removed from the channels of political influence for citizens, even as they continue to resemble recognizable legislative and juridical forms. The different possibilities for democratization beyond the nation state remain open to the EU, and seem to depend upon making European citizenship in some way comparable to the rich array of rights and opportunities that have emerged from long historical struggles for democratic reform within states. Furthermore, institutional and constitutional forms are not necessarily going to generate democratization all by themselves. This conception of democratization seems to forget the basic sociological fact that democracy can develop and flourish only under certain conditions, only some of which democracy can generate on its own. The naïveté of thinking that democracy can bring about its own preconditions has proven to be part of the ideologies of development and is often disastrous; the same is true of democracy as the supposed goal of self-defeating wars of intervention.

Practical questions about the appropriate means aside, the theoretical task of understanding democratization is made even more difficult conceptually by the fact that democracy cannot be understood univocally across types of polities or units of the same polity, precisely because it often takes a variety of institutional forms. But, as a working definition that fits this particular context, I offer the following. Democracy is that set of institutions by which individuals are empowered as free and equal citizens to form and change the terms of their common life together, including democracy itself. In this sense, democracy is reflexive and consists in procedures by which these very rules and practices are made subject to the deliberation of citizens themselves. Democracy is thus an ideal of self-determination, in that the terms of democracy are made by citizens themselves and not others. This definition does not, however, suggest the more specific conception of self-determination that guides much of democratic theory since the eighteenth century, since the ideal of self-legislation in a bounded political community is thoroughly imbricated with democracy's current difficulties. If it is self-rule,

it is the rule of the many and not of the few, and requires at the very least the terms of democracy themselves must pass through the deliberation of citizens.

In light of this analysis, my more specific aim here is to provide a positive account of democratization under transnational conditions. Given the absence of clear institutional channels and the difficulty in creating them, democracy is often thought to come 'from below,' out of the emergence of global civil society and associations. Despite the appeal of this image, it can hardly be doubted that states, organizations of states, and formal international institutions can also be important forces for democratic change, as the EU itself indicates. Whether some process is initiated from above or from below has no clear relationship to its contribution to democratization at the transnational level. On my alternative account, the concept of democratization has two parts: first, it requires institutions, publics and associations in which communicative freedom is realized; and, second, that this communicative freedom be linked to institutions in which members have normative powers and statuses through which they exercise their basic freedoms. Together, these conditions extend relatively uncontroversial social preconditions that have long been widely identified across many different modern theories of democracy: namely, first, the need for a rich associative life of civil society; and, second, for the communicative infrastructure of the public sphere that permits the expression and diffusion of public opinion. I use the term 'public sphere' in a technical sense that begins with Kant and has been developed further by Habermas (1989). Both give special salience to public deliberation as an important basis for democratization, and emphasize transnational institutional design as a means to entrench such conditions.

Distinctive to transnational politics, however, is the democratizing effect of publics based not in the unified audiences of national mass media, but rather in communicative networks that are as dispersed and distributed as the authority with which they interact. As John Dewey put it, the goal of such a process of institutionalizing dispersed authority is to create 'those conditions under which the inchoate public may function democratically' (Dewey 1988: 327). In the case of transnational politics, the inchoate publics under consideration are plural, and that makes a great deal of difference as to how we are to conceive of their emergence and contribution to global democratization. But while these publics offer hope for transnational democracy, they are only necessary and not sufficient conditions. To the extent that transnational associations help to form such counterpublics (opposed to the public addressed in current international institutions), they contribute to the capacity of international society to democratize its relations

of power and authority. However, counterpublics that challenge authority do not rule; and even if they did, we should not take this as a sign of an emerging 'global' public that speaks for the collective will of humanity (or even one that speaks for the multilingual 'Europe' (Kymlicka 2001: 94)).¹ However important civil society and public spheres are for developing communicative freedom, a further element is needed for democratization at the transnational level: there also must be some institutions in which people as not only members of publics and associations, but also citizens and bearers of rights. In the EU, these two conditions have been met to some degree, even if they have not been deeply entrenched.

My argument for this understanding of transnational democratization has four steps. First, I briefly consider the current structure of political authority at the transnational level and show that such authority is a course of domination. Second, I argue that transnational public spheres can provide the first condition for democratizing the transnational polity: the establishment of those social relationships characterized by communicative freedom. However, if such communicative freedom is identified solely with 'democratization from below,' it is insufficient for understanding the aims of such processes. The second necessary condition for democratization is nondomination, understood as the possession of certain statuses and powers that are normative to the extent that they provide collective control over duties, entitlements and obligations. The third step makes this republican dimension of democratization explicit in a conception of a democratic minimum, in which democratization depends upon the effective capacity to initiate deliberation. Finally, I argue that current theories of cosmopolitan and transnational democracy cannot elaborate sufficient institutional conditions that make democratization at the transnational level possible in the context of a multilevel polity such as the EU.

Above and below:

Democratic theory and transnational authority

Some conceptions of democracy demand that the people be able to control most decisions directly, by whatever means that might be achieved. In modern representative democracies, however, 'the people' speak only intermittently and at best only indirectly influence those who control the levers of power. Without regularized channels of political influence (such as elections and representation) in the international sphere, challenge and

¹ For criticisms of the idea of a European-wide public sphere, see Schlesinger and Kevin (2000: 206–29).

contestation by the broader public sphere of international public opinion seem to be the only ways to exercise indirect influence over decision making. In the absence of formal democratic institutions, the public sphere is the only place in which informal nongovernmental organizations (NGOs) can challenge political decisions and attempt to organize public opinion around matters of common concern across borders. When successful, they may become integrated into a 'regime' instituted to monitor the performance of various international institutions, as is the case, for example, with environmental groups who both monitor compliance to pollution and whaling regimes and represent environmental interests in discussions and negotiations of their relevant rules and policies.² In this way, NGOs now often act as surrogate publics and expand the scope of those who can influence decision making and implementation in public institutions. But would such regimes remain a permanent feature of a democratized transnational polity? Slaughter and others think of NGOs as products of informal governance networks, but they offer no real reasons that support their potential for democratization through communicative freedom or normative powers.

This sort of indirect public influence has some legitimizing force, but it does not by itself make such regimes 'democratic', nor does it solve the problem of domination inherent in the relatively independent operation of their quasi-legal powers. Although participation in regimes that are mediated through NGOs may indeed increase the number of actors who participate in decision making, it does not solve the basic difficulty of these emerging forms of political domination: the widening gap between those who govern and define the terms of cooperation and those who are governed and thus still remain outside of civil society.³ Indeed, the capacity to participate in international civil society is very demanding and presupposes certain kinds of statuses and powers not had by the world's poorest persons when faced with global corporate actors. Because of its entry requirements (such as the possession of some kind of recognized legal status), civil society can be as much the basis for inclusion as exclusion.

By comparison, state-oriented public spheres have significantly different features that have developed from long-term processes of democratization.

² Regimes in this sense are 'sets of implicit and explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations' (Krasner 1983: 2).

³ For a critique of such an idea of participation of civil society through NGOs interacting with experts, see Chatterjee (2004: 68-9).

Even when citizens do not influence decisions directly, they are able to exercise certain mutually granted normative powers as members of publics. In participating in free and fair elections, citizens have the normative power to change representatives and office holders and to express their consent to being governed. Given this channel for influence, citizens may be said to at least have 'electoral sovereignty'. This normative power of the collective will of the citizenry is dependent on the role of citizens within an institutional framework that allows for a distributed system of normative powers. In the event that political authority strays outside of the normal institutional channels of democratic influence, citizens can also exercise accountability through the 'contestatory sovereignty' of the *demos*, as when the voice of the people becomes salient in periods of constitutional crisis or reform.⁴ Even in a democracy, authority becomes unresponsive not only when citizens as a collective body are disempowered, but also because these democratic institutions were constructed for a public that is different from the one that currently exists. It is telling that in the international arena, many powerful institutions, such as the International Monetary Fund or World Bank, lack any mechanism for creating publics and channels of public influence over their agendas.

Viewed in terms of opportunities for public influence, international institutions introduce a further problem regarding their interaction with the public. To the extent that they are organized into a plurality of levels, international institutions manifest the heterogeneous polyarchy of political authority that is already characteristic of contemporary democracies. In so doing, they may sometimes amplify the antidemocratic tensions within the modern administrative state, particularly those based on the modern phenomenon of 'agency', a form of authority that is meant to solve the problem of social control for central and hierarchical authority. Given that the principals may not be in a position to monitor their agents even when given the opportunity, the very idea of self-government is eroded by those agency relationships that create the well-known phenomenon of a *reversal of control*. An example of such a reversal can be found in the evolution of such business intermediary roles as factor and banker, roles that often require the introduction of new 'legislative control in the interests of scattered and unorganized principals' (Llewellyn 1930: 484; also White 1985: 205). If democracy is the goal, then this reversal must be undone; and it cannot be

⁴ On the idea that the People speak only in 'constitutional moments', see Ackerman (1991, Ch. 1). Pettit (2000: 105-46) generalizes this idea by distinguishing between the authorial and the editorial dimensions of 'the people'.

undone merely through ad hoc popular consultation or through the use of largely self-appointed civil society organizations as surrogate publics.

How can such a reversal be avoided and authority democratized? Civil society remains too disaggregated to provide any political solution, however much the bottom-up strategy seems appealing and inherently democratic. Practices of empowerment by NGOs may have paradoxes built into them, such as when less well-off civil society organizations become accountable to better-off organizations in exchange for resources and assistance (See Ewig 1999: 97). Similarly, powerful institutions may co-opt and capture the NGOs that monitor them, especially if they have a say in the composition of the consultative bodies and thus exercise control over the public that influences them. Putting the public sphere back into the political structure leads to a very different understanding of deliberative political activity, one that does not automatically consider the entitlements of participants in terms of a relationship between those who govern and those who are governed. Given the role of publics in democratization, democratic politics ought in part to provide the forum in which publics act as intermediaries among civil society, markets and formal political institutions and in so doing create the means by which these relationships can become items on the political agenda across the entire structure.

This intermediate structure is necessary in global politics, in which top-down institutions remain remote from citizens, and civil society organizations alone cannot provide the basis for translating bottom-up deliberative opinion formation into political power. Such strategies fail because they ignore conditions necessary for the success of both democracy and empowerment that are found only by regularizing structural relationships between responsive institutions on the one hand and a vibrant civil society and robust public spheres on the other. For this reason, Dewey's causal conception of a public as 'all those affected by a problem' remains incomplete and indeterminate. A public sphere institutionalizes a particular kind of relationship between persons. As members of a public, persons regard each other as having at the very least the capacity and standing to address and to be addressed by each other's acts of communication. Call this the 'communicative freedom' of publics, a form of freedom that may take on a constructive role by which members grant each other rights and duties in their roles as participants in the public sphere. This freedom emerges from the interaction between the communicative power of participants in the public sphere and those more limited normative powers that they may have in their roles within various institutions. By acquiring such communicative freedom beyond the control of even a disaggregated authority, members of a public can

use the creative and constructive powers of communication to bind asymmetrical authority in a way similar to the obligations typical of the relationships between office holders and citizens. One way that such a public can effect a reversal of control is to see its emergence as recapturing the constituent power of the people as more than simple subjects, now in a dispersed form, when their constitutive power as citizens has failed. Such constituent power can reconfigure the character and interests of the principal. The current gap between public spheres and institutions creates the open question for citizens whether or not such authority has been legitimately exercised. The beginnings of popular control and thus some of the preconditions for democratization are not to be found in the moment of original authorization by either the sovereign or the unified *demos*, but in something that is more spatially, temporally and institutionally dispersed. Publics fit this description.

But before I turn to the public sphere as a location for the emergence and exercise of communicative freedom, let me address an issue that is in some sense both prior and fundamental to the difficulty of obtaining a foothold for democratization. What sort of public sphere is appropriate to challenging and reconstructing relations of political authority, especially ones that lie outside the boundaries of the nation state? Such transnational public spheres cannot be the same as the ones that emerged to help democratize the state. They will not be unified, but ‘distributed’ public spheres. By distributive I mean a form of communication that ‘decenters’ the public sphere so as to transnationalize it; it is a public of publics rather than a unified and encompassing public sphere in which all communicators participate. This will allow us to ask the question of popular control or the will of the people in a different way, framing it not in terms of a phantom public but rather as something akin to the generalized other in Mead’s sense. That is, a public should be understood distributively as both a ‘we’ and a plurality of interrelated individuals. Or, as Aristotle put it: “all” can be said in a variety of ways’ – in the corporate sense, or in the distributive sense of each and every one (Aristotle 1998: 1261b). In order to become political again, popular control must become disaggregated into the constituent power of dispersed publics to initiate democratization that aims at the transformation of a variety of institutions.

Current transnational publics are weak, in the sense that they exert influence only through general public opinion without the benefits of institutionalized deliberation. Or, as in the case of NGOs with respect to human rights, publics may rely heavily on supranational judicial institutions, adjudication boards and other already constituted and authoritative bodies that exercise

authority on the behalf of an indefinite plurality of persons. Nor will public spheres produce democratization on their own, as John Dryzek insists when he argues that ‘deliberative and democratic global politics can most fruitfully be sought in the more informal realm of international public spheres’ (Dryzek 2006: vii). Absent in the informal realm is the republican dimension of democracy, which solves the problem of transforming communicative freedom into communicative power.

The republican conditions for democratization: Communicative freedom and normative powers

The proliferation of principal/agent relations is part of the context of globalization, in which various international organizations and administrative office holders act as agents for their principals, national governments (whether democratic or not). The problem they solve is the typical agency problem of networked social relations and activities that cut across many types of political borders. These sorts of social activities in question now affect an *indefinite* number of people and thus have a distributive character in the sense that I have been using the term. In order to face the problem of domination inherent in such processes, it would seem more is required than communicative freedom, that is, the freedom generated by the mutual recognition of others as participants in public spheres. It might seem that in addition to such freedom, a fair scheme of cooperation across borders is required—perhaps, as Rawls suggests, a ‘law of peoples’ that makes possible ‘a relation of fair equality with all other societies’ (Rawls 1999: 121–2). Similarly, cosmopolitan democracy asks for the protection of freedoms that depend on membership in a specific political community or overlapping set of them. As Held puts it, as ‘members of the political community citizens should be able to choose freely the conditions of their own association’ (Held 1995: 145).

Both of these approaches share with my view the importance of membership, of having normative statuses and powers that come from membership in a specific political community. They also point to the recognition that communicative freedom is only one aspect of securing nondomination. More is still required, and many different views of democracy see this freedom as derived from political membership. The difficulty here is that autonomy or self-determination is either too broad or too indeterminate. If it is thought of broadly, then it requires independence rather than interdependence, and such independence in currently asymmetrical processes of globalization is a matter of superior bargaining position. When democracy is not connected to

membership in a particular democratic community, it seems to lack the conditions that make the powers of citizenship effective. What might these conditions be?

Effective powers of citizenship are possible only on two conditions: communicative freedom and the democratic minimum, where the latter is understood as a specific normative power, the shared ability to initiate deliberation about the content of some institutional scheme. These are also necessary conditions for a specific kind of political freedom: freedom from domination. How does appeal to nondomination avoid this indeterminacy and fill out these two conditions as the aim of democratization? In democratic communities, nondomination is manifested in the ability of each member of such a scheme to avoid having its terms set by others. But the only way in which each can have this ability is that if all have it and thus enjoy their cooperation as a product of their common liberty. In order to develop these possibilities further and suggest the appropriate remedy, it is first necessary to develop an appropriate conception of nondomination itself. This conception should do justice to the democratic minimum, as well as take into account the ways in which institutions and public spheres are the means to develop such powers and freedoms. Central to such a minimum is that one's statuses, rights and duties cannot be changed arbitrarily without deliberation. Following Pettit's view of domination as arbitrary interference, we may instead think that the indefiniteness of social action allows new and wider opportunities for others to arbitrarily interfere in our lives, where those who are dominated have no effective legal means of resisting such interference. Pettit includes among potentially arbitrary influences 'financial clout, political authority, social connections, communal standing, informational access, ideological positions, cultural legitimation and the like' (Pettit 1997: 52). In Pettit's conception, such arbitrary influences have to do with properties of agents, who are able to exercise their will arbitrarily to achieve their freedom at the cost of the interests of others.

But what makes such interference arbitrary cannot be determined simply by reference to the interests or the wills of the affected parties. Arbitrariness as a predicate makes sense only on the normative background of rights, duties, roles, and institutions that actors take for granted in their social action, including various legal and political rights. For this reason, Henry Richardson has criticized Pettit's republicanism for giving a 'non-normative definition of domination' that concedes too much to liberal non-interference (Richardson (2002: 34). Richardson argues instead that domination and nondomination are inherently normative notions, that 'the purported exercise of a normative power

– the power to modify the rights and duties of others – is essential to the idea of domination’ (Richardson (2002: 34). Domination is thus not just the capacity to interfere arbitrarily in another agent’s life, but also the capacity to make use of distinctly normative powers that operate against this institutionalized background of legitimate norms; it is thus the ability to impose obligations and duties arbitrarily. The key here is then to recast the important term ‘arbitrary’ in terms of the use of normative powers to purport to impose duties on others.

What is it to use normative powers with respect to duties and statuses arbitrarily? Dominators stand in some normative relation to the dominated, as father, or king, or colonial administrator, who exercises the normative power of authority to change the normative statuses of the dominated arbitrarily. However, the ‘rational’ administrator may well decide rationally and impartially to impose new duties for the sake of the common good and even in conformity with general legal rules that are publicly known.

As these examples show, domination is not merely the violation of settled expectations in social roles and relationships, especially if these expectations are themselves unjust. As such, domination does not require that a power be used arbitrarily in the sense of being a violation of a rule or norm of a practice. If this were so, then certainly many cases of social exclusion would not be considered forms of domination. Something more is required than the violation of a settled expectation: namely, the use of normative powers without recourse or remedy, without effective opportunity to be able to influence that use. In this way, ‘citizenship is a status that exists of necessity, in a suitable legal regime’ (Pettit 1997: 35). that is sufficient for nondomination so long as this normative status is independent of the good will of others. The stability of normative expectations, or justice as regularity in Rawls’ terms, is too weak to capture the normative powers that enable citizens to transform public opinion into political power.

In no other role or location than as citizens in democratic institutions do members of modern societies exercise their normative powers of changing obligations and statuses under the condition of common liberty. In this case, obligations are not imposed, but are the product of the joint exercise of normative powers and communicative freedom that shape them. Certainly, other forms of authority exist in modern societies that also make it possible for these statuses and obligations to change without popular influence or the discursive control of citizens. Democracy itself is then the joint exercise of these powers and capacities, so that they are not under the control of any

given individual or group of citizens but are jointly exercised by all. The central precondition for such nondomination is the existence of the public sphere, a space for the exercise of common communicative freedom. This space must now be transnational as well as a new kind of public sphere with new forms of technological and institutional mediation. Without this open structure of publics, the overlapping and crosscutting dimensions of interactions across various political communities could not now secure the freedom that is sufficient for nondomination. If this were the aim of transnational democratization, what sort of institutions would allow such interactions?

The democratic minimum and the conditions for legitimate reform

Before developing this institutional and transnational account further, concepts of communicative freedom and normative powers have to be united in a way that helps to elaborate certain minimal conditions that make reflexivity possible. According to my working definition, democracy is that set of institutions and procedures by which individuals are empowered as free and equal citizens to form and change the terms of their common life together, including democracy itself. In this sense, democracy is reflexive and consists in procedures by which rules and practices are subject to the deliberation of citizens themselves. Democracy is thus an ideal of self-determination, in that the terms of self-rule are made by citizens themselves and not others. The *democratic minimum* serves to designate just those necessary conditions of nondomination necessary for democratization, that is, for citizens to be able to form and change the terms of their common life. The same conception could be expressed in terms of basic human rights, but these would have to include political rights as well as rights of membership, such as the internationally recognized 'right to nationality'. Existing democracies often use human rights standards to deliberate about the adequacy of the established practices of the community. When these deliberative practices are part of the international system, human rights are the main currency of evaluation. But much like the democratic ideal itself, the content of human rights is often historically specific, as, for example, when international treaties argue for rights to vote and even for highly specific liberal conceptions of self-determination. Moreover, rights are often cast only in terms of juridical protections, leaving aside political rights that are equally basic freedoms. Any full account of human rights must include reference to those statuses that are implied by rights against tyranny and domination, which form the republican core of the basic freedoms that are central to human rights.

For this reason, the democratic minimum must be expressed in terms that go beyond the usual set of minimum protective rights and negative liberties. Indeed, the Universal Declaration of Human Rights includes not only political and civil rights, but also a fundamental entitlement to an institutional system that fully realizes the whole range of human rights (UDHR, article 28). The 'democratic entitlement' that has become part of international law is justified precisely because of the recognition that democracy is necessary in order to realize human rights. In an appropriately structured transnational democracy, such rights are multiply and robustly realized in ways that do not require the single unitary and state-like structure that worried Enlightenment cosmopolitans. Promoting human rights requires, in Dewey's terms, not merely more of the same democracy, but the possibility of a new and better form of democracy interacting with new, transnational publics.

Why does the realization of human rights require democracy? If among human rights are political rights, these can only be realized where there is meaningful political activity. Such activity may not yet be present in transnational contexts, but it is a constitutive condition for the exercise of these rights, as are certain kinds of statuses and powers that make it possible for citizens to address claims to each other. The democratic minimum permits meaningful political activity to emerge, since it attributes to each citizen the capacity to initiate deliberation, and thus to take up the common activity of deliberating about common concerns, including the agenda of political institutions and the rules which guide political activity within them. These normative powers represent a minimum sense of self-governance that does not presuppose any particular conception of democracy, but instead can be realized in a variety of practices and procedures. At the same time, some institutions that are regarded as democratic in the broad sense do not realize human rights sufficiently, so that citizens can use their normative powers to begin to demand that their institutions and practices be deepened or expanded in some way in response to claims of justice. These rights thus require that practices of meaningful political activity be established.

Given its goals, the theory of the democratic minimum requires thinking about democracy and the capacities of its institutions in new ways. Institutions need not be ideally just to achieve the democratic minimum, but may rather need to equip citizens with certain powers. The obvious place to begin in developing the democratic minimum is in terms of the republican account of those human rights that contribute to having the status of being a free and equal citizen. I argue later that the absence of tyranny that is entailed by membership in humanity is a basic condition of any just polity.

Nonetheless, this absence of tyranny may not reach the democratic minimum, although it certainly reaches something more fundamental in cases of extreme injustice. While the conditions necessary for nontyranny are part of nondomination, it may well be the case that democracies in settler societies that continue to act tyrannically toward aboriginal peoples have not yet met all their obligations to realize human political rights.

In the standard liberal view, this nontyranny condition could be fulfilled by simple noninterference, thus making rights against tyranny a very plausible political means to realize more justice. But this argument falls victim to the democratic circle in presupposing that the conditions of justice already hold. Nontyranny is insufficient to establish the potential reflexivity about normative powers necessary for rectifying injustice. For example, even if protection against the worst injustices were secured by mechanisms of consultation in a Rawlsian decent hierarchical society, the terms of justice and the framework for assigning normative powers would not thereby be made part of the democratically open agenda. A consultation hierarchy promotes a particular conception of the common good by defining only certain reasons as relevant, such as those in accord with a specific interpretation of a specific religious tradition. In this way, the framework for deliberation is prescribed, and only those members who formulate their reasons accordingly will be consulted. This means that members of such societies do not possess communicative freedom in a sufficiently robust sense and thus lack the power to initiate deliberation. Instead, they are merely consulted on terms that they cannot alter. However decent, consultation alone cannot create the conditions for public inquiry that would be effective in securing the democratic minimum.

Another important aspect of democratic theory transformed by the focus on the democratic minimum concerns the requirements for legitimate authority. To grant only powers of consultation and contestation falls well short of democratization, as is manifested in the republican contrast between citizen and slave. Unlike the slave, a citizen has the ability to begin, *to initiate deliberation*, that Arendt calls the supreme human freedom. By contrast, whatever freedoms are granted the slave, she remains dominated and thus lacks any intrinsic normative authority even over herself; at best, she may only follow the initiatives of others. The capacity to begin indicates a fundamental authority, as being what Rawls calls 'a self-originating source of claims'. But such claims themselves are not self-authorizing, but also addressed to another such source, and thus take place within a community of persons with such authorization. The capacity to begin deliberation, rather

than for the achievement of greater or lesser available liberties, thus provides the basic measure for the statuses of persons required for democratization. It should also be noted that extreme destitution creates conditions that are functionally equivalent to tyranny and the absence of political rights and other basic freedoms.⁵

With a deliberative democratic minimum in mind, we can now diagnose the complementary weaknesses of current cosmopolitan and transnational approaches. On the one hand, transnational approaches that emphasize contestation are unable to produce a coherent account of how nondomination would be generated in the absence of effective deliberative institutions to transform such public opinions into political power. On the other hand, cosmopolitan approaches cannot identify a feasible process by which international institutions could be democratized so that the global *demos* could act autonomously through public law. In taking the framework of global order to be constitutive of deliberation, it leaves out the reflexive task of democratization. In order to develop the virtues of a more republican account, the democratic threshold of 'freedom as the capacity to begin' must be a fundamental political right. This right can then be further operationalized in two ways: first, in terms of the capacity of citizens to initiate deliberation in order to amend the basic normative framework; and, second, in terms of the capacity to set an item on an open agenda and thus to initiate joint, public deliberation. How and in what sense this basic democratic capability can be constitutionalized is thus a fundamental question for a transnational polity, since the democratic minimum requires this kind of reflexive order. It would also require that such reflexivity could be exercised across a highly differentiated institutional structure, such as the one developed in the EU.

These sorts of institutions permit the expansion of membership and jurisdiction and along with it new normative powers for citizens; under the proper circumstances of justice, their deliberative boundaries are porous. A polity that closes this open space for the initiation of deliberation on injustice may fail to meet the democratic minimum. Even if democratic in some respects, such a polity lacks the requisite resources for deepening and extending democracy. Such an arrangement may fail to produce justice due to democratic domination through law, that is, through the democratically arbitrary character of membership in a single *demos*. If nondomination is to be realized transnationally, borders must be included in the open agenda through

⁵ Besides Sen's work on capability failure, see Pogge (2002).

which citizens are able to reorder the existing order and change the terms of democracy itself. It is indeed unlikely in an interdependent world with various new forms of nondemocratic authority that democracy can exist solely at one level, whether national, global or transnational. Thus, the democratic minimum has to be widely and multiply realized as a kind of common freedom realized in the whole of any just transnational order, a freedom from domination that can be had only if it is shared with others. Only under this condition, is it no longer possible for citizens to dominate other citizens.

Institutions and democratization

In this section, I consider the adequacy of various accounts of transnational democracy in light of the demands of democratization rather than the content of any specific theory or ideal of democracy: that is, I ask whether such theories enable *democratization*, of creating the reflexive conditions necessary for enhancing democracy through more democracy. I have called this capacity of democracy to reform itself an aspect of the democratic minimum, since it is required both for reflexivity of institutions and for the nondomination of citizens. In order to develop a specific account of the transnational democratic minimum, let me turn first to the core dispute in theories of cosmopolitan democracy. It is really a dispute between two forms of political cosmopolitanism, neither of which provides an adequate theory of democratization under the current circumstances of globalization. In order to develop the particular alternative that I favor, I first develop an exhaustive typology of the main theories, which can be associated with two opposed pairs of thinkers: Buchanan and Habermas on the one hand, and Held and Dryzek on the other. The current discussion can be reconstructed on four main axes: political or social, institutional or noninstitutional, democratic or nondemocratic, and transnational or cosmopolitan. After considering Buchanan, Habermas, Held and Dryzek as the best representatives of particular positions, I develop my own political, institutional, democratic and transnational account. This alternative account can be developed, such that it incorporates the strengths of each while overcoming their fundamental weaknesses.

The best place to begin is to consider the most minimalist account of international democracy, which is offered by Allen Buchanan. This minimalist impulse informs Rawls' work, so much so that he is best thought of as a social rather than a political cosmopolitan. Rawls proposes that we should determine the basic structure of institutions that peoples would agree to in the original position, while tempering the scope of these institutions

through toleration required by the fact of pluralism. The result leaves no room for genuinely political and democratic institutions outside of states that organize peoples. Buchanan endorses this moral minimalism about basic rights, but disagrees about 'how minimal this minimum is' (Buchanan 2004: 176). The next step for Buchanan is to accept a minimal justification of democracy on instrumental grounds that democracy protects 'basic' human rights through the 'right combination' of representative institutions; these institutions are said to 'most reliably achieve the accountability necessary for protecting basic human rights', understood as basic interests that are essential to leading a decent human life (Buchanan 2004: 189). Thus, Buchanan is a political cosmopolitan who endorses political rights and democratic institutions as necessary for the accountability of any institution, including international ones.

Such an instrumental justification is insufficient on its own terms. If among human rights we include political rights and the right to democracy itself, as Buchanan suggests, then democracy is not merely a means to realize human rights, but constitutive of them. Such an instrumental justification cannot justify the full democratic entitlement typically recognized in international law to the extent that it permits, as Buchanan admits, tradeoffs in the international system between 'the capacity to protect basic human rights and building its capacity for democratic governance' (Buchanan 2004: 189). If democracy were indeed a basic human right, then these tradeoffs would be contradictory. Moreover, even the most minimal democracy presupposes the very rights that it is supposed to protect. As even Schumpeter admits, for example, free competitive elections 'presuppose a considerable amount of freedom of discussion *for all*' (Schumpeter 1947: 271-2). Given the intrinsic justification of democracy and the constitutive features of citizenship that are necessary for accountability, democratic minimalism fails to provide a sufficiently robust conception of democracy, leaving the institutional and political bases of accountability unexplored. The central feature of democratic accountability that political rights enable is a distinctive form of reflexivity in which citizens are jointly empowered to refashion the terms and rules of democratic governance itself. Indeed, social scientific generalizations about the protective effects of democracy in the case of famines or wars point not to the efficacy of representative institutions as such or even to the rule of law, but to the creation of the conditions for an active citizenry with robust powers and entitlements that secure accountability through better democratic practice.

The second conception is associated with the work of Habermas and is more strongly democratic, to the extent that it is guided by a particular ideal of a self-determining people who govern themselves by acts of legislation. Democracy on the nation state model connects three central ideas: that the proper political community is a bounded one; that it possesses ultimate political authority; and that this authority enables political autonomy, so that the members of the *demos* may 'choose freely the conditions of their own association' (Held 1995: 145). The normative core of this conception of democracy is the conception of freedom articulated in the third condition: that the subject of the constraints of law is free precisely in being the author of the laws. This conception is not only historically specific, but also cannot provide the basis for an account of the democratic minimum or institutional pluralism despite his recent efforts in this direction (Habermas 2004: 113-93). Habermas cannot have it both ways. When considering various disaggregated and distributed forms of transnational political order, he describes them in nondemocratic terms, as a 'negotiating system' governed by fair bargaining (Slaughter 2004). This is because he clearly and indeed surprisingly accepts that self-determination through legislation is the deciding criterion of democracy, leaving negotiation among democracies as the fundamental form of political activity at the transnational level and the core of human rights protection a matter for coercively backed by juridical institutions. As in the case of Buchanan's minimalism, this less demanding standard of legitimacy does not include the capacity to deliberate about the terms governing the political authority of the negotiation system itself. This position is transnational, but ultimately nondemocratic.

David Held's work on cosmopolitan democracy provides a more complete account than the previous two minimalist democratic positions. It is also more closely tied to an empirical examination of the impacts of globalization than Habermas's conceptual claims, and thus does not so easily take over the metaphysical assumptions of social contract theory. Not only does Held show how international society is already thickly institutionalized well beyond the systems of negotiation that Habermas makes central, he further recognizes that 'individuals increasingly have complex and multilayered identities, corresponding to the globalization of economic forces and the reconfiguration of political power' (Held and McGrew 2002: 95). Such potentially overlapping identities are the basis for participation in global civil society, in nongovernmental organizations (NGOs) and in other transnational civil associations, movements and agencies that create opportunities for political participation at the global level. The enormous advantages of Held's approach over the other two approaches are thus threefold: an emphasis on a

variety of institutions; a multiplicity of levels and sites for common democratic activity; and a focus on the need for organized political actors in international civil society to play an important role in a system of global democracy. For all these advantages, the self-legislating *demos* reappears in Held's explicitly Lockean insistence that 'the artificial person at the center of the modern state must be reconceived in terms of cosmopolitan public law' (Held 1995: 234). In order to reconstitute the community as sovereign, Held argues that the *demos* must submit to the will of the global *demos*: 'cosmopolitan law demands the subordination of regional, national and local sovereignties to an overarching legal framework' (Held 1995: 154, 236).

That this framework is both a 'legal' and an 'overarching' one raises a potential democratic dilemma for such a global *demos*. In order to be *overarching*, the framework must instantiate a hierarchy of authority. In order to be *democratic*, the common framework will have to pass through the collective will and reason of its citizens, thereby recreating at the global level the contractual moment of a determinate 'people' granting each other their mutual rights. In willing the general framework, the exact character of the rights and obligations that the common structure of political action necessarily entails cannot be fully determined. At the same time, however, in order to be *enforceable*, these rights and duties must be specified in some way by an authoritative institution possessing the competence to do so, and thus it must act both legislatively and judicially. The dilemma can be put this way: if it acts judicially, it seems undemocratic; yet, if it acts legislatively, it has no special democratic status over other legitimately constituted legislative wills and requires a much more differentiated democratic structure, insofar as it cannot exercise the power of the *demos* without risking an increase rather than a decrease in domination. I return to this theme below when discussing the European Union.

The fourth and final position can be called 'transnational' rather than cosmopolitan, precisely because it rejects the traditional state model in favor of a 'bottom-up' strategy that promotes a robust transnational civil society as the nonjuridical basis for an alternative to the subordination of citizens to a common framework of public law. This account rejects the analogy to democracy in the nation state *tout court*, seeing states as tending toward ever-greater democratic decline and thus hardly a model for international institutions. According to John Dryzek, its leading proponent, 'there are imperatives that all states must meet' that are located in the core areas of its functioning, including economic growth, social control and legitimation. These imperatives impose 'structural limitations' on the state's

public orientation in matters of policy (Dryzek 2002: 93). Among these are the structural limitations of capital on redistributive policies, now exacerbated by the mobility of capital in globalization. In the international arena, Dryzek's approach is further supported by the increasing importance of NGOs and the emergence of transnational public spheres, consisting primarily of informal networks of association and communication. It is also supported by the emergence of various international 'regimes', that is, agreements about the rules and decision making procedures that regulate specific activities or domains, including commercial whaling, the rights of children, nuclear accidents, and so on.

As with Held's insistence on an 'overarching framework', this shift to informal networks and weak publics from below comes at a high price for democracy. The complementary weakness to Held's juridical model derives from the fact that on Dryzek's account transnational democracy can only be 'contestatory'. Dryzek thus ends up with a kind of institutional minimalism that also elides the dimension of active and empowered citizenship. This is most evident in the following sort of claim: 'Most of the government that does exist (in the form of organizations such as the UN, WTO or the EU) is not at all democratic, which suggests that transnational democrats might usefully focus their efforts on governance' in which civil society already has a large contestatory and discursive role (Dryzek 2002: 133). But what is the alternative means by which those who suffer injustice in the current system can convert their claims into effective political power? Lacking any clear account that would identify the terms of successful democratization and of how the powerless are able to entrench their claims institutionally, contestation is not the proper activity that the dominated require. The same is true of Held's more maximalist account, since the kind of institutional framework that he develops, while differentiated and multileveled, does not address the issue of the appropriate active powers of citizenship sufficient for democratization in the international sphere. The minimum here must be sufficient to contain within it the necessary conditions for nondomination.

A normatively richer alternative is to reject both bottom-up and top-down approaches in favor of an approach that emphasizes vigorous interactions between publics and institutions as the ongoing source of democratic change and institutional innovation. Here deliberation replaces contestation as the proper democratizing activity. An adequate theory must in this respect be more like Held's cosmopolitanism, with its well-articulated multileveled institutional structure. In this way, the account of transnational democracy offered here will preserve the best features of these other conceptions, while

overcoming their fundamental weaknesses. Above all, it will emphasize open-ended, yet institutionally organized process of deliberation and decision making, the structural features of which are already realized to some degree in the EU.

Such an interactive and deliberative approach can also appeal to some actually existing institutions to test for feasibility and adequacy. Indeed, the European Union exhibits this basic structure well, and includes novel ways of organizing public deliberation across borders. In particular, Sabel and others have discussed interactions between publics and institutions that facilitate citizens' influence over dispersed but empowered decision-making processes, such as the Open Method of Coordination (OMC) in the EU. Novel deliberative institutions such as the EU committees that coordinate the OMC can act as institutionalized intermediaries that facilitate interaction, communication and the exchange of information across sites and levels in a complex and iterated process of decision making. Even if such processes are still in need of further democratization, they exhibit two core institutional features lacking in Dryzek's transnational conception: they are both deliberative and reflexive. Given these two features, they can make dimensions of decision making such as agenda setting and the normative framework that empowers the public open to democratic control. Such feasible democratizing processes embody just the sorts of interactions among publics and institutions that, as Dewey put it, 'break existing political forms'. In this case, a principle of the institutional differentiation of deliberative forums provides the basis for a transformation of the unitary structure of sovereign states that also goes beyond the indefinite plurality characteristic of publics. Nonetheless, this sort of institutional structure is open-ended, even as it distributes normative powers to a variety of participants.

I appeal to these processes not in order to defend Cohen and Sabel's idea of directly deliberative polyarchy, but rather to show a kind of institutional arrangement that has the potential for fulfilling the democratic minimum. Whether or not such a deliberative process ultimately succeeds in achieving the ends of democratization, this EU practice exhibits the structural features by which communicative freedom exercised across publics can be transformed into communicative power across institutional levels and sites. It is likely that such forms of deliberation would have to be organized around self-consciously constructed publics with certain decision making powers to act on behalf of other citizens, who in turn may have powers as members of other publics. Certainly, it helps in overcoming problems of administrative discretion and other sources of domination.

Another potential effect on such a conception of democratization applied to the EU would be to widen the scope of the principle of subsidiarity, even as it demands that this principle not exclude deliberation across the appropriate units. But the overall goal of such processes is to make the EU, its member states, and local units more democratic at the same time by sharing authority and decision-making power. Similar processes are now being employed in recent ‘twinning practices’, the aim of which is to self-consciously encourage democratization and the enactment of human rights through common deliberation and planning among member and applicant states (Zeitlin and Sabel 2006: 68–71). These processes introduce the potential for the requisite reflexivity necessary for democratization in particular domains. One, perhaps surprising result of such mutual influence is policy differentiation rather than harmonization, a result that is consistent with the exercise of communicative freedom and normative powers across *demoi*.

Conclusion: Democratizing the transnational polity

If we ask ourselves whether democratically organized societies are likely to become more rather than less interdependent, pluralistic, and complex, it is clear that they will to the extent that democracy entrenches such conditions, even as they interact back upon its institutions and require that they be transformed. These very conditions that cut across borders can promote injustice and even possibly turn a virtuous democratic circle into a vicious one. In that case, democratization is required at various levels at once, and to do this requires that citizens initiate experimental forms of deliberation in new contexts.

My argument here has been two-sided. On the one hand, I have developed an account of the potential for a new distributive form of the public sphere that creates certain preconditions for democracy, specifically, the conditions necessary for communicative freedom that emerge in the mutual recognition of participants in the public sphere and in their struggles to maintain the public sphere against censorship and other arbitrary forms of dominating political authority. On the other hand, I have argued that such freedoms can be secured only through innovative institutions, in which the democratic minimum becomes entrenched in various basic rights. In each case, new circumstances suggest rethinking both democracy and the public sphere outside the limits of their previous historical forms. Rethinking publicity allows us to see that some critical diagnoses of the problems of new forms of communication and publics for democracy are short-circuited by a failure to think beyond what is politically familiar. If my argument is correct that distributive publics are able to preserve and extend the dialogical character of

the public sphere in a potentially cosmopolitan form, then a deliberative transnational democracy can be considered a 'realistic utopia' in Rawls' sense; these new public spheres extend the range of political possibilities for a deliberative democracy across borders.

The support for these claims is both normative and empirical. It is normative to the extent that it shows the superiority of a particular sort of reflexive democracy over other nonstate-oriented possibilities, such as transnational contestation from below or public legal frameworks from above. It is empirical, because it considers the political realities of increasing interdependence and its consequent potential for domination given the limits of current realizations of human rights and democratic capabilities. The next step in the argument would be to show that such a democracy of *demoi* is sustainable. While this argument cannot be developed fully here, the general principles of institutional design discussed thus far suggest what to look for as institutional locations for the exercise of communicative freedom and normative powers. If justice is best realized among dispersed *demoi* in a multiunit polity, then its stability relies not on the centralized power of some sovereign, but on robust connections across diverse *demoi* and institutional locations. For example, directly deliberative designs in the EU rely on institutional actors to collect information, compare the success of various decisions on policy and mediate communication and deliberation at various levels. Other institutional actors, such as office holders and representatives, can act as intermediaries among various *demoi* if these representatives see themselves primarily as citizens.

One of the best insights of transnational republicanism has been precisely to show that properly organized and differentiated democratic institutions can function as intermediaries and promote public interaction and nondomination across borders. In so doing, they can be thought of as part of a long-term project of transnational democratization that extends the democratic minimum across democracies. It may be first instantiated in a European Union capable of reforming itself democratically because the terms of political integration will finally pass through the effective deliberation of citizens, who have both the communicative freedom and the normative powers to set this very item on the agenda.

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Chapter 5

Cosmopolitan Republicanism or Republican Cosmopolitanism?

Comment on James Bohman's 'Democratizing the Transnational Polity'

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There are few scholars who rival James Bohman in the thorough combination of conceptual, normative and empirical arguments that characterizes his work. Bohman further synthesizes two central strands in political theory which usually are at odds into a unique brand of 'cosmopolitan republicanism' – or maybe of 'republican cosmopolitanism' (an alternative I will scrutinize). I agree with many of Bohman's essential points, yet in what follows I will try to highlight some questions worthy of discussion.

There are a number of issues raised by focusing on the EU through a cosmopolitan lense. Generally speaking, the basic challenge as I see it is that *if* the arbitrary exercise of power on a transnational scale – as a phenomenon of global injustice – is the basic problem that a theory of the transnational 'democratic minimum' has to address, as Bohman argues, *then* the EU not just in its current form, but also in its aims and aspirations, may prove to be a questionable model for transnational democracy. This is not primarily due to the paradox the EU raises (which Bohman also refers to) which points to a number of (national) democratic reasons against (transnational) forms of democracy while at the same time pointing to a number of reasons against the illusion of preserving national democracy in an age of globalization. Rather,

the essential point is that from a cosmopolitan standpoint the EU may – even more paradoxically – appear as a supranational entity of ‘higher-order nationalism’, overcoming internal borders in order to erect tighter ones to the outside world. It is not clear what a ‘European identity’ amounts to, but if there is one, it is defined in part by excluding the cultural ‘other’ and by political ideas of prosperity, stability and security as central European values with problematic implications for the questions of borders and of sharing decisions and resources with those outside the Union. In a nutshell, if ‘non-domination across borders’ (p. 87)¹ is the normative aim, the EU could play a constructive role, but it would have to be redefined to quite some extent.²

With these introductory remarks, let me now turn to Bohman’s paper in more detail. Its main point is well taken, and it rests on a republican intuition, indeed. As regards the question of how to establish forms of transnational democracy, Bohman tries to steer a middle way between a model that emphasizes the democratic potentials of transnational civil society on the one hand and a classic view of democratic self-determination based on the idea of a bounded *demos* on the other. He does, however, hold onto an ideal of self-determination, which distinguishes him from a more amorphous and non-institutional civil society perspective. Hence, mere ‘communicative freedom’ of citizens is not sufficient for democracy. The concept of democracy is here understood in a reflexive mode, as a form of politics in which free and equal citizens ‘form and change the terms of their common life together’ (p. 66). Thus, a second component must also be present, which Bohman calls ‘normative powers and statuses’ (p. 67), that is, institutional settings in which certain publics (the plural plays a major role here) have the means to transform communicative freedom into communicative power. They have not only norm-generating but also institution-making power. Only in such a way can publics exercise sufficient democratic power, that is, the power to challenge and reconstruct relations of political authority (p. 72). In its core, I find this argument to be very appealing, but I would like to raise some questions relating to it.

First, what exactly are ‘publics’, that is the agents who exercise democratic power? They are, as Bohman stresses, ‘distributed’ or ‘dispersed’, and yet they have a productive and synthesizing role, generating communicative power. But how are they formed? Do they form around issues, around already existing institutions, around established forms of identification, or across

¹ All references in the text are to James Bohman’s chapter in this report, see pp. 65–89.

² See in particular the constructive arguments by Erik O. Eriksen and John E. Fossum in their contribution to this report (pp. 7–46), framing our RECON discussions.

these? Given that these have to be *strong* rather than weak publics, how can we exclude the dangers inherent in a civil society perspective, namely that existing social and political power reproduces itself in forming certain publics?

Second, how dispersed can publics be in a scheme we call 'democratic'? Even if we agree that in a transnational framework, the traditional notion of *demos* is not appropriate, we would still say that democracy implies that the addressees of legal norms and regulations should also be their authors, even if this authorship is mediated by institutional forms of the exercise of influence – in particular, forms of representation. This means that it is hard to delineate one public from another, for almost any 'specific' issue – such as clean water, social welfare policy or education – concerns, traditionally speaking, the 'common good' of all those to whom such regulations apply. Interested and affected 'publics' will therefore all too often simply be part of *the public* of citizens in a more general sense. Further, in terms of power dynamics, it seems that only if political issues are central and salient enough to interest the general public, can sufficient communicative power to influence decision-making processes be generated. So the argument could – against Bohman's intention – lead to a demand for a strong *general* European public.

Third, how minimal is the 'democratic minimum'? By the term 'democratic minimum' Bohman refers to a certain degree of material normative power, the 'shared ability to initiate deliberation about the content of some institutional scheme' (p. 74). The formulation 'to initiate', however, should not conceal that what is meant is not just setting an item on the agenda and making yourself heard. Rather, what is meant is generating institution-transforming power, which is not just the power to participate in law-making procedures but also – the important reflexive point – the power to question and possibly change the very institutions of law-making. It seems to me that this is the essential republican lesson of the important discussion of freedom as non-domination (Pettit 1997). And if I am not mistaken, the right not to be arbitrarily dominated, not to have your normative power determined by others without adequate justification, is a quite demanding and not so 'minimal' right. It is, in my words, a fundamental 'right to justification' (Forst 1999, 2001) that carries important institutional force. 'Democracy' must thus be conceived of in a strong and comprehensive sense, based on sufficiently institutionalized practices of justification.

A fourth question follows, again as concerns the extension of 'minimal'. If domination as arbitrary rule or subjection is the issue, does this only refer to political domination or also to the illegitimate exercise of *social* power more

generally? I assume that the concept covers the latter, and in that case again the democratic minimum must have powerful means at its disposal – possibly more than the EU allows for at present.

Finally, I return to the point made at the outset about cosmopolitanism. The republican language of Bohman's paper moves it towards expressions such as that about democratic citizens having the ability to 'form and change the terms of their common life' (p. 76), seemingly implying that this common life is defined and bounded. The cosmopolitan language of the paper, however, stresses the 'expansion of membership' and that 'boundaries are porous' – and that 'a polity that closes this open space for the initiation of deliberation on injustice may fail to meet the democratic minimum' (p. 79). Thus, I believe that rather than being a *cosmopolitan republican*, who would argue that a certain context of bounded 'common life' is a presupposition for the exercise of democratic citizenship, Bohman is a *republican cosmopolitan* who sees transnational democracy as the main means to further the cause of global non-domination and justice. Yet, if this is the case, Bohman is closer to David Held's (1995) cosmopolitanism than he indicates (by labelling himself a 'transnational republican'), even though he notes the similarities (p. 85, 88). And furthermore, given these normative standards, we should consider carefully whether the EU in its internal structures, dominated by executive powers, despite important institutions and methods of coordination that aim at mutual learning processes, is a good candidate for the non-minimalist democratic minimum Bohman has in mind, internally and externally.

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On 26 and 27 January 2007 the RECON project was launched. This is a large scale project on European democracy, with a duration of five years. RECON seeks to clarify whether democracy is confined to the nation state or whether post-national democracy is possible under conditions of diversity and complex multilevel governance? This includes taking heed of the challenges to democracy at EU, national and regional/local levels. RECON spells out three different models for democratic reconstitution – national, federal and cosmopolitan, and assesses which approach to democratic reconstitution is most viable – in empirical and normative terms.

A two days conference in Oslo marked the starting point of RECON. On the first day of the conference the theoretical framing paper of the project by Erik O. Eriksen and John Erik Fossum was presented. This was followed by lectures by John Dryzek and James Bohman who were invited key note speakers. Hauke Brunkhorst and Rainer Forst rounded up the opening session by presenting their prepared comments for the key note speeches. In this report we have collected the papers and comments from the opening session of the conference.

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RECON – Reconstituting Democracy in Europe – is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research. The project has 19 partners in 12 countries across Europe and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON runs for five years (2007-2011) and focuses on the conditions for democracy in the multilevel constellation that makes up the EU.

