

Deliberative Democracy and its Discontents



Edited by
*Samantha Besson and
José Luis Martí*

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DELIBERATIVE DEMOCRACY AND ITS
DISCONTENTS

This One



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Deliberative Democracy and its Discontents

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Book Preface

The present collection of essays is the outcome of the workshop on *Deliberative Democracy and its Discontents* that took place from 25 to 27 May, 2005, in Granada (Spain) in the framework of the XXII IVR World Congress of Philosophy of Law and Social Philosophy. All papers published in this volume but one were presented and discussed on that occasion. The Andalusian spring, together with the participants' good will and interest, made for lively and fruitful discussions, which helped improve the quality of the papers and their overall coherence. Reasons were exchanged. Arguments were offered. And some points of view certainly shifted. Thus, deliberation proved once more to be the adequate way of analyzing the virtues and vices of political conceptions and there could have been no better way to discuss deliberative democracy itself, with all its contents and discontents.

The contributions to this volume offer a diversified and balanced discussion of the major arguments circulating today for and against deliberative democracy. Their common aim and thread is, as captured in the volume's title, on the one hand, to assess more critically the benefits of deliberation and, on the other, to address some of the hardest critiques that have been brought against the ideal of democratic deliberation. This overtly critical approach is enhanced by the diversity of perspectives represented among the different contributions and, in particular, three overlapping groups of contrasting conceptions: that of political as opposed to legal conceptions of deliberative democracy that made it possible to address crucial issues of institutional design and practical implications of deliberative democracy; that of national as opposed to post-national conceptions of democratic deliberation that led authors to focus on national as well as post-national and transnational challenges and settings for democratic deliberation; and, finally, that of (North- and South-)American as opposed to European perspectives on deliberative democracy, which permitted us to launch a highly necessary transatlantic dialogue to address global legitimacy problems. These three layers of perspectives are consciously made to overlap in the book as their combination makes for a complex and nuanced discussion of the distinct topics discussed in each of the three sections of the volume.

The book has three parts, devoted respectively to three basic questions: why, how and where to deliberate democratically. For obvious reasons, the different contributions in each section of the book do not pretend to address exhaustively all issues raised by these three questions, but only to shed some light on the most relevant difficulties involved by them. By imposing this general, basic structure both on the workshop and on the book, we aimed, on the one hand, at identifying distinct critical features of deliberative democracy and, on the other, at framing

the debate by placing the different participants in discussion with one another. Each chapter brings, however, an individual contribution that can be read and judged independently from the others in the same section.

The chapters in the first part of the volume engage with the fundamental question of why we ought to deliberate. They discuss the ideal of democratic deliberation by facing up to the issue of its justification and, more precisely, its epistemic justification as a source of legitimacy of political decisions (Lafont, in Chapter 1 and Martí, in Chapter 2), but also by unpacking the methodological difficulty of testing empirically an adequately theorized set of normative claims provided by this ideal (Follesdal, in Chapter 3). The first issue is essential to the very understanding of the normative ideal of democratic deliberation, while the second is necessary for a confirmation of the intuitions that stem from that deliberative ideal. The chapters in the second part of the book take up the question of how we should deliberate under real conditions. This raises the difficult issue of transition from the ideal of deliberative democracy to the actual institutional design of public deliberation (Estlund, in Chapter 4). Some of the problems involved have to do with the role and incentives of politicians that clash to some extent with the very ideal of deliberation (Pettit, in Chapter 5); others pertain to the unavoidable – and perhaps desirable – dimension of conflict and self-interest in all political settings (Mansbridge, in Chapter 6). Transparency in the European Union, or the lack thereof, is discussed as an example of this passage from theory to practice (Curtin, in Chapter 7). Finally, the contributions gathered in the third part of the book deal with the question of who should be deliberating or, more precisely, who are the relevant people that should take part in democratic decision-making. Besides the traditional difficulties in empirically and normatively identifying the *demos* legitimated to take the *kratos* into its own hands, three out of the four chapters in this section take up the new and important challenges raised by post-national, and, in particular, European governance, with respect to the boundaries of the democratic polity (Cheneval, in Chapter 8; Besson, in Chapter 9; and Bohman, in Chapter 10). The final chapter in this section examines whether the judiciary, and especially the higher courts, have a deliberative role to play in the defense and protection of social rights (Gargarella, in Chapter 11).

Many more issues could have been addressed among the discontents of deliberative democracy. The book's introduction offers a general, though extremely sketchy, state-of-the-art account of deliberative democracy theory, highlighting those dimensions that have recently been debated and others that are still neglected, notwithstanding their relevance, and indicating where the specific contribution of each chapter in this book lies. It does, in other words, provide the landscape and context in which the reader can approach other contributions in the volume and this according to a structure distinct from that of the book.

We are grateful to Professor Tom Campbell, the *Applied Legal Philosophy Series'* editor for his early interest in publishing this book and for accepting it in the series. We would also like to thank Ms Lorna Loup, Ms Caroline Mange, MLaw, and Ms Verena Seiler, LLM, for their precious assistance at various stages

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*Samantha Besson and José Luis Martí
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Introduction

Samantha Besson and José Luis Martí

Over the last 25 years or so, the idea of deliberation has gradually become a central component of all major current democratic theories. Since 1980, when Joseph Bessette coined the phrase “deliberative democracy” to refer to a particular conception of constitutional democracy, one that he believed was implicit in some interpretation of the American Founding Fathers’ thought and the constitutional tradition they inaugurated (Bessette, 1980), hundreds of works have been devoted to the idea of democratic deliberation.¹ Gradually, deliberative democracy has become one of the most fashionable ideals in contemporary Western political theory, a token of which may be that deliberative democracy has now gained a privileged place in most recent handbooks on theories of democracy (e.g. Cunningham, 2002, p. 101).

Thus, while the defense of deliberation in politics cannot be said to be new at all, there being a long tradition of democratic deliberation since Aristotle, when we talk nowadays of modern deliberative democracy, we refer to an ideal that was first openly stated in the 1980s. Rooted in a revival of the “public spirited” studies of democracy produced during the 1960s and 1970s (Laslett, 1956; Davis, 1964; Barry, 1965; Flathman, 1966; Bachrach, 1973) and hence ambiguously related to the renaissance of a participatory view of democratic politics (Davis, 1964; Bachrach, 1967; Pateman, 1970; Pennock and Chapman, 1975; Macpherson, 1977; Fishkin, 1979; Mansbridge, 1983; Barber, 1984), deliberative democracy was seen as a response to the so-called “crisis of democracy” denounced by economic and elitist theories of democracy.²

In the first decade after 1980, several works were published both in the United States and Europe that contributed to consolidating the ideal of deliberative

¹ Evidence may be found in the numerous collections of essays that have been published on the issue (see, for example, Bohman and Rehg, 1997; Elster, 1998a; Macedo, 1999; Hongju Koh and Slye, 1999; Eriksen and Fossum, 2000; Fishkin and Laslett, 2003; Aaken et al., 2003; and Steiner et al., 2005).

² They are the theories that Lane Davis, in a very lucid – and critical – article of 1964, calls the “new” and “realist” conceptions of democracy (Davis, 1964, p. 37). These are theories based on Joseph Schumpeter’s work, which deny the significance of the public good (or the public interest) and apply social choice theory to the study of politics and democracy (see, for example, Schumpeter, 1946; Buchanan, 1954 and 1975; Dahl, 1956; Downs, 1956; Buchanan and Tullock, 1962 and Riker, 1982 and 1986). For the notion of “crisis of democracy”, see Crozier et al. (1975). For a modern account of economic theories of democracy and the distinction from “public good” views, see Elster (1986).

democracy (Habermas, 1981; Elster, 1986; Cohen, 1986 and 1989; Manin, 1987).³ During the 1990s, crucial and more ambitious publications gradually emerged (see, for example, Gutmann and Thompson, 1996; Habermas, 1992; Bohman, 1996; Dryzek, 1990; Nino, 1996; and three important collections of essays: Bohman and Rehg, 1997; Elster, 1998a; and Macedo, 1999).⁴ By the end of the decade, James Bohman confirmed “[t]he coming of age of deliberative democracy” in his retrospective on the evolution of the democratic model and noted a “certain maturation in discussions of deliberative democracy” which were more and more “[t]empered with considerations of feasibility, disagreement and empirical limits” (Bohman, 1998, p. 422). A “new, practical emphasis on feasibility” was taken to be “the most striking feature of the recent boom in theories of deliberative democracy” (Bohman, 1998, p. 400). This shift has now been clearly confirmed in the last six years’ publications, which have focused more and more on the institutional design of deliberative democracy and encompass empirical studies of real world deliberation (see, for example, Sunstein, 2000, 2001 and 2002; Goodin, 2000 and 2003; Dryzek, 2000 and 2001; Fishkin and Luskin, 2000; Fung and Wright, 2001; Fishkin et al., 2002; Mendelberg, 2002; Fishkin and Laslett, 2003; Delli Carpini et al., 2004; Steiner et al., 2004; Gutmann and Thompson, 2004; Fung, 2004; Ryfe, 2005).⁵

Active discussion and writing about democratic deliberation over the past 25 years does not mean that all theoretical and practical difficulties with the ideal of deliberative democracy have been dissipated, nor that all that is left is to manage empirical shortcomings. On the contrary, numerous controversies remain and it is the aim of this introduction to map the most important ones.

1 Setting the Agenda: From Theory to Practice and Back Again

Although authors have now realized the importance of working on institutional design and the feasibility of deliberative democracy, Bohman’s (1998) complaint regarding the lack of adequate empirical research about democratic deliberation

³ Other important works at the time were: Mansbridge (1983); Ackerman (1989); Sunstein (1985 and 1988); Michelman (1986, 1988a, 1988b and 1989); and Benhabib (1986 and 1989).

⁴ Other books and articles were also highly relevant for the model’s evolution (see, for instance, Habermas, 1992; Elster, 1995; Estlund, 1993 and 1997; Sunstein, 1993; Benhabib, 1994 and 1996; Bohman, 1998; Cohen, 1996; Mansbridge, 1992; Miller, 1992; Pettit, 1997 and 2003; and Young, 1996 and 1999). It is also important to note that Rawls’ idea of public reason resembles the ideal of deliberative democracy, although it is hard to ascertain whether Rawls can be considered a paradigmatic defender of democratic deliberation (Rawls, 1993, pp. 212–53, and 1997).

⁵ True, elements of an empirical approach to democratic deliberation could already be traced back in earlier works (e.g., Mansbridge, 1983; Bessette, 1994; Fishkin, 1991 and 1995). All lacked, however, a systematic account of institutional design.

is still relevant today, as a lot remains to be done. Andreas Follesdal goes even further in Chapter 3 of this book, where he states that “[t]he present state of the literature makes it clear that both theoretical and empirical questions remain unresolved. Further rigorous theoretical analysis is required about such philosophical questions as the reasons to value political participation and the relationship between procedures and validity. In addition, much empirical research is needed in order to assess existing democratic arrangements and proposed improvements” (Follesdal, in Chapter 3).

Thus, Follesdal rightly emphasizes that we do not even have the agreement about the main features of the ideal model that we need before we can seriously test it in practice. Most authors agree that deliberative democracy constitutes a regulative ideal, but there is little work done on what this implies exactly (see, for a preliminary analysis, Martí 2004, Chapter 1, and 2005b). Follesdal identifies at least five theoretical issues that deserve more attention before one could embark on systematic empirical research on deliberative democracy: (1) What are the main claims of the model? (2) What are the alternative democratic theories? (3) Are there actual forms of deliberation subsumable under the model? (4) Which are the appropriate institutional and cultural conditions to promote and enhance democratic deliberation? And (5) how does partial or total compliance with these conditions affect the legitimacy or justice of deliberative outcomes? (Follesdal, in Chapter 3).

Considering the crucial relevance of these theoretical issues, it is important to address them in more depth, before embarking on the design of concrete political institutions and developing a whole empirical research to evaluate them. This is, in a nutshell, the upcoming agenda for deliberative democracy theories.

2 The First Step: From Practice Back to Theory ...

The first step in this re-discussion of the fundamentals of deliberative democracy is to return to the ideal of deliberative democracy with a keen eye for new issues. This implies, first of all, going back to the core of the ideal, before turning to some of the remaining difficulties.

The Ideal of Deliberative Democracy

Deliberative democracy is an ideal of political legitimacy (Manin, 1987, pp. 351–59; Cohen, 1989, pp. 17–22; Estlund, 1993, p. 1469; Gutmann and Thompson, 1996, p. 4; Bohman, 1996, pp. 4 and 5, and 1998, pp. 401 and 402; Martí, 2005a). It claims that political decisions are ideally legitimate when they are made through a deliberative procedure, which implies publicly exchanging arguments “offered by and to participants who are committed to the values of rationality and impartiality”, and in which all those affected by the decision can take part directly or through their representatives (Elster, 1998a, p. 8). As an ideal, it has a

normative, rather than a descriptive appeal (Sunstein, 1988, pp. 158–60, and 1993, p. 137; Cohen, 1989, pp. 21 and 22; Dryzek, 1990, pp. 36 and 37; Bohman, 1996, pp. 16 and 17, and 1998, pp. 400 and 401). It is a claim as to how our institutional arrangements should be and does not aim at describing how they actually are. As we will see, whether that “inspiration” is to be understood as a mirroring (or maximization) effect or as something else remains an open question (Estlund, in Chapter 4). At the same time, however, deliberative democracy retains a practical vocation and aspires to be useful as a relevant model of political legitimacy, one used to assess the degree to which real and concrete decisions are legitimate.

At the core of the ideal lies the very notion of deliberation which recommends collective and dialogic reasoning as a process of interactive argumentation in which participants offer each other their best arguments either in defense of their opinions, proposals or suggestions or against those of others. Participants engage in that process with a disposition to change their minds and preferences if persuaded by others (Elster, 1983, pp. 53–65; Mansbridge, 1983, pp. 8–10; Manin, 1987, pp. 349 and 350; Bohman, 1996, p. 65; Nino, 1996; Pettit, 2003, p. 157). The kind of persuasion relevant here is that of the force of the better argument (Habermas, 1981; Elster, 1983, pp. 53–65, 1995 and 1998a; Mansbridge, 1983, pp. 8–10; Manin, 1987, pp. 349 and 350; Cohen, 1989, p. 22; Fishkin and Laslett, 2003, p. 2). Hence, the deliberative procedure is considered as a process of free and rational will formation (Manin, 1987, pp. 345, 349 and 350).

A delicate issue arises in this context: what counts as an argument, or more precisely, what does it mean to offer a reason for something? To start with, a position is deliberatively justified if others can reasonably accept it. This is not, however, an empirical, contingent matter. It is not a matter of verifying if people actually accept something. We consider that a group of individuals believes that policy X is justified if it believes that X is reasonably acceptable by others in general, and not only because it is acceptable to them in particular. Thus, X can be deemed justified by some people, even if they do not think it is with respect to them. If justifiability is not a matter of fact, the same may be said of the notion of reason or argument. For something to count as a reason, it must fit certain criteria independent from public evaluation. But a central question remains: what and which are the criteria for the acceptability of arguments in public deliberation?

It is crucial to clarify this feature of rational argumentation because it enables us to distinguish deliberation from other patterns of communication based on irrational persuasion or the use of coercion and threats, such as negotiation or bargaining (Sunstein, 1988, pp. 150 and 151; Cohen, 1989, pp. 17 and 18; Elster, 1995, p. 237, and 1998a, pp. 5 and 6; Gutmann and Thompson, 1996, pp. 1 and 4; Bohman, 1998, p. 400; Pettit, 2003, pp. 139 and 140; but see Mansbridge, in Chapter 6). In a negotiated agreement, consensus may be reached by deception, lies, threats or promises of reward, but it never implies a reasoned change of mind, and parties are openly motivated by self-interest. Deliberation, by contrast, aims at a reasoned consensus achieved through rational persuasion by strong arguments, and deliberating parties are supposed to be impartially motivated.

This is not to say that real deliberation is incompatible with self-interest or with strategic behavior, which are pervasive states of mind. In fact, hypocrisy about self-interested motivation can sometimes be a suboptimal situation by comparison to open manifestations of self-interested claims (Elster, 1995). In those circumstances, the exploration of self-interest can even be considered a necessary condition for a fair resolution of conflicts (Mansbridge, in Chapter 6).

Deliberation should also be distinguished from voting; the rational transformation of preferences differs from their mere aggregation (Manin, 1987, pp. 349–53; Sunstein 1988, pp. 144, 145 and 150; Cohen, 1989, pp. 17 and 18, and 1998, pp. 185 and 186; Gutmann and Thompson, 1996, pp. 1 and 4; Bohman, 1998, p. 400). Obviously, under real conditions (of limited time and bounded rationality) the fact of pervasive disagreement makes voting necessary (Manin, 1987, p. 359; Waldron, 1999a, pp. 91–93, and 1999b; Besson, 2003 and 2005). A realistic deliberative democracy theory should account, therefore, for voting and explain the use of majority rule, not as a necessary evil, but as a fair procedural institution. Deliberation and voting clearly differ, however: the logic of argumentation that prevails in democratic deliberation presupposes the ideal aim of convincing others, while the logic of pure voting remains indifferent to any interaction or communication among voters.

That being said, the theoretical distinction between deliberation, negotiation and voting should remain at the conceptual core of the ideal of deliberative democracy. It is clear indeed that all three will be present in actual political settings. Given the pervasiveness of deep and generalized disagreement, we cannot expect that deliberation necessarily leads to consensus. On the contrary, time constraints usually imply that we have to bring our deliberations to a close with a vote (Manin, 1987, p. 359; Bohman, 1998, p. 413; Waldron, 1999a, pp. 91–93, and 1999b; Besson, 2003). Alternatively, a close study of parliamentary politics makes it clear that negotiation is inescapable, but also useful to reach an agreement that permits mutual understanding, and thus is necessary for political approximations to just outcomes (Mansbridge, in Chapter 6). All this shows that reality does not always match the ideal. Thus, while the ideal of deliberative democracy still favors those institutional settings that promote deliberation and in which the weight of negotiation and voting is reduced, we should keep in mind that mirroring the ideal can sometimes be counterproductive (Estlund, in Chapter 4).

Another benefit of the theoretical distinction between deliberation, negotiation and voting is that it enables us to identify clearly the main alternatives to deliberative democracy, a need emphasized by Follesdal (in Chapter 3). On the one hand, there are theories that emphasize the role of voting and aggregation of preferences as a way of building a collective set of preferences to be maximized. These theories refer to voters as consumers and to democracy as a market and are usually associated with a social choice approach. Broadly speaking, they can be referred to as economic theories of democracy.⁶ On the other hand, there are

⁶ See note 2 and accompanying text.

also theories of democracy that emphasize the role of democratic negotiation and bargaining among citizens or among groups of interests; they deny the existence of a distinct common good and try to avoid the domination of one group over the others. These theories are best exemplified by pluralist accounts of democracy (Dahl, 1956 and 1989; Truman, 1968; Ely, 1980). Finally, in the last few years, another democratic alternative has been growing in importance. It emphasizes the centrality of conflict and division in politics, thus rejecting any attempt to rescue consensus as an ideal end and underlining the importance of self-identity. These are often called agonistic theories of democracy (Laclau and Mouffe, 1985; Mouffe, 1993 and 2000; Tully, 1995). While defenders of agonistic theories of democracy present themselves as competitors to deliberative democracy theories – and generally to any liberal democratic theory – some authors have tried to approximate these two models (see, for example, Dryzek, 2000; Besson, 2005; and Mansbridge, in Chapter 6).

Hard Questions

Although the ideal of deliberative democracy has already been discussed in depth by defenders and critiques of deliberative democracy, it is still ridden with important and persistent controversies.

Justifications of deliberative democracy A first example of these difficulties involves the justification of the model of deliberative democracy and the kind of legitimacy it is supposed to bring to bear on political decisions. The most crucial question to arise is the tension between procedural and substantive accounts of legitimacy, which provide instrumental (epistemic) or intrinsic justifications to the model (Estlund, 1993 and 1997; Gutmann and Thompson, 1996, pp. 26–39, and 2004, pp. 21–23; Christiano, 1997 and 2004; Martí, 2005a). On the one hand, deliberative democracy may indeed be justified as a procedure valuable for its intrinsic fairness and its respect for autonomy, equality and the dignity of participants, and, as such, it may be said to provide its outcomes with procedural legitimacy. On the other hand, deliberation may also be justified in terms of its capacity to produce just outcomes, that is, in terms of its epistemic reliability, and in this sense its outcomes may be regarded as substantively legitimate. While both justifications seem conceptually compatible, there are tensions between them that challenge the coherence of the ideal of deliberative democracy.

This is the topic analyzed and discussed by Cristina Lafont and José Luis Martí in Chapters 1 and 2. Both confirm the prevalence of epistemic justifications of deliberative democracy. Martí examines the main arguments offered by epistemic approaches, trying to show that a coherent defense of deliberative democracy must endorse such an approach. He also argues for the necessity of combining procedural values with substantive ones in order to avoid the trend towards elitism implicit in deliberation (Martí, in Chapter 2). Lafont focuses on a more theoretical and conceptual dimension of the same problem, i.e. the tensions resulting from

the coexistence of two ideals in deliberative democracy: the deliberative and the democratic one. She reinterprets the whole model of deliberative democracy to save its coherence (Lafont, in Chapter 1). A more practical discussion of legitimacy and deliberation can also be found in Deirdre Curtin's argument in Chapter 7.

Democracy in deliberative democracy There is another central feature of deliberative democracy that has received very little attention in the literature: what account of democracy may be said to lie at the core of the model? More concretely, the question arises with respect to the degree and type of political participation and representation deliberative democracy implies (some exceptions are Mansbridge, 1992, 1999 and 2000; Gargarella, 1995; Urbinati, 2000; De Greiff, 2000; Martí, 2004, ch. 5; Besson, 2005). As hinted at earlier, deliberative democracy was at first ambiguously related to the renaissance of participatory democracy in the 1980s. Contrary to what is usually supposed by many commentators, however, deliberative democracy is not conceptually committed to a participatory or direct-democratic ideal. It is true that democratic deliberation ideally implies the participation in the decision-making process of all those affected by the decision to be made (Habermas, 1981 and 1990; Cohen and Sabel, 1997, pp. 332 and 333; Mansbridge, 1992, p. 36; Benhabib, 1994, p. 31; Bohman, 1998, p. 400; Elster, 1998a, p. 8; Dryzek, 2000 and 2001, p. 651). Moreover, some versions of the model explicitly argue for a broad and active participation in public deliberation (Barber, 1984, pp. 173–198; Fishkin, 1991 and 1995; Mansbridge, 1992, p. 36; Cohen and Sabel, 1997, p. 320; Cohen, 1998, pp. 186 and 187; Gargarella, 1998, p. 261; Fung and Wright, 2001, pp. 27–29 and 52; Fung, 2004). Other versions of the model, however, limit their discussion to representative institutions, often for reasons related to the alleged irrationality and passionate will of the people (see Burke, 1989; see also Bessette, 1980 and 1994; Will, 1992; Gregg, 1996; Bell, 1999, p. 74; Wolfensberger, 2000).

Philip Pettit expresses fears of that kind in Chapter 5, where he defends a depoliticized version of deliberative democracy based on a two-dimensional ideal of democracy. According to Pettit, public deliberation should not be restricted to representatives and politicians. The people should be able to deliberate as well. He finds powerful reasons, however, to limit their deliberation to the evaluation of government and to identifying the matters that deserve the attention of politicians (Pettit, in Chapter 5). The difficulty Pettit unveils is the following: to be engaged in deliberation means, among other things, to be ready to change our minds or our preferences in the light of the best argument. Good deliberation in representative settings implies therefore viewing political representation as a formal relationship that preserves the representatives' independence and leaves them relatively unconstrained by their constituents' desires or preferences (Elster, 1998a, p. 3; Goodin, 2000, pp. 58 and 59; Martí, 2004, ch. 5; Besson, 2005). However, if we adopt such a conception of political representation, the public and informal deliberation that takes place in the public sphere and in which all those affected take part becomes almost irrelevant since what counts in determining

a political decision is nothing more than parliamentary deliberations. This implies giving up defending participatory democracy and, still worse, neglecting one important trend in deliberative democracy literature: that based on the public sphere (Habermas, 1962, 1981 and 1992; O'Neill, 1989; Calhoun, 1992; Benhabib, 1992; Fraser, 1992; Bohman, 1996). However, if we want to keep the value of informal deliberation in the public sphere and enhance the way in which the people can participate directly in political decision-making or at least can determine what their representatives can do or approve, then we have to constrain the independence of these representatives and view them as simple delegates of their constituents. By doing so we would make true deliberation impossible in the parliament since representatives would then have to limit themselves to strictly exposing the preferences and opinions of their constituents, and any change of mind or position would be considered as an act of bad faith. Pettit's solution consists of leaving political deliberation to politicians (restricted to parliament and other representative bodies) and limiting public, popular deliberation to matters of identification and evaluation of government's functions (Pettit, in Chapter 5).

Democratic boundaries of deliberation Deliberative democracy, like other political models, cannot escape globalization and has to face the challenges the new legal and political global reality raises for our models of political decision-making. One of these challenges pertains to the boundaries of democracy and hence of the *demos* in democratic deliberation both at the national and post-national levels.

In principle, self-rule – which lies at the core of democracy – also implies self-constitution; the community which binds itself by the laws it generates also defines itself as a democratic subject by drawing boundaries (Whelan, 1983; Offe, 1998). The difficulty is that these boundaries are usually not only civic, but also territorial. In fact, these territorial boundaries often match pre-political territorial boundaries. As a consequence, the will of the democratic sovereign can only extend over the territory under its jurisdiction. The problem is that the territorial limits of the polity contradict the democratic requirement that all those affected by a decision be given a voice in the decision-making process. This is also known as the *paradox of the democratic polity*. This paradox transfers with greater acuity to cosmopolitan democracy in a global world (Archibugi, 2004, p. 461). Even though political boundaries need no longer be conceived in state-centric terms, and although post-national citizenship need not be grounded in nationality or other pre-political elements of collective identity, they remain committed to locality (Benhabib, 2004, ch. 4). Post-national democratic governance is mostly thought to draw boundaries and create rules of membership at some locus or another, even if it is smaller or larger than those of a national state.

Three contributions in the book address the very issue of who should be deliberating, thus identifying the relevant people who can take part in democratic decision-making in a globalized world where all those affected by a decision do not always get to participate in national and supranational decision-making

processes (Cheneval, in Chapter 8; Besson, in Chapter 9; and Bohman, in Chapter 10). All three focus on the European Union (EU) as the most advanced example of institutionalized post-national democracy, but they also argue and draw conclusions for democracy beyond the state in general. The three contributors share the view that deliberative democracy constitutes a perfect model with which to conceptualize the new boundaries of democracy in a global world; deliberation can cope with fluid boundaries and allows for transnational communication (Thompson, 1999, pp. 120–25). What matters for deliberative democracy is indeed the character of political interaction, rather than its locus. As such, deliberative democracy broadens the scope of democratic accountability beyond national borders (Dryzek, 1999, p. 44; Gutmann, 1999; Gutmann and Thompson, 2004, p. 36 ff.; Gerstenberg and Sabel, 2002; Eriksen and Fossum, 2000; Schlesinger and Kevin, 2000; Blichner, 2000; Lord, 2004; Lord and Magnette, 2004).

All three contributors emphasize the importance of realizing the plurality of *demos* affected by the same democratic processes and of identifying the means of ensuring democratic legitimacy within this plurality. The three contributors differ, however, with respect to the ways in which this is to be achieved. Francis Cheneval argues for the inescapability of the territorial *demos*, but emphasizes the benefits of deliberation in a larger epistemic community and thus the existence of a broadly moral *demos* additional to each national political *demos* (Cheneval, in Chapter 8). By contrast, Samantha Besson claims that deliberation cannot be usefully decoupled from political decision-making channels and argues for the deterritorialization of a functional and truly political European *demos* made of (territorial and national) *demos*; she makes different proposals as to how to accommodate these new requirements of deliberative democracy in institutional practice (Besson, in Chapter 9). Focusing more particularly on the recent constitutional exercise in the EU, James Bohman analyzes ways of mending the democratic deficit in Europe; he argues that the EU must meet the repeated challenge of creating the conditions for democratic non-domination. Given that meeting this challenge demands a transnational democratic minimum, the constitutional debates in the EU could well be, he argues, a precursor to a process that could be iterated in many different polities and many different institutions (Bohman, in Chapter 10).

3 The Second Step: ... and Back to Practice

The second and final move in this critical analysis of the current state of deliberative democracy theory implies returning to practice and exploring ways of making deliberation work institutionally. While all authors agree that deliberative democracy constitutes an ideal, it is not always clear what this implies in practical terms.

The Passage from Theory to the Practice of Democratic Deliberation

One of the first questions to solve is precisely that of the relationship between the ideal of deliberative democracy and its practical institutional design. Many contributions in this volume face, in one way or another, the question of how we should move from ideal considerations to practical recommendations. In their contributions to this book, Estlund and Mansbridge explicitly explore some of these difficulties.

Against the widespread Habermasian belief that public discourse must necessarily mirror an ideal procedure of democratic deliberation, David Estlund holds that sometimes this mirroring exercise involves serious distortions. Instead of trying to maximize the “resemblance” between our real institutions and ideal procedures, Estlund follows Marcuse in proposing a principle of wide civility that escapes formalism and promotes sharp, disruptive and informally expressive political action under certain circumstances as a way to prevent deliberative distortions (Estlund, in Chapter 4). In her contribution to this volume, Jane Mansbridge argues in the same vein that the exploration of self-interest, contrary to the classical ideal of deliberation, can be a necessary condition for a fair resolution of conflicts in practice (Mansbridge, in Chapter 6). She argues, we should “integrate normatively the legitimation of ongoing conflict in material interests with a larger commitment to the public good. Accomplishing this goal requires repudiating the position that self-interest has no legitimate role in deliberation, along with the position that negotiation and even bargaining in all their forms are contradictory to, and thus must be excluded from, democratic deliberation” (Mansbridge, in Chapter 6). Conflicts of interests are inescapable in real politics, and “a fair resolution almost always requires not only acknowledging but also exploring these conflicts, some of which cannot be simply subsumed into an overarching common good. Refusing to allow on the table statements of self-interest and the reciprocal questioning of self-interest inhibits self- and mutual-understanding and makes it almost impossible to craft even relatively fair partial resolutions to the ongoing conflict” (Mansbridge, in Chapter 6).

The Institutional Design of Democratic Deliberation

Once theoretical issues pertaining to the ideal of deliberative democracy and the passage from theory to practice have been addressed, it is time to turn to the problems related specifically to the institutional design of deliberative democracy in a specific constitutional framework. Here are some of the many questions that need to be tackled in this context: what are the adequate mechanisms by which the people can participate in deliberative decision-making? How must we modify the structure, composition and functioning of parliaments to make them more deliberative? What sort of deliberative relationship must there be between political institutions, such as the legislative, the government and the judiciary, or

among other institutions and governmental agencies? Is deliberative democracy compatible with judicial review?

Roberto Gargarella takes up the latter question in Chapter 11. He explores whether judicial enforcement of social rights, even against democratic laws, is acceptable to someone who endorses the ideal of deliberative democracy. Gargarella holds that it is if, and only if, the judiciary, and in particular the higher courts, play a deliberative role permitting those affected by the decision to express and defend their opinions based on constitutional arguments, protect the fundamental rights that are the very preconditions of deliberative democracy and, finally, participate in some sort of inter-institutional deliberation. What he rejects, from a deliberative democratic point of view, is judicial supremacy – as opposed to judicial review – that is, the model according to which higher courts have the competence to strike down democratic laws (Gargarella, in Chapter 11).

In her contribution, Deirdre Curtin also focuses on the issue of a deliberation-enhancing concrete design of EU institutions. She purports to verify whether these institutions meet basic requirements of political legitimacy and, in particular, those of transparency. She uncovers some important deficiencies, and argues that “[w]hat the European Union needs at this stage of its development is a much more sophisticated view of the relationship between transparency and legitimacy. Transparency is not a panacea for legitimacy; rather, the most important consequence of a transparent policy-making process is that citizens have the possibility to access and to control this process. To access and to control the different steps in the policy-making process and the way different actors act, transparency is a necessary condition and a first step.” And after studying the functioning of EU decision-making processes and policy-making, she concludes that the “central feature of modern society – the public sphere – is still largely missing at the EU level. In our further thinking on the evolution of the EU as a political system, it may prove more rewarding to imagine the EU as constituted by a multiplicity of gradually evolving communicative public spaces rather than to lament the non-existence of a single public sphere” (Curtin, in Chapter 7).

The Case of Post-national Deliberative Institutions

Post-national deliberation raises interesting issues of institutional design, which add to the difficulties in the conceptualization of deliberation beyond and across national boundaries. The three contributions that discuss deliberation in post-national conditions also offer useful insights into this issue.

In his contribution, Bohman makes various proposals as to the institutional contours of the constitutionalization of the EU and emphasizes the need for them to guarantee a complex and constant democratic iteration in different democratic polities in Europe (Bohman, in Chapter 10). A detailed account of this complex and multi-layered public sphere may be found in Curtin’s discussion of transparency in the EU (Curtin, in Chapter 7). Cheneval also concludes his argument for the deliberative and epistemic community beyond

the national polity by emphasizing the importance of institutionally linking the different territorial *demos*; he starts by excluding the fatality of a world state and opts for a constructivist approach (Cheneval, in Chapter 8). According to him, “[p]hilosophical reflection cannot anticipate the concrete outcomes of this real deliberation about post-national institution-building. Cosmopolitanism can therefore not be anticipated counterfactually in a concrete statist form. The institutional setting created by deliberating *demos* cannot be anticipated in normative theory.”

Besson develops this very argument further in emphasizing that institutional and normative considerations reinforce one another; the EU provides a unique institutional setting that promotes deterritorialized deliberative *demos*-cracy in Europe, and as such constitutes a unique institutional basis for a normative argument, while also revealing important gaps and scope for reform along the lines of normative proposals she makes for institutional reform (Besson, in Chapter 9). Besson exposes different institutional proposals aimed at making the best of Europe’s deterritorialized democracy with respect more specifically to national, transnational and supranational fora of deliberation and to diversified forms of distant representation. All these institutional proposals may in turn be transposed, she argues, to other non-European post-national political processes where transnational and deterritorialized democratic deliberation may prove crucial to successful legal and political integration. The cosmopolitan democracy project is “still in its infancy” (Archibugi, 2004), and it is through institutional achievements like that of deliberative *demos*-cracy in Europe that it can be further developed both in theory and in practice.

It was the aim of this introduction to map some of the most important controversies affecting the ideal of deliberative democracy and to offer a critical background against which to read the different contributions in this volume. Numerous controversies remain and many questions are left unanswered, but the floor is now open for further deliberation.

References

- Aaen, A. van, List, C. and Lütge, C. (eds) (2003), *Deliberation and Decision: A Dialogue Between Economics, Constitutional Theory and Deliberative Democracy* (Aldershot: Ashgate).
- Ackerman, B. (1989), “Why Dialogue?”, *Journal of Philosophy*, 86(1), pp. 5–22.
- Archibugi, D. (2004), “Cosmopolitan Democracy and its Critics: A Review”, *European Journal of International Relations*, 10, pp. 437–73.
- Bachrach, P. (1967), *The Theory of Democratic Elitism. A Critique* (Boston: Little, Brown and Co).
- Bachrach, P. (1973), “Interest, Participation and Democratic Theory”, in J.R. Pennock and J.W. Chapman (eds), *Participation in Politics, Nomos XVI* (New York: Lieber-Atherton), pp. 39–55.

- Barber, B. (1984), *Strong Democracy. Participatory Politics for a New Age* (Berkeley: University of California Press).
- Barry, B. (1965), *Political Argument* (London: Routledge).
- Bell, D.A. (1999), "Democratic Deliberation: The Problem of Implementation", in S. Macedo (ed.), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford: Oxford University Press), pp. 70–87.
- Benhabib, S. (1986), *Critique, Norm, and Utopia* (New York: Columbia University Press).
- Benhabib, S. (1989), "Liberal Dialogue Versus a Critical Theory of Discursive Legitimation", in N. Rosenblum (ed.), *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press), pp. 143–56.
- Benhabib, S. (1992), "Models of Public Sphere: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas", in C. Calhoun (ed.), *Habermas and the Public Sphere* (Cambridge, MA: MIT Press), pp. 73–98.
- Benhabib, S. (1994), "Deliberative Rationality and Models of Constitutional Legitimacy", *Constellations*, 1(1), pp. 26–52.
- Benhabib, S. (1996), "Toward a Deliberative Model of Democratic Legitimacy", in S. Benhabib (ed.), *Democracy and Difference* (Princeton: Princeton University Press), pp. 67–94.
- Benhabib, S. (2004), *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press).
- Bessette, J.R. (1980), "Deliberative Democracy: The Majority Principle in Republican Government", in R. Goldwin and W.A. Schambra (eds), *How Democratic is the Constitution?* (Washington: American Enterprise Institute), pp. 102–16.
- Bessette, J.R. (1994), *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press).
- Besson, S. (2003), "Disagreement and Democracy: From Vote to Deliberation and Back Again? The Move Toward Deliberative "Voting Ethics"", in J. Ferrer and M. Iglesias (eds), *Globalisation, Democracy, and Citizenship – Prospects for the European Union* (Berlin: Duncker and Humblot), pp. 101–35.
- Besson, S. (2005), "The Paradox of Democratic Representation. On Whether and How Disagreement Should Be Represented", in L. Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot: Ashgate), pp. 125–61.
- Blichner, L. (2000), "The Anonymous Hand of Public Reason: Interparliamentary Discourse and the Quest for Legitimacy", in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 141–63.
- Bohman, J. (1996), *Public Deliberation. Pluralism, Complexity and Democracy* (Cambridge, MA: MIT Press).
- Bohman, J. (1997), "Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities", in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 321–48.
- Bohman, J. (1998), "Survey Article: The Coming of Age of Deliberative Democracy", *The Journal of Political Philosophy*, 6(4), pp. 400–25.
- Bohman, J. and Rehg, W. (eds) (1997), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press).
- Buchanan, J. (1954), "Social Choice, Democracy, and Free Markets", *Journal of Political Economy*, 62(2), pp. 114–23.

- Buchanan, J. (1975), *The Limits of Liberty* (Chicago: University of Chicago Press).
- Buchanan, J.M. and Tullock, G. (1962), *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press).
- Burke, E. [1774] (1989), "Speech to the Electors of Bristol", in *The Works of the Right Honorable Edmund Burke* (Boston: Little, Brown and Co), pp. 186–87.
- Calhoun, C. (ed.) (1992), *Habermas and the Public Sphere* (Cambridge, MA: MIT Press).
- Christiano, T. (1997), "The Significance of Public Deliberation", in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 243–78.
- Christiano, T. (2004), "The Authority of Democracy", *Journal of Political Philosophy*, 12(3), pp. 266–90.
- Cohen, J. (1986), "An Epistemic Conception of Democracy", *Ethics*, 97(1), pp. 26–38.
- Cohen, J. (1989), "Deliberation and Democratic Legitimacy", in A. Hamlin and P. Pettit (eds), *The Good Polity: Normative Analysis of the State* (Oxford: Blackwell), pp. 17–34.
- Cohen, J. (1996), "Procedure and Substance in Deliberative Democracy", in S. Benhabib (ed.), *Democracy and Difference* (Princeton: Princeton University Press), pp. 95–119 [also included in J. Bohman and W. Rehg (eds) (1997), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 407–37].
- Cohen, J. (1998), "Democracy and Liberty", in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 185–231.
- Cohen, J. and Sabel, C. (1997), "Directly-Deliberative Polyarchy", *European Law Journal*, 3(4), pp. 313–42.
- Crozier, M., Huntington, S.P. and Watanuki, J. (1975), *The Crisis of Democracy: Report on the Governability of Democracies in the Trilateral Commission* (New York: New York University Press).
- Cunningham, F. (2002), *Theories of Democracy. A Critical Introduction* (London: Routledge).
- Dahl, R.A. (1956), *A Preface to Democratic Theory* (Chicago: The University of Chicago Press).
- Dahl, R.A. (1989), *Democracy and its Critics* (New Haven, CT: Yale University Press).
- Davis, L. (1964), "The Cost of Realism: Contemporary Restatements of Democracy", *Western Political Quarterly*, 17(1), pp. 37–46.
- De Greiff, P. (2000), "Deliberative Democracy and Group Representation", *Social Theory and Practice*, 26(3), pp. 397–415.
- Delli Carpini, M.X., Lomax Cook, F. and Jacobs, L.R. (2004), "Public Deliberation, Discursive Participation and Citizen Engagement: A Review of the Empirical Literature", *Annual Review of Political Science*, 7, pp. 315–34.
- Downs, A. (1956), *An Economic Theory of Democracy* (New York: Harper and Row).
- Dryzek, J. (1990), *Discursive Democracy* (Cambridge: Cambridge University Press).
- Dryzek, J.S. (1999), "Transnational Democracy", *The Journal of Political Philosophy*, 7(1), pp. 30–51.
- Dryzek, J. (2000), *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations* (Oxford: Oxford University Press).
- Dryzek, J. (2001), "Legitimacy and Economy in Deliberative Democracy", *Political Theory*, 29(5), pp. 651–69.

- Elster, J. (1983), *Sour Grapes. Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press).
- Elster, J. (1986), "The Market and the Forum: Three Varieties of Political Theory", in J. Elster and A. Hylland (eds), *Foundations of Social Choice Theory* (Cambridge: Cambridge University Press), pp. 103–32.
- Elster, J. (1995), "Strategic Uses of Argument", in K. Arrow, R. Mnookin, L. Ross, A. Tversky and R. Wilson (eds), *Barriers to Conflict Resolution* (New York: Norton), pp. 237–57.
- Elster, J. (ed.) (1998a), *Deliberative Democracy* (Cambridge: Cambridge University Press).
- Elster, J. (1998b), "Deliberation in Constitution Making", in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 97–122.
- Ely, J. (1980), *Democracy and Distrust. A Theory of Judicial Review* (Cambridge, MA: Harvard University Press).
- Eriksen, E.O. and Fossum, J.E. (eds) (2000), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge).
- Estlund, D. (1993), "Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence", *Texas Law Review*, 71, pp. 1437–77.
- Estlund, D. (1997), "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority", in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 173–204.
- Fishkin, J.S. (1979), *Tyranny and Legitimacy: A Critique of Political Theories* (Baltimore: Johns Hopkins University Press).
- Fishkin, J.S. (1991), *Democracy and Deliberation. New Directions for Democratic Reform* (New Haven, CT: Yale University Press).
- Fishkin, J.S. (1995), *The Voice of the People: Public Opinion and Democracy* (New Haven, CT: Yale University Press).
- Fishkin, J.S. and Laslett, P. (eds) (2003), *Debating Deliberative Democracy* (Oxford: Blackwell).
- Fishkin, J.S. and Luskin, R. (2000), "Bringing Deliberation to the Democratic Dialogue", in M. McCombs (ed.), *A Poll with Human Face. The National Issues Convention Experiment in Political Communication* (Mahwah, NJ: Lawrence Erlbaum), pp. 3–38.
- Fishkin, J., Jowell, R. and Luskin, R. (2002), "Considered Opinions: Deliberative Polling in Britain", *British Journal of Political Science*, 32, pp. 455–87.
- Flathman, R.E. (1966), *The Public Interest* (New York: Wiley).
- Fraser, N. (1992), "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", in C. Calhoun (ed.), *Habermas and the Public Sphere* (Cambridge, MA: MIT Press), pp. 109–42.
- Fung, A. (2004), *Empowered Participation. Reinventing Urban Democracy* (Princeton: Princeton University Press).
- Fung, A. and Wright, E.O. (2001), "Deepening Democracy: Innovations in Empowered Participatory Governance", *Politics and Society*, 29(1), pp. 5–42.
- Gargarella, R. (1995), *Nos los representantes. Crítica a los fundamentos del sistema representativo* (Buenos Aires: Miño and Dávila).
- Gargarella, R. (1998), "Full Representation, Deliberation, and Impartiality", in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 260–80.

- Gerstenberg, O. and Sabel, C.F. (2002), "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?", in R. Dehousse and C. Joerges (eds), *Good Governance in Europe's Integrated Market* (Oxford: Oxford University Press), ch. 10.
- Goodin, R. (2000), "Democratic Deliberation Within", *Philosophy and Public Affairs*, 29(1), pp. 81–109.
- Goodin, R. (2003), *Reflective Democracy* (Oxford: Oxford University Press).
- Gregg, G.L. (1996), *The Presidential Republic: Executive Representation and Deliberative Democracy* (Lanham, MD: Rowman and Littlefield).
- Gutmann, A. (1999), "Deliberative Democracy and Majority Rule", in H. Hongju Koh and R.C. Slye (eds), *Deliberative Democracy and Human Rights* (New Haven, CT: Yale University Press), pp. 227–54.
- Gutmann, A. and Thompson, D. (1996), *Democracy and Disagreement* (Cambridge, MA: Harvard University Press).
- Gutmann, A. and Thompson, D. (1999), "Democratic Disagreement", in S. Macedo (ed.), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford: Oxford University Press), pp. 243–79.
- Gutmann, A. and Thompson, D. (2004), *Why Deliberative Democracy?* (Princeton: Princeton University Press).
- Habermas, J. (1962), *Strukturwandel der Öffentlichkeit* (Darmstadt: Hermann Luchterhand) [*The Structural Transformation of the Public Sphere* (1989), trans. T. Burger (Cambridge, MA: MIT Press)].
- Habermas, J. (1981), *Theorie des kommunikativen Handelns* (Frankfurt am Main: Suhrkamp Verlag).
- Habermas, J. [1983] (1990), "Discourse Ethics: Notes on a Program of Philosophical Justification", in S. Benhabib and F. Dallmayr (eds), *The Communicative Ethics Controversy* (Cambridge, MA: MIT Press), pp. 43–115.
- Habermas, J. (1992), *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp Verlag) [*Between Facts and Norms* (1996), trans. W. Rehg (Cambridge, MA: MIT Press)].
- Hongju Koh, H. and Slye, R.C. (1999) (eds), *Deliberative Democracy and Human Rights* (New Haven, CT: Yale University Press).
- Laclau, E. and Mouffe, C. (1985), *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics* (London: Verso).
- Laslett, P. (1956), "The Face to Face Society", in P. Laslett (ed.), *Philosophy, Politics and Society* (Oxford: Blackwell), pp. 157–84.
- Lord, C. (2004), "Legitimising a Contested Polity: The Case of the EU", in C. Closa and J.E. Fossum (eds), *Deliberative Constitutional Politics in the EU*, ARENA Report (Oslo: Arena), pp. 169–94.
- Lord, C. and Magnette, P. (2004), "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU", *Journal of Common Market Studies*, 42(1), pp. 183–90.
- Macedo, S. (1999) (ed.), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford: Oxford University Press).
- Macpherson, C.B. (1977), *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press).
- Manin, B. (1987), "On Legitimacy and Political Deliberation", *Political Theory*, 15(3), pp. 338–68.
- Mansbridge, J. (1983), *Beyond Adversary Democracy*, 2nd edn (Chicago: University of Chicago Press).

- Mansbridge, J. (1992), "A Deliberative Theory of Interest Representation", in M. Petracca (ed.), *The Politics of Interests. Interest Groups Transformed* (Boulder, CO: Westview Press), pp. 32–57.
- Mansbridge, J. (1999), "Everyday Talk in the Deliberative System", in S. Macedo (ed.), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford: Oxford University Press), pp. 211–39.
- Mansbridge, J. (2000), "What does a Representative Do? Descriptive Representation in Communicative Settings of Distrust, Uncrystallized Interests, and Historically Denigrated Status", in W. Kymlicka and W. Norman (eds), *Citizenship in Diverse Societies* (Oxford: Oxford University Press), pp. 99–123.
- Martí, J.L. (2004), *Autogobierno deliberativo: una defensa de la democracia deliberativa participativa*, doctoral dissertation, Pompeu Fabra University of Barcelona.
- Martí, J.L. (2005a), "The Sources of Legitimacy of Political Decisions: Between Procedure and Substance", in L. Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot: Ashgate), pp. 259–81.
- Martí, J.L. (2005b), "La nozione di ideale regolativo: note preliminari per una teoria degli ideali regolativo nel diritto", *Ragion Pratica*, 25, pp. 381–403.
- Mendelberg, T. (2002), "The Deliberative Citizen: Theory and Evidence", in M.X. Delli Carpini, L. Huddy and R. Shapiro (eds), *Political Decision-Making, Deliberation and Beyond. Research in Micropolitics*, Vol. 6 (New York: Elsevier), pp. 151–93.
- Michelman, F.I. (1986), "The Supreme Court 1985 Term Foreword: Traces of Self-Government", *Harvard Law Review*, 100, pp. 4–77.
- Michelman, F.I. (1988a), "Law's Republic", *Yale Law Journal*, 97(1), pp. 1493–537.
- Michelman, F.I. (1988b), "Political Truth and the Rule of Law", *Tel Aviv University Studies in Law*, 8, pp. 281–91.
- Michelman, F.I. (1989), "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation", *Tennessee Law Review*, 56(2), pp. 291–319.
- Miller, D. (1992), "Deliberative Democracy and Social Choice", *Political Studies*, 40, pp. 54–67 [also included in J.S. Fishkin and P. Laslett (eds) (2003), *Debating Deliberative Democracy* (Oxford: Blackwell), pp. 182–99].
- Mouffe, C. (1993), *The Return of the Political* (London: Verso).
- Mouffe, C. (2000), *The Democratic Paradox* (London: Verso).
- Nino, C.S. (1996), *The Constitution of Deliberative Democracy* (New Haven, CT: Yale University Press).
- Offe, C. (1998), "Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights", *Journal of Political Philosophy*, 6, pp. 113–41.
- O'Neill, O. (1989), *The Constructions of Reason* (Cambridge: Cambridge University Press).
- Pateman, C. (1970), *Participation and Democratic Theory* (Cambridge: Harvard University Press).
- Pennock, J.R. and Chapman, J.W. (eds) (1975), *Participation in Politics, Nomos XVI* (New York: Lieber-Atherton).
- Pettit, P. (1997), *Republicanism. A Theory of Freedom and Government* (Oxford: Oxford University Press).
- Pettit, P. (2003), "Deliberative Democracy, the Discursive Dilemma, and Republican Theory", in J.S. Fishkin and P. Laslett (eds), *Debating Deliberative Democracy* (Oxford: Blackwell), pp. 138–62.

- Rawls, J. (1993), *Political Liberalism* (New York: Columbia University Press).
- Rawls, J. (1997), "The Idea of Public Reason Revisited", *The University of Chicago Law Review*, 64(3), pp. 765–807.
- Riker, W.H. (1982), *Liberalism against Populism. A Confrontation between the Theory of Democracy and the Theory of Social Choice* (San Francisco: Freeman).
- Riker, W.H. (1986), *The Art of Political Manipulation* (New Haven, CT: Yale University Press).
- Ryfe, D. (2005), "Does Deliberative Democracy Work?", *Annual Review of Political Science*, 8, pp. 49–71.
- Schlesinger, P. and Kevin, D. (2000), "Can the European Union Become a Sphere of Publics?", in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 206–29.
- Schumpeter, J.A. [1942] (1946), *Capitalism, Socialism and Democracy*, 2nd edn (New York: Harper and Brothers).
- Steiner, J., Bächtiger, A., Spörndli, M. and Steenbergen, M. (eds) (2004), *Deliberative Politics in Action. Analysing Parliamentary Discourse* (Cambridge: Cambridge University Press).
- Sunstein, C. (1985), "Interest Groups in American Public Law", *Stanford Law Review*, 38, pp. 29–87.
- Sunstein, C. (1988), "Beyond the Republican Revival", *Yale Law Journal*, 97, pp. 1539–90.
- Sunstein, C. (1991), "Preferences and Politics", *Philosophy and Public Affairs*, 20(3), pp. 3–34.
- Sunstein, C. (1993), *The Partial Constitution* (Cambridge, MA: Harvard University Press).
- Sunstein, C. (2000), "Deliberative Trouble? Why Groups Go to Extremes", *Yale Law Journal*, 110, pp. 71–119.
- Sunstein, C. (2001), *Republic.com* (Princeton: Princeton University Press).
- Sunstein, C. (2002), "The Law of Group Polarization", *Journal of Political Philosophy*, 10(2), pp. 175–95 [also included in J.S. Fishkin and P. Laslett (eds) (2003), *Debating Deliberative Democracy* (Oxford: Blackwell), pp. 80–101].
- Sunstein, C. (2003), *Why Societies Need More Dissent* (Cambridge, MA: Harvard University Press).
- Thompson, D. (1999), "Democratic Theory and Global Society", *Journal of Political Philosophy*, 7(2), pp. 111–25.
- Truman, D. [1959] (1968), *The Governmental Process* (New York: Alfred A. Knopf).
- Tully, J. (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press).
- Urbinati, N. (2000), "Representation as Advocacy. A Study of Democratic Deliberation", *Political Theory*, 28(6), pp. 758–86.
- Waldron, J. (1999a), *Law and Disagreement* (Oxford: Clarendon Press).
- Waldron, J. (1999b), "Deliberation, Disagreement, and Voting", in H. Hongju Koh and R. Slye (eds), *Deliberative Democracy and Human Rights* (New Haven, CT: Yale University Press), pp. 210–26.
- Will, G.F. (1992), *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* (New York: Free Press).
- Whelan, F.G. (1983), "Prologue: Democratic Theory and the Boundary Problem", in R. Pennock and J. Chapman (eds), *Liberal Democracy, Nomos XXV* (New York: New York University Press), pp. 13–47.

- Wolfensberger, D.R. (2000), *Congress and the People: Deliberative Democracy on Trial* (Baltimore: Johns Hopkins University Press).
- Young, I.M. (1996), "Communication and the Other: Beyond Deliberative Democracy", in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press), pp. 120–36.
- Young, I.M. (1999), "Justice, Inclusion, and Deliberative Democracy", in S. Macedo (ed.), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford: Oxford University Press), pp. 151–58.

PART I
Why Deliberate

Chapter 1

Is the Ideal of a Deliberative Democracy Coherent?

Cristina Lafont

Introduction

In what follows, I would like to contribute to a defense of deliberative democracy by giving an affirmative answer to the question in the title. The goal is admittedly humble. For the coherence of an ideal says nothing about its desirability, feasibility or overall appropriateness.¹ And, indeed, I will not address these further issues here. But, though humble, the goal of assessing the coherence of an ideal seems to take precedence over any of the other issues. For addressing such issues with regard to an incoherent ideal would be pretty pointless. Of course, all of this assumes that the coherence of the ideal is not self-evident. It is not hard to show why this is so. According to the ideal of a deliberative democracy, political decisions should be made on the basis of a process of public deliberation among citizens. Thus, political decision-making procedures should be both democratic and deliberative. But given that not all procedures that are deliberative are also democratic and vice versa, the possibility of a clash between the deliberative and the democratic components of the ideal cannot be ruled out *a priori*. That is, depending on how each component is interpreted and justified, it could turn out that the best decision-making procedures from a purely deliberative point of view are not particularly democratic or that the best decision-making procedures from a democratic point of view are not particularly deliberative. If that were the case, increasing the deliberative quality of political decisions would require sacrificing their democratic quality and vice versa.² This indicates that, under

¹ Needless to say, defending the coherence of the deliberative ideal does not contribute to the central task that any fully articulated conception of deliberative democracy must accomplish, namely, to spell out in detail the ways in which the deliberative ideal should be put into practice in order to increase the deliberative qualities of existing democratic institutions. But however important this task may be, it is unlikely to succeed before enough clarity about the basic features of the deliberative ideal itself is achieved.

² For an alleged example of such a dilemma facing the deliberative model, see Pettit (2003). I find Pettit's discussion of what he calls "the discursive dilemma" very interesting, but in my opinion what the dilemma shows is the incompatibility between the deliberative

some interpretations, the deliberative ideal will be clearly incoherent. Moreover, its coherence seems very much to depend on a happy coincidence, namely, that the reasons why political decisions must be deliberative and the reasons why they must be democratic turn out to be mutually compatible. But taking into account that plausible answers to each of these questions can pull in opposite directions, it seems clear that not just any defense of the deliberative ideal will do. Only a defense *for the right reasons* can actually lend support to the claim that public democratic deliberation can simultaneously meet our deliberative and our democratic demands. In what follows, I will argue that such a defense is possible precisely by trying to provide a mutually consistent answer to the aforementioned questions, namely, why democracy must be deliberative and why deliberation must be democratic.

As already hinted at, these questions point to an internal tension in the very ideal of a deliberative democracy. Given that “deliberative” and “democratic” do not seem in any obvious way to be coextensive, let alone identical properties, there is no *a priori* guarantee that a commitment to one would always be compatible with a commitment to the other. Thus, it cannot be ruled out that, if worse comes to worse, one may have to choose which commitment trumps the other. However, the mere prospect of facing such a choice weakens considerably any attraction that the ideal may have. For, paradoxical as it may sound, it seems that by developing a full conception of deliberative democracy one may end up either not being a strongly committed democrat or a strong defender of deliberation in politics. Seen in this light, the conceptual challenge for any attempt to develop the ideal of deliberative democracy into a fleshed out conception is to answer the aforementioned questions in a way that is internally consistent and does not lead to a weakening either of the commitment to democracy or to deliberation. In other words, taking at face value the dual commitment entailed in the ideal of deliberative democracy, the task would be to explain the source of each of those commitments and to show how democratic deliberation in particular can contribute to the satisfaction of *both of them* at once.³

Perhaps a hint for how to approach the first task can be taken from the general ideal of democracy as a government “for the people and by the people,” as this ideal seems to express a dual commitment as well. Although the specifically “democratic” element lies in the second property, it seems obvious that a system of government could hardly be justified if it did not (at least) claim to satisfy the first property as well. Thus, a democratic system of government is one that is not

and the aggregative models of democracy, and not a genuine dilemma facing the deliberative model as such. On this issue, see note 30.

³ The specific sense of this claim is to rule out that democratic deliberation could contribute to one of them *only by being detrimental to the other*. This, however, by no means requires defending the much stronger (and implausible) claim that democratic deliberation *alone* is the best means to achieve both of them. On the implausibility of an exclusivity thesis, see Christiano (1997, p. 250).

only for the benefit of all those governed by it, but one in which the governed are at the same time those who get to decide what is and what is not in their benefit. In more familiar terms, the governed are not only subject to the law but authors of the law. According to this ideal of self-rule, the validity of legislative decisions depends not only on whether they are “for the people,” that is, just (efficient, good, etc.) from a substantive point of view, but also on whether they are decided “by the people,” that is, by a procedure that secures the voluntary consent of those who must comply with them. This already provides us with a schematic answer to our first question. At a minimum, the ideal of democracy entails a commitment to a political decision-making procedure that should secure the voluntary assent of its members (1) to substantively just outcomes (2).

However, the democratic ideal suggests a stronger connection between both commitments. It suggests that satisfying the former condition intrinsically contributes to the satisfaction of the latter.⁴ For the *procedure* of making legislative decisions dependent on the voluntary assent of those who must comply with them requires taking the interests of all of them into consideration and thus it contributes at the same time to reaching *substantively* just decisions, that is, decisions equally in everyone’s interest. A government “by the people” intrinsically contributes to the achievement of a government “for the people.”

It is with the interpretation of this connection, however, that the difficulties I mentioned at the beginning originate. For the attempt to give an account of the internal relationship between these two dimensions of validity invites all kinds of reductive strategies of explanation, from strongly reductive strategies that try to define one dimension in terms of the other (e.g., to be a just outcome is to be a democratically decided outcome) to weaker strategies that consider either one dimension of instrumental value for the other (e.g., the value of democratic procedures reside in their instrumental value for reaching substantively just outcomes) or both of value for yet a third dimension (e.g., justice requires substantively correct outcomes and democratic procedures, but for mutually independent reasons).⁵ Of course, the reductive character of these strategies by no means prevents them from being plausible or even correct. The problem concerns specifically the model of deliberative democracy. For, as already hinted at, a defense of the deliberative model on the basis of a reductive strategy threatens to end up being either a strong defense of deliberation at the expense of democracy or a strong defense of democracy at the expense of deliberation. However plausible any of these strategies may be, it is just hard to see how they could count as defenses of the model of deliberative democracy in particular, rather than of something else.

⁴ For recent analyses of the complex relationship between justice and democracy, see the essays collected in Dowding et al. (2004).

⁵ For a detailed overview and analysis of some of these strategies, see Christiano (1999).

It seems thus that a defense of the model of deliberative democracy can be successful only if it can give a consistent justification to the following claims: that democratic deliberation, by its very nature, contributes to securing the best possible outcomes from a substantive point of view, as well as the reasoned acceptance of those who must comply with them and that, to that extent, it can explain the internal relationship in the satisfaction of both conditions as suggested by the democratic ideal. Moreover, to the extent that it is possible to show the intrinsic contribution that democratic deliberation can make to satisfy each of these requirements (or, more cautiously, to the extent that there is nothing about democratic deliberation that would make it impossible to satisfy both of them at the same time), the deliberative model can be considered a plausible ideal and thus serve as a practical guide for designing democratic institutions.

Now, to claim that the deliberative model requires a non-reductive strategy of political justification implies recognizing the logical independence of the aforementioned constraints or requirements. In other words, it implies recognizing that, according to the deliberative model, securing the voluntary consent to political decisions by all those who must comply with them is of intrinsic value, regardless of the likelihood that, by so doing, the outcomes of these decisions may be better or worse from a substantive point of view; and vice versa, securing substantively just decisions is of intrinsic value regardless of the likelihood that, by so doing, the voluntary consent of citizens may be easier or harder to secure.⁶ Different conceptions of deliberative democracy offer different explanations for the nature and justification of each of these constraints and I will not try to defend any particular version of these justifications here.⁷ Assuming that at least some of them are plausible,⁸ what matters in our context is whether their logical

⁶ This claim is weaker than it may seem. Although I do think that the deliberative model requires participants in deliberation to assume that the substantive correctness of (many of) their decisions is independent of their (actual) reasoned consent, I am referring here to a much weaker claim, namely, that for the deliberative model reaching a *voluntary* consent is not enough; it must be a *reasoned* consent, that is, a consent based on reasons that all reasonable people could accept (or could not reasonably reject). To that extent, considerations about the substantive correctness of the outcome cannot be excluded from deliberation for the sake of reaching agreement.

⁷ Doing so would be necessary in order to argue for the superiority of the model of deliberative democracy vis-à-vis other models (democratic or otherwise), whereas here my goal is only to show the internal consistency of the deliberative model. Given this goal, my approach here aims to be as ecumenical as possible; that is, I will try to identify the minimal core of claims that are necessary for defending any particular version of the deliberative model without taking sides on any further claims that can be considered optional or controversial among the different conceptions of deliberative democracy.

⁸ Most of these justifications draw heavily from contractualist ideas. The distinctive feature of social contract theories is the attempt to explain the validity of social norms in terms of the notion of a possible agreement among those who must comply with them. This is the normative core of the otherwise metaphorical idea of a social contract. What

independence can be defended as well. If both conditions of political justification impose independent constraints for the design of democratic institutions, a clash between them may seem unavoidable, unless a specific way of making them compatible can be shown.

Within the deliberative model this is done by introducing a further condition that can plausibly be said to satisfy both constraints at once, namely, a condition of *mutual justifiability*.⁹ On the one hand, such a condition is internally connected to the epistemic goal of reaching substantively correct outcomes (i.e., just, efficient, good, etc.).¹⁰ For it seems plausible to claim that a deliberative procedure suitably designed to track “the force of the better argument,” to use Habermas’s term, contributes to increasing the epistemic quality of the decisions. On the other hand, a condition of mutual justifiability is internally connected to the democratic goal of reaching legitimate decisions by securing the free and reasoned

varies among the different contractualist theories is the kind of reasons (moral, political, prudential, etc.) that are appealed to for justification. Usually, justifications of the model of deliberative democracy draw from the Kantian tradition of contractualism in their appeal to moral reasons related to the autonomy of agents (that is, to the intuition that forcing anyone to act against her own reason is morally wrong and thus that the validity of political decisions cannot lie beyond the reasoned agreement of those who must comply with them).

⁹ As expressed by Gutmann and Thompson (2000, p. 161), deliberative democracy’s fundamental principle is that “citizens owe one another justifications for the laws they collectively impose on one another.” For their particular interpretation of the commitment to mutual justifiability, see also Gutmann and Thompson (1996, pp. 52–94, and 2004, pp. 133–38).

¹⁰ Due to my ecumenical aims, I leave open the question of how many dimensions of validity may be involved in the evaluation of political decisions and which criteria of correctness may be appropriate in each case, according to different conceptions of deliberative democracy. Thus, my use of the expression “correct outcomes” is just a placeholder in need of supplementation by whatever specific account each conception of deliberative democracy may offer for what such “correctness” in turn consists in. To my knowledge, the conception of deliberative democracy that offers the most elaborate account of the different dimensions of validity of political decisions and their respective senses of correctness is Habermas’s discourse theory. According to that conception, the outcomes of political decisions can be evaluated from the moral, the pragmatic and the ethical points of view. What is at issue in each case is (roughly) whether these outcomes are just, efficient or “good for us,” and the appropriate forms of deliberation are moral, pragmatic, and ethical discourses, respectively. These dimensions of validity are relevant for evaluating the outcomes of processes of bargaining and compromise as well, but in those cases what is at issue from the moral point of view is the fairness of the procedures rather than the substantive justice of the outcomes themselves. See Habermas (1993 and 1996). A further refinement in this scheme has been proposed by some authors sympathetic to discourse theory, who distinguish among the latter processes between purely strategic bargaining processes and compromises on moral and ethical issues. See McCarthy (1991 and 1996); Bohman (1998).

assent of those who must comply with them. For it seems equally plausible that a deliberative procedure designed to track the force of the better argument can contribute to distinguishing those decisions that can meet with the participants' free and reasoned assent and those that do not. Moreover, precisely in virtue of its two-dimensional origin, a condition of mutual justifiability indicates the appropriate limits of both our epistemic and our democratic goals. With regard to the epistemic virtues of a political decision procedure, the constraint of mutual justifiability implies that it is not enough that its outcomes *be* in fact correct, they must be *manifestly so* to their members (Cohen, 1997, p. 73). Consequently, our goal is to select the decision procedure able to secure not just the epistemically best outcomes, but the best outcomes among those that can attain the free and reasoned assent of their members. With regard to the democratic virtues of a political decision procedure, the constraint of mutual justifiability implies that it is not enough that political decisions *be* in fact *agreed* upon. In addition to this, the justifiability of the reasons that support them must be manifest to their members. Consequently, our goal is to select the decision procedure most suited to securing not just agreement, but publicly justified agreement. If this is indeed an appropriate understanding of both our epistemic and our democratic goals, the core claim of the deliberative model, namely, that public deliberation can contribute to reaching both of them, seems very plausible. Thus we need to analyze the details of the deliberative interpretation of each of these goals. For this task we can take as a guide our initial questions, namely, why democracy must be deliberative and why deliberation must be democratic, respectively.

1 Epistemic Virtues of the Deliberative Model

To some, the question of why democracy must be deliberative may sound like another way of asking why it is better to make political decisions on the basis of rational deliberation instead of just making them haphazardly. Seen in this light, the answer seems obvious: democracy must be deliberative in order to increase the likelihood of reaching correct decisions or, as it is usually put, in order to track the truth. This is because the correctness of our decisions depends on the right assessment of all relevant information and this, in turn, requires rational deliberation.¹¹ This answer undoubtedly expresses a strong intuition behind the deliberative ideal, but its purely epistemic character poses two important threats to a defense of the deliberative model.

As hinted at before, a purely epistemic justification of the deliberative ideal has no internal resources for explaining why deliberation must be democratic. For if it turned out that the right assessment of relevant information could be better guaranteed by non-democratic means, say, by an elite of political and

¹¹ For a purely epistemic defense of the role of deliberation in democracy, see Nino (1996, ch. 5).

moral experts, no argument would be left to support the claim that deliberation must be democratic. A purely epistemic conception of democracy is essentially committed to epistocracy (i.e. rule of the knowers)¹² and only contingently committed to democracy. That is, the latter commitment is contingent on the truth of the empirical claim that democracy is the best form of epistocracy (i.e. that the set of knowers happens to be the entire community). To the extent that the link between democratic deliberation and correctness is contingent, it cannot be *a priori* excluded that some form of non-democratic deliberation could (putatively) offer a better guarantee of reaching substantively correct decisions, in which case democracy would (and should) be dispensable, according to this view.

Of course, a possible reaction to this argument could be to just bite the bullet. If one is really and seriously committed to the virtues of deliberation and reason in politics, perhaps one should not be embarrassed to recommend whichever decision procedure turns out to be epistemically better. If a defender of deliberative democracy must actually choose between deliberation and democracy, perhaps deliberation is ultimately the right choice. After all, if developing the deliberative ideal is understood as the attempt to give content to the concept of ideal deliberation, perhaps the right approach would just be to spell out the features that a process of ideal deliberation should have from a normative point of view, and to leave open the empirical question of participation; that is, of who may be able or best suited to participate in such a process. However, there is another, potentially even more devastating threat in following this argumentative strategy. A purely epistemic justification of the deliberative ideal may not only be detrimental to democracy, it can even be detrimental to deliberation as well.

According to a purely epistemic conception, the goal of a deliberative procedure is to secure the substantive correctness of its outcomes. Given this goal, it seems that a prerequisite for ideal deliberation would be the availability of full information. For nothing short of it would secure correct outcomes. However, accepting such a stringent condition would have very damaging consequences for a conception of deliberative democracy. First of all, such a prerequisite would sever the link between ideal and real deliberation to such an extent that it may

¹² I borrow this term from Estlund (1997, p. 183). In this article Estlund offers an epistemic defense of democracy, but it is not of the “purely” epistemic kind that I am referring to here. He advocates a mixed strategy that entails not only epistemic requirements, but also a requirement of procedural fairness. He calls this strategy “epistemic proceduralism.” In contradistinction, the mixed strategy that, in my opinion, underlies the deliberative model entails epistemic requirements and a requirement of deliberative and not just procedural fairness. As will become clear later, given that the deliberative procedure must give better reasons greater influence over the outcome of the decision-making process, its fairness does not consist in granting everyone equal opportunities of influence over the outcome, but in granting them equal opportunities of participation in the deliberative process of shaping or contesting the public justifiability of the outcome. As a consequence, the deliberative model has some similarities with Estlund’s epistemic proceduralism, but it has some crucial differences as well. On some of them, see note 15.

invalidate the central claim of the deliberative conception; namely, that real public deliberation matters for the validity of political decisions. To the extent that real deliberation must take place under conditions that fall short of full information, it would be unclear what its contribution is supposed to be to the validity of its outcomes. In fact, as many authors have pointed out, real public deliberation can make decisions worse from a substantive point of view (Elster, 1997 and 1998; Sunstein, 2003; Shapiro, 1999). What this indicates is that a purely epistemic conception of the deliberative ideal may be essentially committed to ideal deliberation, but it is only contingently committed to real deliberation. Consequently, depending on the circumstances, the deliberative ideal may not issue a recommendation for increasing real democratic deliberation. But, yet again, perhaps this is just as it should be. However paradoxical it may seem that a defender of deliberative democracy may end up committed neither to democracy nor to real deliberation, it could be that the normative commitment behind the deliberative ideal is just a commitment to ideal deliberation. However, there is a difficulty in following this strategy as well. For even at the level of ideal deliberation, a prerequisite of full information threatens to invalidate the view that public deliberation is of intrinsic value for the correctness of political decisions. For, once full information is available, it is no longer clear what the role of interpersonal deliberation should be (Sunstein, 2003; Estlund, 1993b). Strictly speaking, the purely epistemic conception is committed to the ideal assessment of information, but not necessarily to ideal deliberation *per se*. In view of the negative prospects of pursuing a purely epistemic strategy to explain the epistemic virtues of the deliberative ideal, perhaps it would be better to follow the opposite strategy. First, identify some epistemic property that public deliberation by its very nature can plausibly be claimed to track, and then explain why it matters for the validity of political decisions.

Considering what was mentioned in the previous section, it seems more promising to claim that public deliberation tracks *mutual justifiability* or, to use Joshua Cohen's term, "justification through public argument" (Cohen, 1997, p. 72). For it is hard to see how such a condition could be met, but through public deliberation. This is not to claim that real deliberation cannot fail to track public justifiability. For real deliberation can easily be more sensitive to pressures other than that of the force of the better argument. In this sense, "mutual justifiability" is a genuine goal that real democratic deliberation should try (and thus may fail) to achieve. The claim is only that public deliberation, that is, a deliberative procedure that includes all available views and arguments in order to determine where the balance of argument lies, seems intrinsically well suited to track mutual justifiability. And, given that mutual justifiability, as opposed to truth or correctness, is not recognition-transcendent, that is, given that "the better argument" can fall short of being the correct one, there is nothing that *a priori* prevents real deliberation from mirroring ideal deliberation. Inclusion of all views and arguments available at a given time for an assessment of their

relative strength by no means requires full information, infallibility or any other epistemic condition beyond human capacities.

Now, the tricky part of following this strategy lies in our ability to give an equally plausible answer to the second question, namely, what it is about public justification that contributes to the validity of political decisions. For nothing would be gained in the attempt to move away from the purely epistemic strategy if the answer to the second question were, in turn, that public justification is just a reliable indicator of truth. As we saw before, this move would make the plausibility of the model of deliberative democracy depend on the truth of two very contentious claims, namely, that democracy is the best form of epistocracy and that public deliberation is the most reliable indicator of truth.

I do not mean to suggest that a defense of these claims is not possible. In fact, such defenses are easy to find within the broad camp of epistemic justifications of democracy, for obvious reasons. Given that any epistemic justification of democracy is committed to the claim that political questions can have substantively right or wrong answers, it seems hard to rule out the possibility that some may know those answers better than others. If this is the case, and substantive correctness is the only goal, one should conclude that these experts should rule. A familiar line of argument intended to avoid this conclusion is to claim that, given the specific nature of political questions, the existence of moral experts, that is, an elite significantly more reliable at getting the right answers to political questions than the rest of the citizens, is highly unlikely. Given that the correctness of political decisions essentially depends on their justice, that is, on whether they are equally in everyone's interest, and given that each individual knows best what is in his or her own interest, it is extremely unlikely that any putative moral expert could actually know what is in everyone's best interest better than the members of the community as a whole.¹³ This is why democracy is, in fact, the best form of epistocracy.

Of course, this line of argument relies on several empirical assumptions whose correctness is very hard to assess. But my impression is that this is not its main problem. The real difficulty in following a strategy that relies on these claims is not so much that they may turn out to be false. It is rather that, even if they were true, they seem *irrelevant* for a defense of democracy. The problematic assumption behind such an argumentative strategy is that its commitment to democracy is due to purely epistemic reasons. Consequently, an answer to the question of whether moral experts exist seems all that is needed to answer the question of whether they should rule. But this is a non-sequitur. For the latter question, as opposed to the former, is not about expertise, but about authorization for decision-making. Even if someone could know better than me which political decisions are in my own interest, this does not mean that *anyone could be better than me at giving my*

¹³ For an argument along these lines, see Dahl (1989, ch. 7), also Nino (1996, ch. 5).

own authorization to act on them.¹⁴ Nobody can give my authorization for me. What is wrong with defending authoritarianism is not the optimism of assuming that there are experts who can make political decisions better than others, but the illegitimacy of assuming that this relieves these experts of the obligation to *ask for others' authorization* before making decisions *for them*.¹⁵ A commitment

¹⁴ The point perhaps becomes clearer if we switch from the political context to a practical context, in which the existence and even the authority of experts is not questioned, for example medical practice. Although doctors are clearly experts and their authority is widely recognized, we still have to authorize the treatment decisions they make for us. But this is not because their expertise may be limited or questionable after all. It is just because no amount of expertise could ever enable them to take *my own risks*. Only I can do so. Obviously, the same applies to the risks and consequences of political decisions to which we must comply.

¹⁵ In this context, it is important to keep in mind that the obligation of *securing authorization* before making decisions on someone else's behalf is not met just by *securing their recognition of your expertise* (see prior note). In "Making Truth Safe for Democracy," Estlund offers a defense of epistemic democracy against the charge that it involves a commitment to epistocracy that seems to conflate both conditions (Estlund, 1993a). He conceives of his argument as offering a purely epistemic objection to authoritarianism (namely, that "no knower is so knowable as to be known by all reasonable people" Estlund, 1993a, p. 88). Consequently, his official line of defense is supposed to confront authoritarianism on purely epistemic grounds; namely, on its epistemic difficulties in answering the question "who will know the knowers?". But his argument seems to smuggle in a condition of legitimacy disguised as an epistemic condition. For it assumes that the reliability of any putative candidate for being a moral expert would need to be demonstrated beyond reasonable doubt to all reasonable members of the political community. On the basis of this assumption he adduces several epistemic reasons that cast doubt on the chances of such a demonstration and concludes that it is unlikely that all citizens would agree on the candidate's putative expertise. However, he offers no epistemic reasons to motivate the rationale of imposing such a peculiar condition in the first place. In general, the expertise of any putative candidate in any field (from medicine to physics, jurisprudence, and so on) usually is judged by other experts in that field and not by democratic referendum. This makes perfect sense from an epistemic point of view precisely because, *per hypothesis*, not all members of the community qualify as experts. By asking that the reliability of the putative expert be demonstrated to all reasonable members of the political community, Estlund is asking for a condition of authorization; that is, of securing the *legitimacy* of delegating to the expert's authority. But such condition is *logically independent and irreducible to any merely epistemic condition*. In other words, Estlund seems to misidentify the question that is actually driving his criticism of authoritarianism. The relevant question is not who will *know* the knowers, but who should *authorize* them. Only a concern for the latter question justifies the requirement that the reliability of the putative moral experts be demonstrated beyond reasonable doubt to all members of a political community. But once this is recognized, it becomes clear that what is doing the work in Estlund's argument, if anything, is not the epistemic constraint of requiring demonstration "beyond reasonable doubt," but the democratic constraint of requiring demonstration "to all members of the community." For, once it is recognized that the entire community is the proper locus for the

to democracy is rooted in the recognition of this obligation as a condition of political legitimacy.¹⁶

According to the deliberative model, this intrinsic dimension of the validity of political decisions requires participants in deliberation to be able to convince others of the putative correctness of a political proposal with reasons that they can accept (that is, reasons that would be unreasonable for them to reject).¹⁷ Consequently, in tracking the “mutual justifiability” of political proposals, deliberation is not just contributing to tracking their correctness, but most importantly it is at the same time tracking the extent to which they can attain the reasoned assent of those who must comply with them. This is one intrinsic value of the process of public *deliberation* as such. Taking into account that the validity of political decisions depends not only on their substantive correctness (i.e. justice, efficiency, etc.) but also on the legitimacy of their implementation, it is possible to see what is wrong with a purely epistemic explanation of the contribution that public deliberation makes to the validity of political decisions. Although a constraint of mutual justifiability is indeed an epistemic constraint, it is not due to merely epistemic reasons. It is not just because justification can be an indicator of truth that participants in political deliberation must justify their views with reasons that the others can accept, as in any other epistemic discourses (ordinary or scientific). It is because we are under the obligation of *convincing them* before we make decisions to which they must comply that political deliberation must be democratic. In other words, we are independently committed to justify our political decisions to them with reasons that they can reasonably accept, whether doing so increases the likelihood of correct decisions or not in any given occasion. What is wrong with the purely epistemic defense of the deliberative ideal is the assumption that such defense turns on whether mutual justifiability is or is not the best means for the goal of reaching substantively correct decisions. This ignores that an intrinsic element of our goal is reaching mutually justifiable decisions and not only putatively correct ones.

In this context, it is very important to underline the exact difference between a purely epistemic and a deliberative justification of democracy – for the difference is not that the latter does not have an epistemic dimension. A successful defense

authorization of any delegation to putative experts, it becomes clear that the point of the “demonstration” is not epistemic (i.e. to secure certainty or beyond-reasonable-doubtiness), but political (i.e. to secure legitimate authorization). What seems most problematic in the purely epistemological interpretation of Estlund’s objection is that it seems to share the basic premise of authoritarianism, namely, that a knower who was so knowledgeable as to be known by all reasonable people could just make decisions for them without asking for their permission.

¹⁶ Of course, once this obligation is recognized, democracy promises to win by default.

¹⁷ This is the deliberative interpretation of the democratic requirement that those who must comply with the laws must be able to see themselves not only as subjects to them but also as authors of them.

of the deliberative ideal indeed requires a defense of the epistemic virtues of public deliberation and thus of its contribution to increasing the quality of its outcomes from a substantive point of view. But the intrinsic contribution of public deliberation to the legitimacy of political decisions makes a crucial difference in the sense and implications of that defense. For, in contradistinction to the purely epistemic view, the success of the latter does not turn on whether public deliberation is just the most reliable indicator of truth. It turns on whether it is the most reliable indicator of truth *among the reliable indicators of mutual justifiability*. This implies that, as long as no better alternative to ideal public deliberation can be offered for achieving the goal of mutual justifiability, public deliberation remains non-negotiable. Consequently, worries about the epistemic deficiencies of *real* deliberation processes do not automatically have the status of objections to the deliberative model, as they would for the purely epistemic view. Instead, they can be taken as practical imperatives. They indicate which features of existing institutions of public deliberation need to be transformed to maximize their contribution to the goal of achieving the best possible outcomes from a substantive point of view.¹⁸ This remains the case as long as no epistemic objections to *ideal* deliberation can be offered; that is, as long as there is no reason to assume that tracking the force of the better argument diminishes rather than increases the likelihood of substantive correctness.¹⁹ As long as we have no reason to question the general epistemic value of reasoned justification for knowledge, tracking the force of the better argument can intrinsically contribute to increasing the substantive correctness of political decisions. This is a genuinely epistemic virtue of the deliberative model.

2 Democratic Virtues of the Deliberative Model

To the extent that public deliberation can be understood as a procedure that aims to include all available views and arguments in order to determine where the balance of argument lies, it seems intrinsically well suited to track mutual justifiability. But if a commitment to mutual justifiability is interpreted merely as derived from a plausible general condition for knowledge, that is, from a commitment to reasoned justification or maximal rational consistency, it would have no obvious democratic implications. As we saw before, the democratic sense

¹⁸ As already indicated, this is surely the bulk of the work that a fully articulated conception of deliberative democracy must accomplish by addressing all empirical questions about institutional design that would allow real democracies to approximate the deliberative ideal. See note 1.

¹⁹ The same applies, of course, to the goal of mutual justifiability. Worries to the effect that real deliberation may fail to track mutual justifiability can be taken as practical imperatives to transform existing deliberative practices so as to maximize their responsiveness to the force of the better argument (rather than to other forces).

of the commitment to mutual justifiability derives from the obligation to reach legitimate decisions by securing the free and reasoned assent of *those who must comply with them*. That is, the obligation is not just to secure some justifying reasons before making political decisions, instead of making them irrationally, but to secure the reasoned assent of the citizens of a particular political community. In other words, what needs to be shown is how the epistemic features of a procedure of public deliberation can genuinely contribute to the democratic goal of securing the actual reasoned consent of actual people.

Deliberation and Consensus

A straightforward answer to this question could be the following: in tracking the force of the better argument, public deliberation can contribute to reaching the reasoned assent of the members of a particular political community precisely by bringing about a unanimous consensus on those views that are supported by the force of the better argument. Although post-deliberative decisions that are unanimously agreed upon may turn out to be incorrect from a substantive point of view,²⁰ their public justifiability by no means decreases the likelihood of their correctness and certainly secures the legitimacy of their implementation, at least as long as no evidence to the contrary or new counterarguments arise. This is a genuinely democratic virtue of the deliberative model. Defenders of the deliberative model usually express it in the form of a “democratic principle.” Joshua Cohen’s version of the principle is that “outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals” (Cohen, 1997, p. 73). Habermas’s discourse-theoretic version of the principle is that “only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted” (Habermas, 1996, p. 110).

Needless to say, unanimous post-deliberative consensus is as secure a way to satisfy such a condition of democratic legitimacy as there can be. However, as is often pointed out, unanimous consensus is hardly ever possible in pluralist societies. Thus, unless some additional answer can be given, there seems to be no genuine contribution that public deliberation as such makes to the democratic process for all those situations in which no unanimous consensus is achieved. If this is the case, the strength of the deliberative model seems very limited. However

²⁰ In my opinion, antirealist interpretations of the deliberative ideal are in the end untenable, but I do not mean to rule them out here. Even those authors who, following an antirealist strategy, identify substantive correctness with ideal rational consensus recognize the possibility that new evidence or new counterarguments may undermine a prior consensus without undermining the rationality of the deliberative procedure that brought it about. See, for example, Habermas (2003, p. 258). I very much doubt that such a claim can be defended successfully within an antirealist approach, but I will not discuss this issue here. I have discussed it at length in Lafont (1999, 2003 and 2004).

valuable public deliberation may be from an epistemic point of view, from a strictly democratic point of view it seems largely worthless (if not even detrimental²¹) as a collective decision-making procedure. As critics of the deliberative model usually point out, democracy begins precisely when deliberation ends and action is taken (usually by voting). If the only democratically significant feature of a procedure of tracking the force of the better argument derives from its ability to generate unanimous consensus, public deliberation can be considered largely insignificant from a democratic point of view, at least for modern pluralistic societies.²²

In view of these difficulties, many authors sympathetic to the deliberative ideal have suggested that the deliberative model should drop the requirement of consensus in order to increase the plausibility and usefulness of the model for democratic theory. However, in this context it is important to notice that the difficulties just mentioned are not derived from the requirement of consensus, but from the requirement of consent. That is, the difficulties originate in the requirement of securing *the agreement of all* participants in the democratic process. This, however, is not a peculiar requirement of the models of deliberative democracy. It is the democratic criterion of legitimacy itself. It could hardly help the deliberative model to weaken the condition of democratic legitimacy so as to require only the reasoned agreement of *some* of the citizens. This would make the deliberative model not a model of democracy, but of something else. Given that this is not a viable option, the only other way to weaken the requirement of reasoned consensus would be by requiring the *agreement of all* citizens, but *for different reasons*.²³ However, a model with *only* this weaker requirement could

²¹ See note 14.

²² See Elster (1997). For some empirical evidence to the contrary, see Steiner et al. (2004).

²³ See McCarthy (1991 and 1996). According to his pluralistic proposal, citizens could agree to the implementation of what they consider the wrong policy from a substantive point of view, for reasons other than its substantive merits (reasons such as procedural fairness, the need for cooperation, mutual accommodation, stability, and so on). The deliberative model can certainly recognize the legitimacy of this weaker requirement for *some* kinds of issues. The paradigm examples are choice-sensitive issues that call for compromises (e.g., whether to use public funds for a new sports center or a new road system, to use Dworkin's example (2003). Assuming that for those issues the participants in deliberation themselves consider reasons such as procedural fairness, mutual accommodation, and so on, the *right* reasons, the requirement of reaching the reasoned agreement of all participants would indeed be met in those cases as long as the conditions of democratic fairness are satisfied. However, the proposal of dropping "reasoned consensus" as a requirement involves accepting its legitimacy for *all* kinds of cases, especially for cases of deep moral disagreement (e.g. for choice-insensitive issues such as capital punishment, euthanasia, abortion, and so on). But it is precisely with regard to the latter cases that the pluralistic proposal seems to face an additional difficulty. Although the strongest reason that critics of consensus adduce in favor of their proposal is the fact of deep moral disagreement in pluralistic societies, it seems that the consensual

hardly count as a model of deliberative democracy.²⁴ For this requirement can certainly be satisfied without deliberation. Moreover, deliberation seems to play no role in satisfying it. The weaker requirement seems to describe precisely the situation in which public deliberation *fails* in its task of identifying the views supported by the force of the better argument in order to give them a greater influence over the outcome. However, if this were not a failure but the very goal, as the weaker requirement would have it, a deliberative mechanism of tracking the force of the better argument would seem particularly unsuited for equalizing the influence of different reasons over the outcome. By declaring the substantive reasons for political decisions *irrelevant* for securing the agreement of the citizens, the deliberative model would just concede defeat to the aggregative model of democracy and recognize that a deliberative procedure of tracking the force of the better argument has no intrinsic contribution to make in *determining the outcome* of the decision-making process. And if this is the case, the deliberative model

model is in a better position to account for that fact than the pluralistic model. This is because deep moral disagreement can only be a persistent feature of pluralistic societies to the extent that the goal of all those concerned in the resolution of deep moral conflicts is consensus on the substantively right policy. For if anything short of such consensus were indeed acceptable to the members of a political community as a final solution to their conflict there would be no reasons left for persistent disagreement. I discuss in detail the difficulties of McCarthy's proposal along these lines in Lafont (2006).

²⁴ Some authors seem to recommend the weaker requirement merely as an additional possibility. Accordingly, their recommendation would not be to drop the requirement of consensus altogether, but to limit it to some cases and recognize moral compromises as acceptable in other cases. For an example, see Bohman (1998). The difficulty with this proposal lies in determining its precise conceptual significance. For, in terms of a characterization of the goal of deliberation, the proposal seems to coincide with the standard, consensual model. Given that participants in deliberation cannot know in advance which moral disagreements will issue in post-deliberative consensus and which ones will not, it seems that the consensual goal must be always in place in the process of deliberation and, consequently, a moral compromise remains necessarily a second-best, temporary outcome. This is especially the case if, as Bohman insists, the possibility of future revision of the reached compromise (presumably in view of counterarguments against its substantive merits) must always remain open (see Bohman, 1998, p. 101). However, if the significance of the proposal lies in the revisionary suggestion that participants in deliberation should consider moral compromise not as a second-best, temporary option, but as a perfectly acceptable goal, it threatens to collapse into the stronger suggestion of dropping the requirement of consensus for all cases. For, if nothing is wrong with moral compromise, why should unanimous consensus be required at all? Moreover, if there is no criterion for distinguishing in advance which cases of deep moral disagreement fall under which category, how can participants in deliberation implement the proposal? How can they know for which cases and at what point to drop the goal of consensual agreement on the substantively right policy? If the answer is just "whenever the attempts to reach a deliberative consensus have already failed," the proposal collapses into the standard, consensual model.

has nothing to contribute to an understanding of democracy, whether it requires consensus or not. So long as it is a condition for democratic legitimacy that all participants in the democratic process must be able to give their free assent to the outcomes, if those in the minority, who give their free assent to the majoritarian outcome in spite of their substantive disagreement, do so for procedural reasons *that are unrelated to any epistemic features of the deliberative process*, the deliberative model makes no essential contribution to a theory of democracy.

Seen in this light, it seems that the deliberative model can only be defended if it can be shown that public deliberation, by virtue of tracking the force of the better argument (assuming it does), can intrinsically contribute to bringing about the free assent of all participants in the democratic process, even in cases of substantive disagreement. In other words, what is needed is a genuinely deliberative (as opposed to a merely aggregative) interpretation of the legitimacy of majority rule.

A Deliberative Interpretation of Majority Rule (Or Why to obey Wrong Laws)

Providing a deliberative interpretation of majority rule is perhaps the hardest task for any defense of the deliberative ideal. For here the difficulties are not just those derived from the usual mismatches between ideal models and the realities of politics. It is at the conceptual level of the ideal itself that it seems hard to provide a plausible answer. Precisely in view of the epistemic purpose of deliberation, it seems particularly implausible that genuinely deliberative reasons could be found to explain why those who disagree with the substantive correctness of the outcome should ever give their consent to decisions they think are wrong. It is important to keep in mind what is at issue here. The issue is not whether minorities should always consent. For, needless to say, depending on how wrong these political decisions are, they probably should not. Neither is the issue to single out a unique reason that would explain or justify the legitimacy of majority rule for all possible cases. For different considerations (from procedural fairness to stability, mutual accommodation, etc.) may all play some role in some cases and a different role in others (or none at all), depending on the specifics of the situation. What is at issue here for the deliberative model is only whether reasons internal to the deliberative process could ever be among those considerations and, if so, what kind of reasons they would be.

In my view, the most plausible answer that defenders of deliberative democracy have offered to that question is that public deliberation, by tracking the force of the better argument, can contribute at the same time to determining *where the burdens of proof lie* in the deliberative process. If deliberative democracy is understood as an ongoing process of public deliberation punctuated by elections, majoritarian post-deliberative views can be interpreted as indicators of where the onus of argument lies at a particular moment of the deliberative process.²⁵

²⁵ For a detailed defense of this interpretation of majority rule, see Habermas (1988 and 1996, pp. 179–86).

This is a genuinely epistemic feature that must be present in any process of reasoned deliberation. For if tracking the force of the better argument through deliberation is possible at all, determining where the balance of argument lies at a given time must be possible as well in order for the process to have an orientation. However, given the specificities of the commitment to public justifiability that underlies democratic deliberation in particular, this epistemic feature intrinsic to any deliberative process of justification becomes democratically significant. This is because tracking which side of the argument failed to provide convincing arguments in support of a particular decision at a given time is tracking who failed to meet the commitment of public justifiability at the time a decision had to be made. Recognizing this deliberative failure can thus provide a reason for the minority to consent to the majoritarian outcome of the deliberation process, which is internal to the deliberative process and does not depend on surrendering their own judgment as to the substantive correctness of the decision.²⁶ It offers a genuine deliberative explanation of why what the majority finds more convincing after deliberation can²⁷ lend legitimacy to its implementation, even by the minority's own lights. According to this view, the minority democrat accepts the majority decision neither because it is correct (*per hypothesis* this is not the case) nor because the post-deliberative views of the majority are, in general, more likely to be correct (although they may well be, as many epistemic democrats claim²⁸). It is only because (and to the extent that) the post-deliberative majoritarian views are more likely to reflect the force of the better argument available at a given time. Of course, even if they do, this does not indicate that the minority is wrong from a substantive point of view. But it does indicate that the onus of argument is on them to satisfy the requirement of public justifiability.

Under the assumption that a commitment to public justifiability is motivated independently of its ability to guarantee substantive correctness, it is understandable why in cases of reasonable disagreement the minority may give its voluntary consent to the majoritarian outcome of the deliberation process without thereby having to surrender their own judgment about the substantive correctness of the decision. Those participants in a process of deliberation that on a given occasion disagree with the agreement reached by the majority may still give their voluntary consent to it for the *deliberative* reason that their arguments failed to convince most members of the community that the decision is actually incorrect

²⁶ It also does not depend on sacrificing substantive correctness for the sake of procedural fairness in general. I discuss this issue in the next section.

²⁷ Obviously, whether it does or not in any particular case is, according to the deliberative ideal, precisely a function of whether the deliberative process is genuine (i.e. whether it actually displays the features of genuine deliberation: total inclusion of available views and arguments, equal opportunities of participation, responsiveness to the force of the better argument, etc.).

²⁸ For epistemic accounts of voting and majority rule, see Coleman and Ferejohn (1986); Estlund (1997).

(unjust, inefficient, etc.) and not only putatively so. Precisely to the extent that participants in democratic deliberation consider public justifiability as a condition for legitimacy, the minority's failure to provide convincing arguments here and now requires them to accept the majoritarian outcome of the deliberation process even by their own lights and thus voluntarily.

However, recognizing that public justifiability can fall short of substantive correctness implies recognizing that the conditional agreement of the minority by no means makes the political decision thereby any more or less substantively correct (just, efficient, etc.) than it actually is. Thus, the minority's success in finding convincing arguments at a future time to show the specific way in which the norm is actually incorrect (unjust, inefficient, etc.) would in principle undermine the prior, majoritarian agreement, even by the majority's own lights. This implies that, even at the purely conceptual level that we are considering here, majority rule cannot be the only mechanism for ensuring that the commitment to public justifiability is satisfied.

Deliberation and Contestation

Given that public deliberation does not guarantee substantive correctness, if a reasonable minority did not feel compelled to change their minds concerning the substantive correctness of the majoritarian decision, the onus of argument may well be on them, but this does not mean that for this reason the democratic commitment to public justifiability has been satisfied for all those concerned. For in such a case the majority *per hypothesis* has failed to justify their post-deliberative decision to the minority with reasons they can reasonably accept and the minority must nonetheless comply with it. As we already saw, the democratic commitment to public justifiability is much more specific than the epistemic commitment to justification intrinsic to any deliberative process in general. It is a commitment to mutual justifiability in particular.

At this point, however, the deliberative model seems to face an impossible task. For how can the commitment to mutual justifiability among the particular members of a particular political community be satisfied in cases of deliberative disagreement, if deliberative disagreement is nothing other than lack of mutual justifiability? The key to the solution lies in the same feature of the deliberative model that made a deliberative interpretation of majority rule possible. The deliberative model conceives of democratic deliberation as an *ongoing process* punctuated by elections.²⁹ Accordingly, the legitimacy of a majoritarian decision

²⁹ As I will try to show in what follows, the consequence of conceiving of democratic deliberation as an *ongoing process* is very important in view of the fact of persistent disagreements in pluralistic societies. This is because, according to this view, that the commitment to mutual justifiability can be met in cases of disagreement does not depend on assuming that for each particular democratic decision the minority will always agree with the majority on who failed to provide convincing arguments. For if there are persistent

is contingent on the deliberative failure of those defending the minoritarian view in making a successful move in the argumentative process at a given time. To the extent that the minority can recognize that, even if their view happens to be correct, they nonetheless have failed to show why this is so with reasons that most members of the community can accept, they would have a deliberative reason to obey decisions they think are wrong. But by parity of argument if they succeeded in making the necessary argumentative move, the decision should be the opposite, according to this view. This indicates that the possibility of deliberative disagreement does not need to undermine the commitment to mutual justifiability. What it requires is an additional commitment to contestability,³⁰ that is, to the

disagreements among them it is likely that they will disagree on this issue as well. According to this view, the reason why all citizens can consider that the commitment to mutual justifiability can be met in a deliberative democracy, in spite of persistent disagreements, is because they recognize that the institutional procedures of deliberative majority rule and deliberative possibilities of contestation reflect their shared commitment to securing mutual justifiability. Thus, although different groups may disagree on how to interpret the *outcomes* of those procedures in particular occasions, they all can agree on the validity of having such *procedures* in place to ensure mutual justifiability. Although these procedures do not guarantee that the commitment to mutual justifiability will be met permanently in the sense of being met for every single democratic decision and according to everyone (for no procedure seems able to guarantee that), they do guarantee that it will be met permanently in the sense that these procedures constitute a permanent feature of their democratic institutions and are open to everyone.

³⁰ I borrow this term from Pettit (2003). In general terms, I agree with Pettit's account of the commitment to contestability in that article, but I think that a genuinely deliberative interpretation of that commitment would lead to very different conclusions with regard to its implications for democracy. Precisely to the extent that a commitment to contestability requires favoring collective rationality over responsiveness to individual views, as Pettit convincingly shows, one no longer has to accept, as Pettit seems to do, that there is a genuine "discursive dilemma" or, in other words, that increasing the deliberative component necessarily implies reducing the democratic component (see Pettit, 2003, p. 148). For, according to the deliberative model, the democratic component does not need to be identified with responsiveness to individual views, as in the aggregative model. Rather, it should be identified with responsiveness to deliberative (that is, open, unforced and reasons-based) possibilities of contestation. And meeting this condition requires *increasing, not decreasing, the deliberative component*. If this is the case, defenders of deliberative democracy do not have to accept the claim that increasing the deliberative component necessarily implies sacrificing the democratic component. Within the deliberative model, the democratic inclusion of those whose individual views on a given occasion are not in the majority is not measured by their fair chances of being in the majority in other occasions (as in the aggregative model), but by their fair chances of contestation in all occasions (that is, their fair chances to challenge the conclusion with further arguments that may lead to a revision of the majoritarian decision). Consequently, according to the deliberative model, majoritarian decisions should not be seen as decisions about which views get excluded (unavoidably reducing the democratic component), but as decisions

permanent possibility of effective deliberative contestation of collective decisions. How such a possibility can be best secured through real democratic institutions is an open question that different conceptions of deliberative democracy may answer in different ways.³¹ The only constraint that seems intrinsic to the deliberative model as such is that the possibilities for effective contestation must themselves be of a deliberative kind. This may seem a relatively weak constraint,³² but it is neither empty nor uncontroversial. In contradistinction to other democratic models, such a constraint prevents the deliberative model from providing any basis for endorsing veto rights, for example.³³ This is because, according to the deliberative ideal, the outcome of public deliberation must be sensitive to the quality of the reasons that support decisions and not to the authority of the views of any particular individuals or groups. On the other hand, the deliberative character of the possibilities of contestation guarantees that the commitment to contestability does not become an exogenous element in the deliberative model. In fact, the necessity of a commitment to *deliberative contestability* seems overdetermined, so to speak. For it is required for both democratic and epistemic

about which views carry the onus of argument or the burden of proof for possible revision of the collective decision taken at a given time. From this perspective, it seems that a deliberative interpretation of the commitment to contestability would depart at important points from Pettit's own interpretation. This is not too surprising if one takes into account that, according to Pettit, "freedom as non-domination supports a conception of democracy under which contestability takes the place usually given to consent" (Pettit, 1997, p. 9). If the interpretation I am offering here is on the right track, within the deliberative model contestability is only *a* dimension of the commitment to mutual justifiability but not a possible replacement for it.

³¹ For a detailed proposal, see Pettit (1997, 1999 and 2000) (but see also the prior note).

³² This constraint leaves many controversial issues undetermined. For example, it does not rule out the inclusion of deliberative possibilities that are not themselves *democratically* constituted, such as the possibility of judicial review (or any other institutional means of contestation that rely on officers appointed on a statutory basis instead of democratically elected ones).

³³ That the deliberative model provides no basis for endorsing (individual or group-based) rights to veto does not mean that introducing such rights as temporary measures to redress the consequences of the existence of persistent minorities is necessarily incompatible with the deliberative model. Given that the existence of persistent minorities is certainly incompatible with the deliberative ideal (that is with the requirement that the quality of the reasons and not the identity of those who defend them determines political decisions), the ideal itself does not provide an answer to the question of what the best temporary measures may be for removing existing social conditions that are hostile to such an ideal. However, authors who argue in favor of veto rights may find the weak "temporary" interpretation that is compatible with the deliberative ideal insufficient and endorse instead a stronger strategy based on conceding "epistemic authority" to specific minorities for issues that affect them directly. This strategy, though, seems clearly incompatible with the deliberative model. On the intricacies of this issue, see Young (1997, 2000, ch. 4, and 2003).

reasons. A commitment to deliberative contestability serves the epistemic goal of securing reasoned revisability (Habermas, 1988). For it guarantees the permanent inclusion of all relevant considerations (evidence, arguments, objections, etc.) available at any given time. In so doing, it helps to secure the best possible outcomes from the point of view of their substantive correctness. At the same time, a commitment to deliberative contestability serves the democratic goal of securing the free and reasoned assent of all citizens. It surely does so by guaranteeing the fair value of equal opportunities of participation in the deliberative decision-making process. However, this is not its only contribution. By ensuring that the responsiveness to the quality of the reasons is a *permanent* feature of the deliberative decision-making procedure, it also gives the necessary assurance to the citizens that their assent will not require a trade-off between their epistemic and democratic goals. To the extent that the deliberative ideal does not require citizens to sacrifice substantive correctness for the sake of democratic legitimacy or vice versa, they can reflectively endorse the appropriateness of the ideal of a deliberative democracy. This is because only democratic deliberation, by virtue of tracking the mutual justifiability of political decisions, can promise to secure the substantively best outcomes among those that can attain the free and reasoned assent of their members.

References

- Bohman, J. (1998), *Public Deliberation* (Cambridge, MA: MIT Press).
- Christiano, T. (1997), 'The Significance of Public Deliberation', in J. Bohman and W. Rehg (eds), *Deliberative Democracy* (Cambridge, MA: MIT Press), pp. 243–77.
- Christiano, T. (1999), 'Justice and Disagreement at the Foundations of Political Authority', *Ethics*, 110, pp. 165–87.
- Coleman, J. and Ferejohn, J. (1986), 'Democracy and Social Choice', *Ethics*, 97, pp. 6–25.
- Cohen, J. [1989] (1997), 'Deliberation and Democratic Legitimacy', in J. Bohman and W. Rehg (eds), *Deliberative Democracy* (Cambridge, MA: MIT Press), pp. 67–92.
- Dahl, R. (1989), *Democracy and its Critics* (New Haven, CT: Yale University Press).
- Dowding, K., Goodin, R. and Pateman, C. (eds) (2004), *Justice and Democracy* (Cambridge: Cambridge University Press).
- Dworkin, R. [1987] (2003), 'What is Equality? Part 4: Political Equality', in T. Christiano, *Philosophy and Democracy* (Oxford: Oxford University Press), pp. 116–37.
- Elster, J. [1986] (1997), 'The Market and the Forum: Three Varieties of Political Theory', in J. Bohman and W. Rehg (eds), *Deliberative Democracy* (Cambridge, MA: MIT Press), pp. 3–34.
- Elster, J. (1998), 'Deliberation and Constitution Making', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 97–122.
- Estlund, D. (1993a), 'Making Truth Safe for Democracy', in D. Copp, J. Hampton, and J. Roemer (eds), *The Idea of Democracy* (Cambridge: Cambridge University Press), pp. 71–100.

- Estlund, D. (1993b), 'Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence', *Texas Law Review*, 71, pp. 1437–77.
- Estlund, D. (1997), 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority', in J. Bohman and W. Rehg (eds), *Deliberative Democracy* (Cambridge, MA: MIT Press), pp. 173–204.
- Gutmann, A. and Thompson, D. (1996), *Democracy and Disagreement* (Cambridge, MA: Harvard University Press).
- Gutmann, A. and Thompson, D. (2000), 'Why Deliberative Democracy is different?', in E.F. Paul, F.D. Miller and J. Paul (eds), *Democracy* (Cambridge: Cambridge University Press), pp. 161–80.
- Gutmann, A. and Thompson, D. (2004), *Why Deliberative Democracy* (Princeton, NJ: Princeton University Press).
- Habermas, J. (1988), 'Popular Sovereignty as Procedure', in J. Habermas (1996), *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press), pp. 463–90.
- Habermas, J. [1991] (1993), 'On the Pragmatic, the Ethical, and the Moral Employments of Practical Reason', in J. Habermas, *Justification and Application* (Cambridge, MA: MIT Press), pp. 1–17.
- Habermas, J. [1992] (1994), 'Three Normative Models of Democracy', *Constellations*, 1(1), pp. 1–10.
- Habermas, J. [1992] (1996), *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press).
- Habermas, J. [1999] (2003), 'Rightness versus Truth: On the Sense of Normative Validity in Moral Judgments and Norms', in J. Habermas, *Truth and Justification*, trans. B. Fultner (Cambridge, MA: MIT Press), pp. 213–36.
- Lafont, C. (1999), *The Linguistic Turn in Hermeneutic Philosophy* (Cambridge, MA: MIT Press).
- Lafont, C. (2003), 'Procedural Justice? Implications of the Rawls–Habermas Debate for Discourse Ethics', *Philosophy and Social Criticism*, 29(2), pp. 167–85.
- Lafont, C. (2004), 'Moral Objectivity and Reasonable Agreement: Can Realism be reconciled with Kantian Constructivism?', *Ratio Juris*, 17(1), pp. 27–51.
- Lafont, C. (2006), 'Justice and Legitimacy. The Intricate Relation of Morality to Politics', in M. Herrera and P. De Greiff (eds), *Razones de la Justicia. Homenaje a Thomas McCarthy* (México: UNAM) (forthcoming).
- McCarthy, T. (1991), 'Practical Discourse: On the Relation of Morality to Politics', in T. McCarthy, *Ideals and Illusions* (Cambridge, MA: MIT Press), pp. 181–99.
- McCarthy, T. (1996), 'Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions', *Cardozo Law Review*, 17(4–5), pp. 1083–125.
- Nino, C. (1996), *The Constitution of Deliberative Democracy* (New Haven, CT: Yale University Press).
- Pettit, P. (1997), *Republicanism* (Oxford: Oxford University Press).
- Pettit, P. (1999), 'Republican Freedom and Contestatory Democratization', in I. Shapiro and C. Hacker-Cordón (eds), *Democracy's Value* (Cambridge: Cambridge University Press), pp. 163–90.
- Pettit, P. (2000), 'Democracy, Electoral and Contestatory', *Nomos*, 42, pp. 105–44.
- Pettit, P. (2003), 'Deliberative Democracy, the Discursive Dilemma, and Republican Theory', in J. Fishkin and P. Laslett (eds), *Debating Deliberative Democracy* (Oxford: Blackwell), pp. 138–62.

- Shapiro, I. (1999), 'Enough of Deliberation. Politics is about Interests and Power', in S. Macedo (ed.), *Deliberative Politics. Essays on 'Democracy and Disagreement'* (Oxford: Oxford University Press), pp. 28–38.
- Steiner, J., Bächtiger, A., Spörndli, M. and Steenbergen, M. (2004), *Deliberative Politics in Action. Analysing Parliamentary Discourse* (Cambridge: Cambridge University Press).
- Sunstein, C.R. [2002] (2003), 'The Law of Group Polarization', in J. Fishkin and P. Laslett (eds), *Debating Deliberative Democracy* (Oxford: Blackwell), pp. 80–101.
- Young, I. [1989] (2003), 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', in T. Christiano (ed.), *Philosophy and Democracy* (Oxford: Oxford University Press), pp. 287–309.
- Young, I. (1997), 'Difference as a Resource for Democratic Communication', in J. Bohman and W. Rehg (eds), *Deliberative Democracy* (Cambridge, MA: MIT Press), pp. 383–406.
- Young, I. (2000), *Inclusion and Democracy* (Oxford: Oxford University Press).

Chapter 2

The Epistemic Conception of Deliberative Democracy Defended *Reasons, Rightness and Equal Political Autonomy*

José Luis Martí¹

Introduction

Deliberative democracy has become one of the most promising ideals in democratic theory, even though there is not a single, privileged account of that ideal. Instead, we can say that there are several views under a common umbrella; deliberative democracy being what James Bohman qualifies as “a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision making and self-government” (Bohman, 1998, p. 401). The epistemic conception (EC) of deliberative democracy counts as one of these views, stressing particularly a justification of the whole ideal in terms of the epistemic value of the decisions made following a democratic deliberative procedure (Cohen, 1986a and 1989a; Estlund, 1993a, 1993b, 1994, 1997 and 2000a; Nino, 1996; Christiano, 1996, 1997 and 2004; Gaus, 1996, 1997a and 1997b; Manin, 1987).

It is usual to distinguish in the literature between fair or pure proceduralist views and epistemic views of deliberative democracy (Estlund, 1997; Bohman, 1998; Christiano, 2004) – roughly speaking, between intrinsic justifications and

¹ Different versions of this work have been presented in the legal philosophy workshop at the Pompeu Fabra University in Barcelona in April 2005, in a seminar at the Universitat Oberta de Catalunya (Barcelona) in May 2005, in the Special Workshop “Deliberative Democracy and Its Discontents” at the 22nd IVR World Congress held in Granada in May 2005, in the Seminario Internacional de Filosofía del Derecho de Vaquerías-Córdoba (Argentina) in September 2005 and finally at the Jurisprudence Discussion Group at Oxford University in November 2005. I thank all participants in these events for their useful and intelligent comments that helped to improve this chapter. I want also to thank most particularly Jorge Rodríguez, Roberto Gargarella and Samantha Besson, who rigorously read early drafts of the chapter and enabled me to avoid several mistakes. Finally, I thank Jillian Reynolds and Rosemary Besson for their linguistic advice.

instrumental ones – even though the differences between them are not always totally clear. The reason for such a deficit seems to be that while supporters of epistemic deliberative democracy have explicitly defended this conception, other deliberative democrats have simply not mentioned the epistemic case for democracy. Notwithstanding the huge literature on this topic, I think that some work is still required in order to understand what it does exactly stand for. My purpose here, then, is to contribute to such a task by clarifying the precise claims made by the EC and to argue that (1) a coherent defender of deliberative democracy cannot hold a pure proceduralist conception, and hence that the EC becomes unavoidable for deliberative democrats. At the same time, however, I want to emphasize that, while the EC certainly involves an instrumental justification of deliberative democracy, this is not incompatible with holding an intrinsic one too. Instead, I will argue that (2) an adequate epistemic conception of deliberative democracy must combine both dimensions, the epistemic and the intrinsic one, in order to avoid some elitist trends – towards non-democratic principles of government – always implicit in epistemic justifications. If I am right, deliberative democracy is necessarily committed to the epistemic claim, but requires, at the same time, to be concerned with those intrinsic features that make a decision-making procedure democratic.

Before exploring the EC, let me begin by briefly introducing a few points about the general theory of deliberative democracy, which are relevant to my argument.

1 The Justification of Deliberative Democracy

Deliberative democracy is a normative ideal of democracy. The adjective “deliberative” added to democracy refers to a particular way of decision-making based on argumentation or deliberation, as opposed to bargaining and voting (Elster, 1995, p. 239, and 1998a, pp. 5–8).² As a democratic ideal, deliberative democracy requires the inclusion of all those (potentially) affected by a decision in the very process of decision-making (Manin, 1987, p. 352; Cohen, 1989a; Dryzek, 1990 and 2000; Bohman, 1996 and 1998; Nino, 1996; Elster, 1998a, p. 8), recognizing in each of them an equal capacity to influence the final decision (Cohen, 1989b; Bohman, 1996, ch. 3, and 1997; Christiano, 1996; Brighouse, 1996; Gutmann and Thompson, 1996, ch. 8; Gaus, 1996). As a deliberative ideal, political decisions are to be made through a collective procedure of argumentation, where arguing consists of exchanging reasons – for or against

² For the explicit distinction between deliberation and negotiation, see Sunstein (1988); Cohen (1989a); Gutmann and Thompson (1996 and 2004); Bohman (1998) and Pettit (2003). For the explicit distinction between deliberation and pure voting, see Manin (1987); Sunstein (1988 and 1991); Cohen (1989a and 1998); Gutmann and Thompson (1996, pp. 1–4, and 2004, pp. 13–21); Bohman (1998, p. 400).

certain proposals – with the purpose of rationally convincing others, instead of strategic participation oriented to imposing personal political preferences or desires on others (Manin, 1987, pp. 352 and 353; Cohen, 1989a, pp. 17–21; Estlund, 1993a and 1993b; Gutmann and Thompson, 1996; Christiano, 1996, pp. 53–55; Fishkin and Laslett, 2003, p. 2). This is also supposed to lead us, at least ideally, to rational consensus.³

As a discursive process based on reasons, deliberation assumes, as we will see, both *the existence of rightness* (or impartiality, or some other equivalent) in political decisions, and *the possibility of knowing which is the right* (or impartial) *decision* (Cohen, 1986a, p. 54 ff.; Estlund, 1993a, 1993b and 1997, p. 174 ff.; Christiano, 1997). To argue in favor of decision A means, briefly, to show that decision A is *the right* decision, or at least, that A is *better in terms of rightness*

³ If we had a perfect rationality, no restraints on time and costs, and could be engaged in an ongoing deliberative procedure, consensus about the right proposal would be expected to be the outcome of the whole process (Mansbridge, 1983 and 1992, p. 36; Cohen, 1989a; Sunstein, 1988 and 1993; Gaus, 1996 and 1997a; Estlund, 1997; Bohman 1998). Some deliberative democrats have denied this, affirming that consensus is a too demanding ideal, since it seems unreasonable to expect that all participants could agree on some particularly controversial matters. Deliberative procedures, they affirm, must necessarily conclude by voting and majority rule (Manin, 1987, p. 359; Gutmann and Thompson, 1996, pp. 52–94; Waldron, 1999a, pp. 91–93, and 1999b; Goodin, 2003, p. 1; Besson, 2003 and 2005). However, in my opinion such an argument is misleading. That deliberative procedures *necessarily* conclude by voting is certainly true so far as actual procedures are concerned, because of the fact of pluralism and deep (and reasonable) disagreement. Indeed, we can concede, disagreement is one of the circumstances of *real* politics (Waldron, 1999a, pp. 101–103). We can even admit that there are some reasonable disagreements produced by what Rawls called “the burdens of judgment” (Rawls, 1993, pp. 54–58), and also that disagreements in general (reasonable or unreasonable) contribute to the quality of deliberation. The more different the reasons and preferences to be contrasted by argumentation are, the more deliberative the final decision will be under real conditions (Manin, 1987, pp. 352–57; Sunstein, 1993, pp. 24 and 253; Gutmann and Thompson, 1996, pp. 1 and 41; Christiano, 1997, pp. 249–50; Waldron, 1999a, pp. 105–106). But all this has nothing to do with the end of the *ideal* procedure. What explains, from my point of view, that some authors (like Rawls or Waldron) insist on finding pervasive reasonable disagreements in the ideal situation is that they are thinking of a less utopian ideal world, that is, a world characterized by less demanding ideal conditions, provided that ideal worlds can be ranked according to the degree of idealization involved. Accepting that this is logically possible, I see no advantages in doing so, since the reason why regulative ideals are useful is precisely to be deeply in contrast with the miseries of reality – to overcome, in this case, the burdens of judgment – in order to remind us permanently which is the world we would like to tend to. If so, the view that an ideal deliberative procedure always reaches rational and reasonable consensus can only be rejected by holding some sort of ontological pluralism of values, and this is not what these authors are trying to hold. Although this is certainly a possibility not explicitly excluded by most of the literature, it will not be explored here, for it is completely irrelevant to my argument.

than other decisions being compared. To the extent that democratic deliberation involves the possibility of exchanging reasons and rational communication, participants in deliberation must assume the existence of some intersubjective criterion of validity for their claims, a criterion that should be *at least partly independent* from the participants' preferences, desires or beliefs, and from the process itself (Cohen, 1986a, p. 34 ff.; Estlund, 1993a, p. 1448 ff., and 1993b, pp. 74, 79–81). Such a standard defines what is politically right and wrong, two categories that the reasons provided by deliberators necessarily refer to. Note that if the rightness of a decision were constituted by a real decision-making procedure, participants in such a procedure could not argue, nor could they provide or confront reasons (except instrumental ones), since providing and confronting reasons conceptually means appealing to some intersubjective standard of rightness that must be at least partially independent from the process and from the participants' beliefs and desires (Estlund, 1993a), and therefore it could not be rightness-oriented.⁴ On the other hand, I say "*at least partially independent*" because considering such a standard as dependent on an ideal (counterfactual) procedure (or beliefs or desires), but logically independent of real (actual) procedures (or beliefs or desires) is enough to make sense of deliberative democracy (Estlund, 1997, pp. 180–81).⁵ This conception of rightness certainly requires some kind of objectivity. Anyway, it can be understood in several ways, depending on the meta-ethical view one holds. For a moral realist, rightness has to do with moral truth in correspondence with some moral facts. For a moral constructivist, instead, it is related to some notion of common good, general interest or impartiality, as constructed by human reasoning. This conception of deliberative democracy is therefore compatible with different meta-ethical

⁴ At least to the extent that substantive rationality (rationality of final ends) is involved. Of course, this does not affect instrumental reasoning, but this kind of technical reason is not the only one expected to be produced and appealed to in a deliberative setting. See also note 7.

⁵ In other words, in a constructivist approach, such as that defended for instance by Nino, one could say that what is right is what people under ideal circumstances (that could grant, for instance, impartiality) would choose. According to Nino's epistemic approach, for instance, "moral truth is constituted by the satisfaction of formal or procedural presuppositions of a discursive practice directed at attaining cooperation and avoiding conflicts," and "intersubjective discussion and decision is the most reliable procedure for having access to moral truth, since the exchange of ideas and the need to justify oneself before others not only broaden one's knowledge and reveal defects in reasoning but help satisfy the requirement of impartial attention to the interests of everybody concerned" (Nino, 1996, pp. 112–13). Note however that appealing to ideal conditions in defining the regulative ideal of deliberative democracy does not necessarily imply such constructivist approach. One could say, in a realist approach, that what is right is also logically independent of the ideal procedure, and then, what people under ideal conditions do is only to *single out*, and not to *decide*, what is right. For a criticism of the ideal procedure constituting the standard, see Bohman (1998, 402 ff.).

positions (Estlund, 1997, pp. 180 and 181), although all of them must be based on some account of moral objectivity or intersubjectivity.⁶

What I want to emphasize here is just that appealing to an intersubjective standard of rightness is exactly what characterizes argumentation, as opposed to bargaining, and that it amounts to a conceptual implication of such a distinction (Estlund, 1993a, p. 1448 ff.).⁷ Both are processes of communication in which participants try to persuade others to accept a particular proposal. But, in bargaining, negotiators can openly use various means of persuading others – such as deceptions, threats, promises, concessions, and so on – that cannot count as reasons; that is, that do not appeal to what is right or wrong. Deliberators, on the contrary, must be oriented to the common good or the rightness of political decisions (Sunstein, 1988; Cohen, 1989a and 1998; Gutmann and Thompson, 1996 and 2004; Bohman, 1996 and 1998; Christiano, 1997; Young, 2001; Pettit, 2003), and only try to convince others rationally by the force of arguments; that is, by showing that their proposal is better than any other on fair terms, and not on a self-interested basis (Habermas, 1981; Elster, 1983 and 1998a; Mansbridge, 1983; Cohen, 1989a; Gutmann and Thompson, 1996 and 2004). Pure voting consists, on the other hand, of expressing preferences in ballots, without any

⁶ Those positions – i.e. skepticism or radical non-cognitivism – that cannot provide a criterion of intersubjective validity that meets the requirement of partial independence from people's desires and preferences are excluded. Hence, although the meta-ethical question is partly irrelevant, it is not as irrelevant as Waldron thinks it is (Waldron, 1999a, ch. 8).

⁷ Consider a paradigmatic case. If we want to share an ice cream and have to decide on the ice cream's flavor before buying it, each personal preference or desire will be relevant in a context in which there is no intersubjective standard of rightness. Suppose that our preferences are in conflict because you prefer chocolate and I prefer vanilla. We can then negotiate. I can promise you, for instance, that "if you accept to choose the vanilla ice cream I will pay for it." Or you can threaten me by saying that "if we do not choose the chocolate ice cream I will go home (alone)." But it seems quite strange to say that we can argue for one flavor or the other – that we can provide reasons in favor of one of them. The case changes when after eating chocolate ice creams during six days, I say "hey, this is unfair, we always choose chocolate and never vanilla. Be reasonable and let's choose vanilla today." In such a case, I am certainly arguing (or implicitly presupposing some arguments), but I am also appealing to some standard of fairness. The critic could say that such standard is valid only to the extent that it is accepted by the participants, and then it is not independent of their beliefs, preferences or desires. But this would *miss the point*. Of course, a Humean skeptic can also believe that deliberation is possible in considering means-ends relations, as Hume himself accepted. If a community shares some determinate values, its members can argue and deliberate about how to reach and maximize those values. But the significant point of deliberative democracy is that deliberation about ends and values is possible and meaningful – that it is possible to provide reasons in favor of showing that abortion is right or wrong, that social rights should be protected or not in terms of justice, etc. In other words, the idea of moral and political deliberation presupposes that we can resolve, at least ideally, our disagreements about the very standards of rightness.

kind of previous communication. Citizens come to ballots and cast their votes based on their internal, subjective preferences and, as Rousseau stated,⁸ they should not deliberate or discuss previously about the proposals since any kind of communication can pervert and manipulate opinions and thus mislead the *volonté générale*, the final outcome of voting (Rousseau, 1992, Second Book, ch. III and Fourth Book, ch. II).⁹ If deliberative democracy is based on the ideal of argumentation, democratic negotiation constitutes the basis for pluralist theories of democracy (Dahl, 1956 and 1989; Truman, 1968; Ely 1980), and pure voting is the basis for economic theories of democracy (Schumpeter, 1946; Downs, 1956; Buchanan and Tullock, 1962; Riker, 1982 and 1986).

Of course, arguing, bargaining and voting are only pure ideals and we usually find them mixed in real democratic decision-making procedures. Further, all of them are probably inescapable features of real (as opposed to ideal) democracy. As Bohman puts it, “[f]ew deliberative democrats now think of deliberation independently of voting and bargaining. The question is only how to make them more consistent with deliberation rather than undermining it” (Bohman, 1998, p. 415). However, it is crucial to be aware that they define the contours of different democratic models: what democratic theories purport is to give precedence to one of these three ideal models over the other two in real decision-making procedures. This is why, in order to justify deliberative democracy we need to show that it is better or preferable than other alternatives based on the other ideals, mainly on the pluralist model of democracy and the economic theory of democracy. What we need, therefore, is some sort of comparative justification.

2 The Epistemic Conception of Deliberative Democracy

The main claim of the epistemic conception (EC) of deliberative democracy, of the kind authors such as Joshua Cohen, David Estlund, Carlos Nino, or Gerald Gaus have developed, runs as follows.

⁸ For this interpretation of Rousseau, see Shklar (1985, pp. 18–20 and 179–86); Manin (1987, pp. 345–47); Sunstein (1988). Others have defended, however, a deliberative interpretation of his works: see Cohen (1986b, pp. 288–92); Pettit (2003, p. 140).

⁹ Citizens can vote according to their opinions about what the common good is, as in Rousseau’s model, or according to their self-interest, as in many economic theories of democracy. Notwithstanding, the Rousseauian model is grounded on some epistemic conception of democracy (of pure voting in this case) – a view that denies epistemic value to deliberation but concedes it to voting (without deliberation), while the economic theory of democracy shares with the pluralist theory (and with all other theories based on the ideal of bargaining) the denial of the existence of the common good or any other equivalent notion of rightness, moral truth, and so on, and thus rejects the epistemic conception, for there is nothing to know but the electorate’s desires (Sunstein, 1985, p. 32, and 1988; Cohen, 1986a, p. 26 ff.; Estlund, 1993a and 1993b).

Epistemic conception (EC). Deliberative democracy is justified and thus political decisions made through a deliberative procedure are legitimate because democratic deliberative procedures have more epistemic value than the other *democratic alternatives*. And this means that decisions made by such procedures are more likely to be right *in general* – whereas rightness must be some process-independent and intersubjectively valid standard – than decisions made by other democratic procedures.

The reason why this conception is called “epistemic” is that the procedure it endorses is considered generally reliable (to a sufficient degree) for knowing which are the right political decisions. As it requires some reliability only in general, it is not necessary that such a condition be met in every case. Other democratic procedures may be more reliable in one particular case, but this does not invalidate the general claim.¹⁰ On the other hand, what the EC affirms is the epistemic superiority of the deliberative procedure in comparison to other *democratic* procedures, and not to non-democratic ones.¹¹ This does not mean, however, that such a procedure is infallible. Hence, political decisions made through it may be perfectly wrong. Still worse, since the deliberative procedure politically legitimates all the decisions made through it, we will find that some political decisions can be both legitimate *and* morally wrong at the same time. Now, let me examine what I consider the *two basic theses* of the EC for deliberative democracy: the *ontological thesis* and the *epistemological thesis*.

First of all, considering that we are referring to an epistemic conception, we necessarily presuppose that we can and want to know something. Then, the obvious question is *what do we want to know?* As we are engaged in the context

¹⁰ We could find some circumstances in which it would be better (in epistemic terms) for citizens to cast their votes directly without any previous deliberation. This is the case, for instance, when we are absolutely sure that the deliberative quality of communication would be so low if we permitted it, that we have more chances to make the right decision by blocking such communication. But note that these should be very extreme conditions, such as massive threats, absolute asymmetry in information apportionment, a great mutual disrespect, and other circumstances that make participation in deliberation unfree or unworthy. Anyway, it would be a case of empirical failure of the application of the deliberative ideal.

¹¹ Of course, such an assumption depends on my characterization of the EC. Someone could hold, instead, that the EC states the epistemic superiority of deliberative democracy in respect of any other political decision-making procedure (including the non-democratic ones). In such a case, as I will explore below, the EC would be threatened by strong elitist trends that can make it, in the end, incompatible with democracy. Anyway, this alternative does not reflect, in my view, the actual claims made by the epistemic deliberative democrats. They seem to assume that democracy is already justified (perhaps by other – intrinsic – reasons) prior to non-democratic forms of political power, that is, that the context in which they are doing their job is the theory of democracy. And, then, that the EC provides a justification for deliberative democracy before other democratic ideals.

of political decision-making, the answer seems to be: we want to know which is the right decision in a particular case. And then, we assume, there is to be some standard of rightness to be known and it is possible to know it. As I said earlier in relation to deliberative democracy in general, the standard of rightness must be at least partially independent both from the decision-making procedure and from the participants' beliefs, preferences and desires, for otherwise argumentation itself would be impossible. Therefore, this standard must be objective in this sense. Anyway, it is the same independence and the same objectivity required by the very notion of argumentation that characterizes the whole democratic deliberation. And thus the EC remains relatively neutral in respect to the meta-ethical question: its ontological thesis does not commit it to some kind of hard moral realism or something similar. If the EC does not assume other meta-ethical commitments than those involved by the very notion of deliberative democracy, it cannot be objected to on the basis of some particular meta-ethical implausibility, unless this objection is also directed to deliberative democracy itself. Finally, the existence of such an independent standard enables us to speak of political knowledge and political beliefs, as required precisely by an epistemic conception. These beliefs are essential to the practice of argumentation (they are its inputs) and at the same time they can be transformed through it in the light of the best argument (Elster, 1983 and 1995; Mansbridge, 1983; Manin, 1987; Cohen, 1989a). So, we can say that people argue *from* (political) beliefs, *with* (political) reasons, and *for* (political) proposals in order to reach a (political) decision.¹² Thus, the first basic thesis of the EC is:

Ontological thesis. One or several standards of rightness of political decisions exist as something at least partially independent both from the decision-making procedure and from the participants' beliefs, preferences and desires. And this standard is knowable.

¹² Inputs into a deliberative procedure can be beliefs about what is right to do in a particular case or statements about which proposal is preferred. Of course, beliefs and preferences are not the same thing. To begin with, they have different illocutionary qualification, and therefore are not reducible to one another. Notwithstanding, they are closely interrelated under some assumptions of rationality: from the individual point of view, to say that "I believe that proposal A is right and the others are wrong" implies that "I should prefer proposal A to the others," and if I am rational, I certainly do, counting such preference as a desire, at least as a second-order one. Of course, as a matter of fact, I can actually have other preferences or desires, even stronger or overriding ones. This only means that, if people are rational, they should prefer those political proposals they believe to be right to those they believe to be wrong. And it is enough to characterize the ideal model, since it works in idealized circumstances (Marti, 2004, ch. 2). If so, we can affirm that beliefs and preferences are both inputs into the deliberative procedure. In this chapter, I will refer rather to beliefs, since the epistemic model seems to require them.

Once we have affirmed that there is something to know and that it is possible to know it, another question arises: *how can we know it?* Or, if there are several cognitive ways, which is the best of them? If we aspire to know which political decision is right in a particular case in order to enact it, we will surely have to rely on some particular procedure to find it, and then, provided that there are no infallible procedures in politics – there is no such thing as perfect procedural justice – we should look for the most reliable procedure on epistemic terms. Hence the second basic thesis underlying the EC:

Epistemological thesis. Democratic deliberation is *in general* the most reliable *democratic* procedure in order to identify which are the right political decisions, and therefore it is the adequate method to make legitimate political decisions.

As we saw earlier, the superiority of the deliberative procedure in terms of reliability is established in comparison with other democratic procedures and not with non-democratic ones. Furthermore, such reliability is general. As such, the possibility that another democratic procedure is epistemically better in some particular case is not excluded.¹³ Finally, that deliberative democracy is epistemically reliable implies that its results are reliable too. Epistemic reliability means just this: that decisions made through a democratic deliberative procedure are more likely to be right than those made through other democratic procedures. In other words, as we have good reason to consider the decisions made by such a procedure correct, we can say that (i) our “basic institutions” are “legitimate so far as they establish the framework for free public deliberation” and that (ii) the “outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals” (Cohen, 1989a, pp. 21 and 22).¹⁴

On the other hand, although both the ontological and the epistemological theses are necessary (and, jointly, sufficient) conditions for the EC of deliberative democracy, the second one is particularly characteristic of it, while the first one can also be held by other non-epistemic conceptions. All defenders of deliberative democracy agree that the democratic deliberative procedure provides its results with political legitimacy, but those who reject the EC must hold that political decisions are legitimate because they have been produced through a fair political process (with intrinsic value only). So, we could distinguish two main ways

¹³ As Gaus rightly shows, it is very difficult to provide some concluding reasons to demonstrate that deliberative democracy, or any, is the most reliable procedure on epistemic terms (Gaus, 1997b, pp. 277–81). Anyway, we can weaken the thesis and claim only that “no method for resolving moral disputes can be shown beyond a reasonable doubt to be epistemically better than democracy” (Gaus, 1997b, p. 282).

¹⁴ Although this quote by Cohen refers to hypothetical conditions (“if they could”), and this could suggest that we do not need real deliberation at all, we can say that real democratic deliberative procedures legitimate their outcomes even when disagreement persists and the procedure must end with voting.

of justifying deliberative democracy: *the intrinsic justification* (on the basis of some intrinsic features of the process itself) and *the instrumental justification* (by reference to the probability of the rightness of its outcomes). Offering an intrinsic justification is attributing value to the procedure itself, usually in terms of honoring values such as autonomy, equal consideration and respect, or political equality (Manin, 1987, pp. 352–59; Sunstein, 1988; Cohen, 1989a; Elster, 1995; Bohman, 1996; Gutmann and Thompson, 1996 and 2004; Young, 2001; Pettit, 2003). This position is usually called *pure (or fair) proceduralism* (or “democratic expressivism,” as Gutmann and Thompson label them in Gutmann and Thompson, 2004, pp. 21–23; see also Christiano, 2004, p. 267, fn. 3; and Estlund, 1997, pp. 176–79). The instrumental justification, instead, consists mainly (though not exclusively) in attributing some value to the decisions made through the deliberative procedure.¹⁵ Since such value is the rightness of the decision, the procedure can be seen as a way of identifying right decisions and, hence, it is supposed to have epistemic value and it may be called, as Estlund refers to it, *epistemic proceduralism* (Estlund, 1993a, pp. 1467–70, and 1997, p. 181 ff.).

This is the classic presentation of the problem of justification (Estlund, 1993a and 1997; Gutmann and Thompson, 1996, pp. 26–39, and 2004, pp. 21–23; Christiano, 1997 and 2004; Fearon, 1998; Goodin and List, 2001, pp. 277–78).¹⁶ Notwithstanding, this characterization has been traditionally misunderstood. First, the intrinsic justification and the instrumental one are not mutually exclusive (or are not logically incompatible): it is possible to say that deliberative democratic procedures have epistemic value and, at the same time, that they honor such values as autonomy and political equality (Cohen, 1989a; Gutmann and Thompson,

¹⁵ Other instrumental justifications, which have really been alleged by some authors, consist of (i) affirming that deliberative politics appear more legitimate from the citizens’ point of view, as they have been able to participate in it, revealing and defending publicly their views in a context of mutual respect, or of (ii) recognizing to deliberation positive effects for the participants in terms of political education, public virtues, and so on (Christiano, 1997, p. 244 ff.). For some of these justifications, see Manin (1987, pp. 354 and 363); Mansbridge (1992, p. 36); Estlund (1993b, p. 82); Cohen (1998, pp. 186–87); Elster (1998a, p. 11); Gargarella (1998, p. 261). But, as Estlund has pointed out, “the self-education justification is too thin to support agency-based hope of citizens as democratic participants. Without some further public reasons for a democratic system other than self-development, citizens are likely to lack reasons and motivation for the form of activity that would be educative” (Estlund, 1993b, p. 84).

¹⁶ Christiano includes a third way of justifying deliberative democracy – what he calls political justification – that claims that deliberative democracy is a necessary and sufficient condition for the political justification of the outcomes of the process (Christiano, 1997, pp. 245–46, 262–74). Although it has to do with the idealization that some authors have drawn in their description of the model, I am not able to see why such conception is comparable to the other two, or why they are mutually exclusive. In my view, and part of Christiano’s argument tends to show this, this third justification is a specification of either the instrumental one or the intrinsic one.

1996 and 2004, p. 22; Christiano, 1997 and 2004; Estlund, 1997; Gaus, 1997b, p. 284). Therefore, we are not obliged to choose between these two options as they can be combined in diverse ways. The EC of deliberative democracy does not necessarily reject that democratic and deliberative procedures also have intrinsic value. What characterizes the EC is the attribution of epistemic value to deliberative democracy, no matter if it also has other values, or even if these other values are more important than the instrumental one in the overall justification. The only way to abandon the EC, as we will see in the fourth section below, is to reject one of the two basic theses explored above. Second, I know of no one who has explicitly rejected the EC¹⁷ or who has defended either a *pure proceduralism* or a *pure epistemic proceduralism*.¹⁸ It would be misleading therefore to characterize the actual debate as a choice between these two positions.

However, both kinds of values (intrinsic and instrumental) can be in conflict with each other. Certainly, under some circumstances it can be impossible to preserve or honor the intrinsic and the instrumental values at the same time, and we can be required to choose between (or prioritize) them. Indeed, this is simply a particular case of the more general tension between procedure and substance in their role as values relevant to characterize legitimacy (Cohen, 1994; Bohman, 1998).¹⁹ To define a satisfactory notion of political legitimacy we should address two irreducible (and potentially conflicting) questions: (1) which is the legitimate procedure to make political decisions²⁰ and (2) which is the substantive content required for a decision to be legitimate? They are irreducible because we cannot give the same answer to both. They are potentially conflicting because they involve two different criteria of legitimacy that can generate opposed qualifications of the

¹⁷ Gutmann and Thompson, for instance, state that “participants [in deliberation] do not argue for argument’s sake; they do not argue even for truth’s own sake” (Gutmann and Thompson, 2004, p. 5). They also argue later that “any adequate theory must recognize both [the instrumental and the expressive views of deliberation]” (p. 22), and admit in the same page that “[t]he instrumental view reminds us that because the stakes of political decision-making are right, and deliberation is a time-consuming activity, a deliberative process should contribute to fulfilling the central political function of making good decisions and laws.”

¹⁸ Estlund rightly attributes the defense of pure proceduralism to Robert Dahl – although Dahl is not a deliberative democrat – and hesitates to extend this label to Joshua Cohen and Thomas Christiano (Estlund, 1997, p. 176 and fn. 5). And rightly so. Both are easy cases, in my view, of a mixed position that combines intrinsic with instrumental values. On the other hand, he attributes what he calls the correctness theory (the pure epistemic proceduralism) to Rousseau, but, again, the latter was not a deliberative democrat (Estlund, 1997, p. 181 ff.; Christiano 1997, p. 245).

¹⁹ For a discussion of this issue, see Martí (2004, ch. 4, and 2005).

²⁰ The question about the procedure implicitly includes also a third question about who is the authority, and the complete version should run as follows: who can legitimately make political decisions and how? On the notion of legitimate authority referred to the issues I am analyzing here, see Christiano (2004).

same decision: the same political decision can be legitimate under the procedural criterion but illegitimate under the substantive one, or the contrary. This is a very serious problem and we still have no solution at all. Fortunately, we do not have to face it now because it is irrelevant for my present purpose. The important thing is that even if there are (perhaps irremediable) tensions between the intrinsic and the instrumental values of deliberative democracy, we cannot see them as incompatible. Furthermore, regarding the general problem of procedure versus substance, the majority of authors defends both values as necessary, related to political legitimacy, and some even declare them co-original (Habermas, 2001 and 2003; see also, for a similar view, Cohen, 1994; Dworkin, 1997; and Gutmann and Thompson, 1996, p. 27).²¹ This shows that, at least for some related problems, it is not so strange to defend two kinds of values which, in spite of being in conflict in some specific cases, are considered equally relevant for legitimacy. This is particularly so when we introduce the distinction between political legitimacy and moral rightness (Estlund, 1993a, pp. 1468–70, and 1997, pp. 174, 187–88; Rehg, 1997 and 1999; Bohman, 1998; Lafont, 2004; Christiano, 2004, p. 271 ff.; Martí, 2004, ch. 4, and 2005), which enables us to say that some decisions are politically legitimate, having been made through a legitimate procedure, but are at the same time morally (substantively) wrong.

3 Two Versions of the Epistemic Conception

It is necessary here, in my opinion, to introduce a further subtle distinction in the interpretation of the epistemological thesis of the EC which seems crucial to defend the EC from many of its critiques and that gives rise to two different versions of the EC. On a strong reading of the epistemological thesis one could say that the superior epistemic reliability of democratic deliberation (in comparison to other democratic procedures) lies in the fact that *democracy itself* (deliberative or not) – that is, in short, the rule of the many, as opposed to the rule of the few and the rule of one alone – *has epistemic value*, and *deliberation itself* (democratic or not) – that is, a process of argumentation, as opposed to a process of negotiation and a process of voting without communication at all – *has epistemic value* too, and hence *deliberative democracy benefits from the combined epistemic value of both democracy and deliberation*. This is the claim of what I call the Strong EC, and it is necessary to hold something like the Condorcet Jury Theorem (CJT) in order to defend it. While this is the version of the model most often criticized, few authors have committed to so strong a claim.²²

According to a weaker reading of the epistemological thesis, one could say that the superior epistemic reliability of democratic deliberation (in comparison

²¹ I have criticized this position elsewhere (Martí, 2005), but for different reasons that are not relevant here.

²² As far as I know, the only exception is Nino (1996, pp. 127–28).

to other democratic procedures) lies in that *deliberation itself, or the combination of democracy and deliberation*, but not democracy alone, *has more epistemic value* than other democratic alternatives. This Weak EC is not necessarily committed to the CJT, although it can claim that the application problems of the Theorem can precisely be solved through deliberation and, therefore, in the end, that democratic deliberation has a complex epistemic value derived from (i) deliberation itself, and from (ii) the CJT applied to the democratic dimension of the procedure and corrected by deliberation too. This is, from my point of view, the majoritarian element within the EC and, as I will try to show in the next section, all defenders of deliberative democracy should adhere to.

Let me say something about the Strong EC. Although I do not pretend to analyze the CJT and all its problems here, it is useful to mention some of them in order to understand what makes some people uncomfortable with the epistemic views and to discuss some possible solutions that are certainly relevant for my argument. As is well-known, the Theorem says that when certain conditions are met, the probability that the right decision is supported by a majority of voters is an increasing function of the number of participants as well as of the epistemic competence of each one converging to 1 as the number of participants tends to infinity (Condorcet, 1972, Part 5, pp. 279–304).²³ The conditions to be met are four, and whenever they are actually met, the Theorem mathematically grants its conclusion. Thus, if such conclusions could be respected in real political decisions, we could state that, in our democracies, what the majority prefers is more likely to be right than what is preferred by the minority, and that such a probability increases to the extent that the number of voters and their epistemic competence do. If correct, this would be a devastating argument in favor of the EC of democracy. Of course, the critics of the CJT emphasize that such idealized conditions are impossible to meet in practice. So, the principal discussion about the Theorem focuses on the feasibility of four conditions. Anyway, many authors have shown that most of them can be loosened and the Theorem still works. The four basic conditions are the following.

- 1 *Participants must vote sincerely for what they think correct and therefore strategic behaviors are excluded.* As a matter of fact, again, it is not possible to guarantee that each participant votes sincerely. People actually behave strategically and such a feature is unavoidable in practice. However, Austen-Smith and Banks seem to have demonstrated that the CJT still works in the presence of strategic

²³ This Theorem was supposed to be applicable to the members of juries in trials. The original can be found in Rousseau (1992, Book Four, ch. 2). For the modern reception, see Black (1958, pp. 162–65); Grofman et al. (1983, pp. 261–78); Kornhauser and Sager (1986); Cohen (1986a, p. 35 ff.); Grofman and Feld (1988); McLean and Hewitt (1994, pp. 32–54); Austen-Smith and Banks (1992 and 1996); Estlund (1993b, pp. 92–94, and 1997); Goodin and List (2001, pp. 283–88); Goodin and Estlund (2004). A proof of the CJT may be found in Estlund (1994).

motivations (Austen-Smith and Banks, 1992 and 1996; contra: Cohen, 1986a, pp. 36–37).

- 2 *Votes (or individual participations) must be independent from one another.* That is, participant A's being correct must be independent from participant B's being correct, excluding interferences. Once again, it is a matter of fact that it is impossible to guarantee voters' independence if a necessary condition for such independence consists of having no communication at all between them. Communication is obviously inevitable in politics, and then, interference among voters is unavoidable. However, as many authors have suggested, the condition required by the CJT is not the complete absence of communication, but only avoiding absolute dependence in voting. That is to say, what affects the results of the Theorem is that some people vote under pressure, force, threat, logrolling and so on because this nullifies the aggregated value of such a vote (Estlund, 1994; Waldron, 1999a, pp. 134–36; Goodin and List, 2001; Berg, 1993). Communication is not a problem; further, it can become a factor that improves epistemic competence and then contributes in other ways to increasing the expected results of the CJT.
- 3 *Voters have to choose between only two alternatives.* If there were more than two, then the conclusion would not be guaranteed. In effect, the original CJT only works if there are two alternatives. If there are three or more, as Condorcet himself observed, and later Kenneth Arrow proved, we run the risk of cycling majorities and, then, the collective results are irrational (Riker, 1982, p. 60; Estlund, 1997, p. 189). However, this objection is less effective than it seems. First, as Gerry Mackie has suggested, in a more-than-two-options political issue, such options are usually interdependent in the face of some general, political principle, and then the conclusions of Arrow's Impossibility Theorem are avoided by relaxing one of its conditions (Mackie, 2003, pp. 386–92). But, second, and most important, Goodin and List seem to have demonstrated that the CJT can be extended to plurality voting over k -options as well (Goodin and List, 2001).
- 4 *The epistemic competence of each voter has to be more than 0.5.* That is, each participant is more likely to be right than wrong. Of course, as a matter of fact, the epistemic competence of all participants cannot be the same since they all have different probabilities of being right or wrong. Anyway, as many authors have shown, it is not necessary for all to have the same competence, as Condorcet presupposed. All that is required is for the average epistemic competence of the group (the average probability of being right across the group) to be above 0.5. Indeed, according to Grofman et al. (1983, p. 268 ff.) an average epistemic competence of 0.471 would be enough. Furthermore, in Goodin and List's extended version of the CJT to k -options, the required competence is only for each voter to be more likely to choose the correct option than any other option, and this certainly relaxes the condition (Goodin and List, 2001; Goodin and Estlund, 2004, p. 138).

Amongst all the objections that the CJT has attracted, those that challenge this fourth condition are the most serious ones. The main problem from my point of view lies in how we can know whether people have an average epistemic competence higher than 0.5. And the CJT is implacable if this condition is not met: when people have an epistemic competence lower than 0.5, the probability for the majoritarian decision to be wrong increases with the number of voters! The problem here is that it is absolutely impossible to know what anyone's epistemic competence is, unless we have independent access to truth, and this of course is not the case (Estlund, 1993b, p. 93, and 1997, pp. 185–86). The question, then, is: do we have some reason to *presuppose* that this fourth condition is met, even when we have no guarantee that it actually is? Once we have renounced finding some evidence about it, what we need is a reason to act *as if* people have an average epistemic competence higher than 0.5, even when they do not.

One “candidate” reason is what Goodin and Estlund, adopting Davidson's expression, have called “the principle of charity:” that “our fellow citizens are more likely to be right than wrong and therefore that the winning outcome is quite probably the correct one” (Goodin and Estlund, 2004, p. 136). Perhaps adopting the principle of charity is the only way of making sense of our political practice, which assumes that rational deliberation among citizens is possible.²⁴ But the “principle of charity” is not a reason to presuppose that people are more likely to be right than wrong, but the presupposition itself. And then we need another justification for adopting it. Another reason could be the following intuition: if someone, being a member of a Jury, is going to decide about the culpability or innocence of someone else by tossing a coin, with no rational deliberation at all, the probability of making the right decision is exactly 0.5. Then, it seems reasonable to suppose that if such a person examines the information available and deliberates with herself, that is, if this person introduces rationality in decision-making, the probability should be higher than 0.5. But none of this is conclusive. People's beliefs are interrelated and some of them are certainly false. Therefore, it is not true that by introducing rationality, the probability of being right necessarily increases. When a Nazi has to decide about the Jews' future he has a higher probability of making the right decision if he tosses a coin than if he tries to rationally consider the decision. Burdens of judgment and other biases in individual reasoning affect our epistemic competence, and as such leave open the question about the fourth condition.²⁵

²⁴ Another reason is suggested by Goodin and Estlund themselves and constitutes the main argument of their work: “knowing that the democratic outcome was 60:40, we have then to decide which possibility is more credible. Is it more credible that in this sort of case the average voter is 60 percent likely to choose correctly (...) ? Or is it more credible that the average voter is in this sort of case only 40 percent likely to choose correctly (...) ?” (Goodin and Estlund, 2004, p. 140). But see note 26.

²⁵ Furthermore, the problems of biases suggest that if this fourth condition cannot be met, it is at least partly due to a failure of the second condition (the independence of voters),

All of these are serious problems for the Strong EC, but the Weak version is still possible. Let me begin with a remark about ideal and real deliberations. In the ideal model, democracy basically means *inclusion* of all those potentially affected by the decision reached and *equal consideration and concern* for everyone, that is, in other words, to respect the *equal political autonomy of all*. Under ideal conditions, again, such inclusion does not affect the epistemic value of deliberation since participants are engaged in the process of arguing with impartial motivations respecting and taking others' arguments seriously, with no time constraints, etc. Of course, real conditions differ considerably from that. People can behave self-interestedly or hypocritically; they do have time constraints (and other sunk costs); and they disagree even after deliberation: the fact of pervasive disagreement certainly makes voting an essential part of real deliberation (Manin, 1987, p. 359; Gutmann and Thompson, 1996, pp. 52–94; Waldron, 1999a, pp. 91–93, and 1999b; Besson, 2003 and 2005). However, this does not affect the general epistemological thesis of the EC. First, such a thesis refers to an ideal procedure. Second, and this is crucial, real democratic deliberations keep their epistemic value to the extent that they come closer to the ideal model.²⁶

Now, there are at least four reasons to think that deliberation has epistemic value; that is, that it can be justified in epistemic terms ahead of other democratic models (based on bargaining or pure voting): (1) *Deliberation increases the exchange and pooling of information*, including information concerning the interests of all those potentially affected by the decision. Hence, it increases the relevant knowledge available (Manin, 1987; Cohen, 1989a; Dryzek, 1990; Nino, 1996, pp. 117–28; Bohman, 1996; Elster, 1998a, p. 11; Fearon, 1998, pp. 45–49).²⁷ (2) *Deliberation permits and improves the detection of factual and logical mistakes* in citizens' reasoning about the world as well as about their preferences formation (Nino, 1996, p. 124; Fearon, 1998, pp. 49–52). (3) *Deliberation helps to control*

since the burdens of judgment and biases of this sort are caused by interdependencies (Goodin and Estlund, 2004, p. 137). In my opinion, Goodin and Estlund do not realize that it is precisely because of this that we cannot rely on the "inverse CJT" which they propound to make sense of the presupposition of epistemic capacity. A similar objection to the CJT may be found in Cohen (1986a, p. 35 ff.).

²⁶ To the extent that they are affected by time and cost constraints, hypocritical behavior, manipulation, etc., they certainly lose part of their epistemic value. That is the reason why we can affirm that in some extreme conditions of deliberative failure, democratic decisions do not count with epistemic value at all. To defend the EC is, therefore, a further reason to try to improve actual democratic decision-making procedures, and not to justify them at any rate.

²⁷ Deliberation also enables the expression of intensities of preferences of individuals; that is, "whether they have strong or different feelings about particular choices" (Fearon, 1998, pp. 45–46), and this can both contribute to solve some dilemmas in transforming individual preferences into collective ones, and improve the knowledge of the interests of others (Fearon, 1998, pp. 45–49; Mackie, 2003, pp. 391–92). Such expression certainly increases the shared relevant knowledge.

the emotional factors and to filter irrational preferences. Since “the presence of some emotional factors in moral discussion and the democratic process can work against the discovery of moral truth,” a rational procedure of will formation as deliberation reduces the emotional or irrational distortions, although it is true that “there are important ways in which emotions assist in the progress of a genuine process of argumentation” (Nino, 1996, p. 125; see also Manin, 1987; Cohen, 1989a; Bohman, 1996; Knight and Johnson, 1997, p. 313, fn. 31; Fearon, 1998, pp. 45–49; Pettit, 2003, p. 157). And, finally: (4) *Deliberation makes the manipulation of information and political agenda more difficult.* Contrary to what some opponents of deliberative democracy have held (see Sanders, 1997; Przeworski, 1998; Stokes, 1998), democratic deliberative procedures do not lead to “ideological domination” through manipulation of information and political agenda. Deliberation, instead, tends to avoid inequalities of information, the very source of such manipulation, and the possibility of manipulation is much greater in the models based on bargaining or pure voting since they offer no chance to contrast opinions and information (Fearon, 1998, p. 48).

The first condition increases or improves the necessary positive conditions for an adequate epistemic enquiry. And it depends on the participation of those potentially affected by the decision, so that its epistemic value refers to democratic deliberation only, and not to an elitist one. The other three conditions, instead, reduce epistemic distortions and contribute therefore to necessary negative conditions (like the absence of manipulation). All four are gradual and make the deliberative procedure *a filter of impartiality and substantive justice*. Consequently, the closer a real democratic deliberative procedure is to the ideal of deliberative democracy, the greater the reliability of such a procedure to produce impartial and substantively just outcomes. Furthermore, the very process implies a “quest for justification” of personal claims that excludes some inputs that work against such impartiality (Nino, 1996, p. 121).²⁸ Therefore, people engaged in ideal deliberation must make genuine arguments, normative propositions that could be accepted from an impartial point of view. But even when they are not actually impartially motivated and try instead to make what Elster calls a “strategic use of argument” (Elster, 1995), some attitudes remain excluded by the very practice of argumentation because they are obliged to behave *as if* they were impartially motivated, *as if* their statements were genuine arguments, and *as if* they took others’ arguments into consideration. This is, in Elster’s eloquent terms, the “civilizing force of hypocrisy” (Elster, 1995 and 1998b). The partial constraints it imposes exclude statements such as the following (Nino, 1996, pp. 121–24):

²⁸ I refer both to impartiality and to substantive justice to remain neutral in respect of the meta-ethical question. If the independent standard of rightness we want to know is, as many authors consider, something like impartiality or fairness, a deliberative procedure that enables all those affected by the decision to express and defend their opinions, beliefs and preferences is much closer to impartiality than any other.

- the mere expression of wants or description of interests ...
- the mere description of facts, such as a tradition or custom, that a human authority has enacted, or a divinity has ordered ...
- the expression of normative propositions that are not general, in the sense that the cases to which they apply are accounted for with proper names or definite descriptions ...
- the expression of normative propositions one is not prepared to apply to cases which are indistinguishable from the present one on the basis of properties relevant to the propositions themselves ...
- the obvious practical inconsistencies ...
- the expression of normative propositions that do not seem to take into account the interests of individuals ...
- the expression of normative propositions that do not purport to be moral, that is, acceptable from an impartial point of view, but are only prudential or aesthetic and thus cannot provide reasons for resolving a conflict of interests among different people ...

Therefore, even if one accepts that the deliberative practice cannot totally avoid strategic behavior, it can and in fact does fight against partiality and biases better than voting and bargaining (Hurley, 1989). In other words, as I said earlier, and although it is often not totally successful in doing so, deliberation works as a filter of impartiality and substantive justice, for it leaves aside some partial and/or openly unjust claims (Sunstein, 1988; Cohen, 1989a and 1996; Gargarella, 1995 and 1998; Gutmann and Thompson, 1996 and 2004; Bohman, 1996 and 1998; Nino, 1996, pp. 121–28; Fearon, 1998, pp. 52–55; Pettit, 2003, p. 157).

Let us now turn to the Weak EC. Remember we said that it is not necessarily committed to the epistemic value of mere democracy, nor to the CJT. But we also mentioned that it is possible to affirm that deliberation can help to overcome the problems in the applicability of the CJT. Now we can understand why. By tending to impartiality, deliberation reduces what appear to be the sources of the main problem for such applicability: the burdens of judgment and the biases in individual reasoning. Therefore, deliberative democracy can have epistemic value in two ways: first, deliberation makes the CJT possible and attributes epistemic value to democracy itself; and second, deliberation itself has epistemic value. But it should also be remembered that this claim is not necessary for the Weak EC; it suffices to claim the epistemic value of deliberative procedures. The question now is: how then can the whole EC be rejected?

4 Two Ways of Rejecting the Epistemic Conception

One way of defending a particular conception consists of showing that there is no reasonable possibility of rejecting such a conception: call it *the negative strategy of justification*. If proving this were possible in respect to the EC of deliberative

democracy, it would be necessarily justified. Of course, I do not pretend to do this, though my approach follows a negative strategy too. My aim is weaker and consists of showing that some possible rejections of the EC actually fail, while others imply a general refusal of the whole deliberative democracy. If I am right, a coherent defender of deliberative democracy must embrace the EC as well. Hence, I will not defend the EC against any possible objection. Indeed, many of these objections amount to significant challenges for the general model of deliberative democracy. My only point here is internal to the deliberative democracy model and questions the possibility of defending such a model without also adopting an EC.

In my opinion, there are two and only two ways of rejecting the EC of deliberative democracy, which consist alternatively of (a) refusing the ontological thesis, or (b) refusing the weak version of the epistemological thesis.

The Rejection of the Ontological Thesis

Strictly speaking, there are two forms of rejection of the ontological thesis of the EC, which defends the existence of an at least partially independent standard of rightness. The first one denies its existence. The second consists of denying the possibility of knowing about it, even if it happens to exist. In both cases, the consequence is that a political practice that presupposes the existence of such a standard becomes misleading or pointless, something that can have no value at all.

The problem with this first way of rejecting the EC, in its two variants, is that deliberative democracy itself presupposes, as we saw in Section 1, such an ontological thesis: it assumes the existence of an at least partially independent standard of rightness, and that this standard is knowable. This is precisely what distinguishes arguing from bargaining, and explains the very practice of offering reasons and arguments, and hence it must be accepted by any defender of deliberative democracy (Estlund, 1993a, pp. 1437–44, 1448–53).²⁹ It is obviously not easy to positively justify such an ontological thesis. And since it is impossible to prove the truth of the denial of an existential statement like this, those who affirm such a statement have the burden of proof and evidence.³⁰ Their answer will clearly depend on their meta-ethical view, but scope precludes exploring some

²⁹ Although some of them prefer avoiding the language of the common good or independent standards, they appeal in the end to intersubjective or enlightened interests in an equivalent way (see Mansbridge, 1983, pp. 24–28; Bohman, 1996 and 1998, p. 405; Knight and Johnson, 1997, p. 313, fn. 31; Gargarella, 1998, p. 261; Pettit, 2003, p. 157; Christiano, 2004, p. 269 ff.).

³⁰ Indeed, what is impossible to prove is the truth of an empirical existential statement, not the truth of an analytical one. However, even though the existence of independent standards of rightness is not empirical, it is certainly not a matter of analytical or logical truth.

of the arguments here. Notwithstanding the difficulties in establishing the truth of the thesis, a significant part of our political practice would become pointless or even absurd, if we rejected it. Any discourse about political legitimacy would be meaningless, if it were to be understood as more than mere subjective support to a particular framework or setting. However, my point here is not about the truth or falsity of the ontological thesis of the EC, but only to show that a coherent defender of deliberative democracy cannot renounce such a thesis, and therefore cannot reject the EC for this first reason.

The Rejection of the Weak Interpretation of the Epistemological Thesis

The second way to reject the EC is to refuse the weak interpretation of the epistemological thesis explored above. Refusing the strong interpretation by questioning the applicability of the CJT, as we have done, is not enough, for in such a case the Weak EC still stands. While rejecting the Weak EC implies also rejecting the Strong one, the reverse does not hold. Now, how could we reject the Weak EC? Remember, first, that to say that a procedure A has epistemic value means that: (1) such a procedure is epistemic to some degree – that is, it is apt to lead us to know the right answer to a particular question – and (2) it is more reliable in general to lead us to the right answer than other procedures (B and C) – that is to say, its outcomes are more likely to be right than the outcomes of B and C. To reject such a statement, we could hold that B or C has more epistemic value, or that we are not able to know which of them has it, or finally that none of them has it. There are, then, four possible strategies for refusing the Weak EC: (i) to hold that bargaining has more epistemic value than arguing or voting; (ii) to hold that pure voting has more epistemic value than arguing or bargaining; (iii) to hold that we are not able to know which of them has epistemic value; or (iv) to affirm that none of them has epistemic value.

The first strategy is absurd, since bargaining cannot conceptually have epistemic value, as – it supposes – there is no independent standard of rightness over the issues we negotiate. Bargaining is not epistemic at all. All we can know through a procedure like this are the pure interests or desires of those who take part in it. On the other hand, the second strategy also sounds quite implausible. To affirm that pure voting has more epistemic value than democratic deliberation, we should embrace and justify something like the CJT and say at the same time that deliberation – the exchanging of reasons and arguments – not only cannot provide more epistemic value, but moreover that it actually reduces the epistemic value of pure voting. In other words, we should solve all the problems in the applicability of the CJT, reject the four reasons in favor of the epistemic value of deliberation examined before, and add that collective reasoning and argumentation aggravates the practice of voting. But this is implausible. It seems, instead, that if we were able to solve the application problems of the CJT, the Strong EC would be right,

for the exchanging of information, reasons and arguments prior to voting can only be epistemically positive.³¹

The third strategy is more interesting. We could admit that both democratic deliberation and pure voting (in some special circumstances) are epistemic procedures (condition 1 of having epistemic value), and however verify that in some cases deliberation seems more reliable, but in other cases it is better (more reliable) to vote directly, without prior deliberation, because of the dangers of rhetorical persuasion and manipulation. In effect, irrational persuasion and manipulation are two elements concerning a bargaining model, and they decrease, by definition, the epistemic reliability of a particular setting. If so, we could say that we are not capable of knowing which of these procedures is more reliable *in general* (condition 2 of having epistemic value). But the circumstances under which pure voting is more reliable than democratic deliberation always show a failure of a real setting to reproduce the ideal model of deliberative democracy. And we should assess the reliability of ideal models, and not of poorer real copies, or even less the reliability of an ideal model versus that of a poorer real copy of another model. Problems occurring in real settings are at the most obstacles in the application of a regulative ideal, but no reasons against it.

Finally, we could try the fourth strategy. If we admit that deliberation is an epistemic process – and it seems reasonable to do so – and also admit that it is more reliable in general than pure voting – and this also seems reasonable – how can we hold that none of the democratic decision-making procedures has epistemic value? The only way, as far as I can see, is saying that there is a non-democratic procedure much more reliable than deliberation that makes the reliability of democratic deliberation ridiculous. In other words, we could affirm that deliberation can produce so many wrong outcomes that could be avoided by otherwise using a non-democratic procedure that we resist to attribute epistemic value to the former. This strategy, however, forgets that the epistemological thesis restrains the comparison of reliability to democratic procedures. And such a restraint is not an arbitrary clause to keep the truth of the thesis at any rate. As I said, the EC is oriented to justify deliberative democracy within a democratic framework, that is, it presupposes the legitimacy of democracy itself.

Nevertheless, this last point indicates something very important: the plausibility of some elitist trend in the epistemic logic, and the necessity to adopt an intrinsic justification of deliberative democracy as well, as a complement of the instrumental, epistemic one. This is what I want to explore in more detail in the next section. So far, we can conclude that any plausible rejection of the EC of deliberative democracy ends up challenging either the value of deliberation or the value of democracy. If I am right, then, a coherent defender of deliberative democracy should embrace the EC as well.

³¹ Note that we do not say that rhetoric and persuasion could worsen the results of simple voting. This is probably true, but rhetoric and persuasion have nothing to do with deliberation, but with its failure.

5 The Tendency to Elitism and the Justification of Deliberative Democracy

One of the main fears about the EC of democracy is that it can lead us to an elitist view (Estlund, 1993a, p. 1464 ff., and 1993b). And this is true. We have seen that political legitimacy depends significantly on the reliability of the decision-making procedure used to find or produce the substantively right decisions. And since some agents are wiser than others, such reliability increases dramatically to the extent that the access to the decision-process is restricted to the wiser. Remember, first, that according to the CJT there are two ways of increasing the likelihood of the rightness of a particular decision: to increase the number of participants or to increase the average epistemic competence, and the most efficient is undoubtedly the latter (Estlund, 1993b, p. 95). Second, besides the CJT, it is reasonable to think that if we restrict participation in deliberation to those wiser and more capable of sound argumentation, the probability of the final decision being correct is higher than if we open deliberation to all. In other words, a deliberative procedure is epistemically more reliable if it is exclusive.

If so, one could hold that the EC of deliberative democracy enhances a tendency to elitism, as it favors restrictions in the access to decision-making (Estlund, 1993a, pp. 1463–64; 1993b, p. 71; 1997, pp. 181–83, and 2000b, p. 123; Bohman, 1996, pp. 3 and 111; Sanders, 1997, pp. 354–59; Goodin and List, 2001, p. 280, fn. 13; Dryzek, 2001, p. 655). If we were *only* concerned with the substantive quality of political decisions, and since the elitist restriction increases the probability to produce right decisions, political legitimacy would require democratic elitism. We could then endorse representative institutions as a way of filtering out people not able to participate in decision-making. Thus, a division of labor could be useful not only to overcome the size and complexity difficulties for direct participation, but can also work as something similar to natural political selection, following certain principles of distinction (Manin, 1997). Elitist representative institutions could maximize the deliberative quality of political decision-making, as deliberation in courts among justices is supposed to do, leading us to a democratic elitist system of excellence, democratic legitimacy still being guaranteed through periodic elections by universal suffrage.

Estlund has analyzed this problem accurately, calling such a position *Normative Epistemic Authoritarianism* (Estlund, 1993b). This authoritarianism endorses three tenets (Estlund, 1993b, p. 72):

- 1 *The Cognitivist Tenet*: Normative political claims (at least often) are true or false.
- 2 *The Elitist Epistemic Tenet*: Some (relatively few) people know the normative political truth significantly better than others.
- 3 *The Authoritarian Tenet*: The normative political knowledge of those who know is a strong moral reason for their holding political power.

As we have seen, the first tenet is presupposed by the EC itself, so it cannot be rejected. The second is empirical, but difficult to deny. However, it must not be confused with a normative claim in differentiation in treatment or consideration and respect, since an empirical claim can never imply a normative one. The negation of this second tenet is to affirm that we all have the same epistemic competence, that we are “equally wise about moral and political issues,” and this is, as a matter of fact, surely false. Even if we all had the same epistemic capabilities – the same possibility to have an equal understanding – we would actually have different understandings because of the diversity of available information and personal insights. Then, we lack the evidence in both directions.³² Anyway, I think we cannot reasonably doubt this elitist empirical claim. All our intuitions and our practices head in this direction.

The problem with authoritarian elitism is, of course, the step from the first two tenets to the third. We could think of at least three arguments against such a step and then against the elitist conception. First, as Estlund argues, the elitist approach must respond to the challenge of “who will know the knowers?” (Estlund, 1993b, pp. 84–89). That is, if some people are entrusted to make political decisions because of their better knowledge, wisdom and capacities, how do people who do not share such knowledge, wisdom and capacities identify the wiser? They surely cannot. They will not be able either to recognize the character features necessary to be distinctively considered, or to verify if those who make decisions are making the right ones.³³ This problem is all the more dramatic because of reasonable disagreement. People disagree reasonably about controversial political matters. And then even wiser and capable people disagree about such matters. Hence “a putative knower can be doubted by some reasonable people, and so knowledge cannot give moral legitimacy to political power” (Estlund, 1993b, p. 94). If this argument is correct, then the possibility of enhancing representative (elected) elitist institutions was only a mirage. And what was regarded as a democratic form of elitism quickly becomes a non-democratic one. Roughly, if we do not trust people to make political decisions, then we cannot trust them to elect the proper representatives.

³² Indeed, as it became clear with the epistemic competence condition of the CJT, we cannot be sure whether we have a different or an equal epistemic capacity, since we do not have independent access to political truth. The only way to ascertain something both in the case of the CJT condition and of the Elitist Epistemic Tenet is to know *independently* what is politically true all the time and to measure the number of times people are right or wrong. And this is impossible.

³³ In Estlund’s words, “[e]ven if some have knowledge, others have no way of knowing this unless they can know the same thing by independent means, in which case they have no use for the others’ expertise” (Estlund, 1993b, p. 84). This brings Estlund to reject what he calls “*The Second-Order Epistemic Tenet*: The knowers can be known by sufficiently many nonknowers to empower them, and to practically and morally legitimate their power.” And being skeptic about this tenet, he rejects Normative Epistemic Authoritarianism (Estlund, 1993b, p. 84).

However, in my opinion, this first argument is not enough to reject political elitism. True, there are a lot of problems in knowing who the knowers are. But it is probably easier to know who they are not. Therefore, we could maintain restrictions in the access to political decision-making. Although we cannot know who the 0.1 per cent wisest are to govern us, we surely can identify the more ignorant and incapable 20 or 10 per cent and leave them out of the political processes. Perhaps those who lack high-school studies or who have an IQ of under 80, are less reliable to make right political decisions, and we should leave them out. Perhaps we could do the same with 50 per cent of the population. Why would it be unfair or unjust? I think it certainly would be.

Let me explore two other arguments. The second argument for rejecting political elitism is provided by classic liberal thought: the point is not only who knows the knowers, but also who controls those who govern. Even if we could select the wisest and most capable people to govern, how could we be sure that they will be making the right decisions, and not promoting their own private interests? We can establish, following the classical liberal solution, "checks and balances," like division of power, bicameralism, judicial review, etc. But it will not be enough if all such institutions are constituted by the wiser! How can the rest of us be protected against tacit or explicit conspiracy by all the "empowered" to maintain the *status quo* and keep the power in their hands? Further, there are no equilibrium-solutions available to avoid the risk of domination. When political decisions, including those about basic matters, are involved, someone has to make the final decision.³⁴ But this second argument is not enough. Note that the risk of having an uncontrolled government increases when the number of those involved in government decreases. The more people engaged in politics, the less chance of conspiracy.³⁵ Then, the elitist could say, as before, that what she purports is to leave out only a small part of the population. If 80 per cent of the people are engaged in politics, there can be enough guarantees against conspiracy.

However, the problem is not so much the risk of conspiracy, but that of domination. To leave a part of the population out of decision-making, even if it is a small one, implies that that part will be dominated by those who remain inside.³⁶ To be dominated does not imply to be actually oppressed, pursued or interfered with, but to be in a situation that makes this possible. And this leads us to the third argument. In order to reject political elitism, we need to find an intrinsic value in democratic procedure, something that makes it worthy independently of its epistemic (or another instrumental) value (Estlund, 1993b, p. 82). And deliberative

³⁴ To forbid or allow abortion is a decision that necessarily has to be made. If not explicitly, then the *status quo* is maintained and the decision is made implicitly.

³⁵ I am assuming here, for the sake of argument, that those who are not politically wise do not (or should not) take part in politics, since they are not able to sort out and assess those wiser than them.

³⁶ What I mean by domination comes close to Pettit's account of individual liberty, albeit applied to public autonomy (Pettit, 1997 and 2001).

democrats usually agree in attributing such a value to deliberative democracy: they refer, in different terms, to something like “equal political autonomy” (Christiano, 1997, pp. 258–62, and 2004, p. 269 ff.; Cohen, 1996; Brighouse, 1996; Bohman, 1996, ch. 3, and 1997; Nino, 1996, p. 117; Gutmann and Thompson, 1996, ch. 8; Gaus, 1996, pp. 246–57; and Estlund, 2000a), something based on a principle of equal consideration and concern or basic equality or human dignity.

That deliberative democracy is a procedure that promotes this intrinsic value means that it is procedurally fair to everyone’s claims (Estlund, 1997, pp. 189–98, and 2000a, p. 140 ff.). Since the procedure is democratic, it promotes inclusion. Since it is governed by the force of arguments, and not by any particular, private or selfish consideration, it treats all the participants impartially and enhances impartiality in its results. Finally, deliberative democracy pays attention not only to people’s interests or brute preferences (as bargaining or voting do) but to people’s reasons and arguments in favor of their proposals. Hence, it treats people as reason bearers, capable of rationally articulating their political views. And since it enables everyone to express themselves politically, it is more sensitive to people as reasonable and autonomous agents. Public autonomy here means the capability to pursue rational aims freely chosen or, paralleling the individual notion, to pursue their own plans of political life. If private autonomy is not to choose arbitrarily, as a matter of whim, but to choose deliberately, as a matter of reason, public autonomy is not to choose on the basis of mere interests or desires, but on the basis of public reason. Therefore, deliberative democracy is more appropriate to respect and promote the value of political autonomy than other models based on bargaining or pure voting, for it conceptually assumes that participants are politically autonomous, and allows them to develop such autonomy.³⁷

Democratic deliberation is based on public reason. This mere feature makes it apt for an instrumental justification that emphasizes its epistemic value before other democratic procedures. But it also makes it apt for an intrinsic justification in terms of a basic principle of equal consideration and respect when compared to other non-democratic alternatives. Therefore, the idea of public reason promotes rightness as well as equal political autonomy. I think we can conclude not only that the epistemic and the intrinsic justification are both required, but also that they imply each other.³⁸ Some sort of division of labor is working here. Intrinsic

³⁷ This makes deliberative democracy adequate to pursue and enhance the republican notion of liberty as non-domination (Pettit, 1997 and 2001). Indeed, as many authors have emphasized, modern republicanism has been largely committed to the value of deliberative democracy, even if in my opinion there are no conceptual implications between both political ideals (Sunstein, 1985, 1988 and 1993; Habermas, 1992, ch. VII, and 2001; Pettit, 2003, pp. 151–56; and Skinner, 1998).

³⁸ This is so, even if they are potentially conflicting, that is, if they can be at odds in some particular cases. Similarly with what occurs with the paradox of political legitimacy between procedural and substantive values, or as an instance of it, the tensions between the intrinsic and the epistemic values of deliberative democracy must be accepted as unavoidable. See Martí (2004, ch. 4, and 2005). See also text accompanying note 20.

values justify democracy in general and instrumental, epistemic ones justify democratic deliberation. Both jointly justify deliberative democracy.

Conclusion

The purpose of this chapter was to revisit the epistemic conception of deliberative democracy. What I have argued is that, first, a coherent deliberative democrat has very good reasons to defend the epistemic conception, because the core of the deliberative democracy ideal implicitly presupposes what is claimed by such a conception (and that it is not so unreasonable as some think it is); second, that even if the epistemic view is right, it cannot, however, be the only justification of deliberative democracy, for the epistemic concern leads us to an elitist approach that has to be rejected in order to defend democracy itself; and third, that we have to recognize some intrinsic values in democratic deliberative procedures. If so, the traditional picture is misleading. There is no dilemma between intrinsic and instrumental justifications of deliberative democracy. The key lies in solving the paradox of two values that imply each other and at the same time can be in mutual conflict, but this is another story. Anyway, if I am wrong on all these conclusions, and this might well be the case, we will always be able to track the truth together. Deliberating, I guess.

References

- Austen-Smith, D. and Banks, J.S. (1992), 'Strategic Models of Talk in Political Decision Making', *International Political Science Review*, 13(1), pp. 45–58.
- Austen-Smith, D. and Banks, J.S. (1996), 'Information Aggregation, Rationality, and the Condorcet Jury Theorem', *American Political Science Review*, 90(1), pp. 34–45.
- Berg, S. (1993), 'Condorcet's Jury Theorem, Dependency among Jurors', *Choice Welfare*, 10(1), pp. 87–95.
- Besson, S. (2003), 'Disagreement and Democracy: From Vote to Deliberation and Back Again? The Move Toward Deliberative "Voting Ethics"', in J. Ferrer and M. Iglesias (eds), *Globalisation, Democracy, and Citizenship – Prospects for the European Union* (Berlin: Duncker and Humblot), pp. 101–35.
- Besson, S. (2005), 'The Paradox of Democratic Representation. On Whether and How Disagreement Should Be Represented', in L. Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot: Ashgate), pp. 125–61.
- Black, D. (1958), *The Theory of Committees and Elections* (Cambridge: Cambridge University Press).
- Bohman, J. (1996), *Public Deliberation. Pluralism, Complexity and Democracy* (Cambridge, MA: MIT Press).
- Bohman, J. (1997), 'Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities', in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 321–48.

- Bohman, J. (1998), 'Survey Article: The Coming of Age of Deliberative Democracy', *The Journal of Political Philosophy*, 6(4), pp. 400–25.
- Bohman, J. and Rehg, W. (eds) (1997), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press).
- Brighouse, H. (1996), 'Egalitarianism and Equal Availability of Political Influence', *Journal of Political Philosophy*, 4(2), pp. 118–41.
- Buchanan, J.M. and Tullock, G. (1962), *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press).
- Christiano, T. (1996), *The Rule of the Many* (Boulder: Westview Press).
- Christiano, T. (1997), 'The Significance of Public Deliberation', in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 243–78.
- Christiano, T. (2004), 'The Authority of Democracy', *Journal of Political Philosophy*, 12(3), pp. 266–90.
- Cohen, J. (1986a), 'An Epistemic Conception of Democracy', *Ethics*, 97(1), pp. 26–38.
- Cohen, J. (1986b), 'Reflections on Rousseau: Autonomy and Democracy', *Philosophy and Public Affairs*, 15(3), pp. 275–97.
- Cohen, J. (1989a), 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity: Normative Analysis of the State* (Oxford: Blackwell), pp. 17–34.
- Cohen, J. (1989b), 'The Economic Basis of Deliberative Democracy', *Social Philosophy and Policy*, 6(2), pp. 25–50.
- Cohen, J. (1994), 'Pluralism and Proceduralism', *Chicago-Kent Law Review*, 69, pp. 589–618.
- Cohen, J. (1996), 'Procedure and Substance in Deliberative Democracy', in S. Benhabib (ed.), *Democracy and Difference* (Princeton, NJ: Princeton University Press), pp. 95–119 (also included in J. Bohman and W. Rehg (eds) (1997), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 407–37).
- Cohen, J. (1998), 'Democracy and Liberty', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 185–231.
- Condorcet, Marquis de [1785] (1972), *Essai sur l'application de l'analyse à la probabilité des décisions rendues à la pluralité des voix* (New York: Chelsea Publishing Company).
- Dahl, R.A. (1956), *A Preface to Democratic Theory* (Chicago: The University of Chicago Press).
- Dahl, R.A. (1989), *Democracy and Its Critics* (New Haven, CT: Yale University Press).
- Downs, A. (1956), *An Economic Theory of Democracy* (New York: Harper and Row).
- Dryzek, J. (1990), *Discursive Democracy* (Cambridge: Cambridge University Press).
- Dryzek, J. (2000), *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations* (Oxford: Oxford University Press).
- Dryzek, J. (2001), 'Legitimacy and Economy in Deliberative Democracy', *Political Theory*, 29(5), pp. 651–69.
- Dworkin, R. (1997), *Freedom's Law. The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press).
- Elster, J. (1983), *Sour Grapes. Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press).
- Elster, J. (1995), 'Strategic Uses of Argument', in K. Arrow, R. Mnookin, L. Ross, A. Tversky and R. Wilson (eds), *Barriers to Conflict Resolution* (New York: Norton), pp. 237–57.

- Elster, J. (ed.) (1998a), *Deliberative Democracy* (Cambridge: Cambridge University Press).
- Elster, J. (1998b), 'Deliberation in Constitution Making', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 97–122.
- Ely, J. (1980), *Democracy and Distrust. A Theory of Judicial Review* (Cambridge, MA: Harvard University Press).
- Estlund, D. (1993a), 'Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence', *Texas Law Review*, 71, pp. 1437–77.
- Estlund, D. (1993b), 'Making Truth Safe for Democracy', in D. Copp, J. Hampton and J. Roemer (eds), *The Idea of Democracy* (Cambridge: Cambridge University Press), pp. 71–100.
- Estlund, D. (1994), 'Opinion Leaders, Independence, and Condorcet's Jury Theorem', *Theory and Decision*, 36(2), pp. 131–62.
- Estlund, D. (1997), 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority', in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 173–204.
- Estlund, D. (2000a), 'Political Quality', *Social Philosophy and Policy*, 17(1), pp. 127–60.
- Estlund, D. (2000b), 'Jeremy Waldron on Law and Disagreement', *Philosophical Studies*, 99(1), pp. 111–28.
- Fearon, J.D. (1998), 'Deliberation as Discussion', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 44–68.
- Fishkin, J.S. and Laslett, P. (eds) (2003), *Debating Deliberative Democracy* (Oxford: Blackwell).
- Gargarella, R. (1995), *Nos los representantes. Crítica a los fundamentos del sistema representativo* (Buenos Aires: Miño y Dávila).
- Gargarella, R. (1998), 'Full Representation, Deliberation, and Impartiality', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 260–80.
- Gaus, G. (1996), *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford: Oxford University Press).
- Gaus, G. (1997a), 'Reason, Justification, and Consensus: Why Democracy Can't Have It All', in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 205–42.
- Gaus, G. (1997b), 'Looking for the Best and Finding None Better: The Epistemic Case for Deliberative Democracy', *The Modern Schoolman*, 74, pp. 277–84.
- Goodin, R. (2003), *Reflective Democracy* (Oxford: Oxford University Press).
- Goodin, R. and Estlund, D. (2004), 'The Persuasiveness of Democratic Majorities', *Politics, Philosophy and Economics*, 3(2), pp. 131–42.
- Goodin, R. and List, Ch. (2001), 'Epistemic Democracy: Generalizing the Condorcet Jury Theorem', *The Journal of Political Philosophy*, 9(3), pp. 277–306.
- Grofman, B. and Feld, S. (1988), 'Rousseau's General Will: A Condorcetian Perspective', *American Political Science Review*, 82(2), pp. 567–76.
- Grofman, B., Owen, G. and Feld, S. (1983), 'Thirteen Theorems in Search of Truth', *Theory and Decision*, 15, pp. 261–78.
- Gutmann, A. and Thompson, D. (1996), *Democracy and Disagreement* (Cambridge, MA: Harvard University Press).
- Gutmann, A. and Thompson, D. (2004), *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press).

- Habermas, J. (1981), *Theorie des kommunikativen Handelns* (Frankfurt am Main: Suhrkamp Verlag).
- Habermas, J. (1992), *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp Verlag).
- Habermas, J. (2001), 'Constitutional Democracy. A Paradoxical Union of Contradictory Principles?', *Political Theory*, 29(6), pp. 766–81.
- Habermas, J. (2003), 'On Law and Disagreement. Some Comments on "Interpretative Pluralism"', *Ratio Juris*, 16(2), pp. 187–94.
- Hurley, S. (1989), *Natural Reasons, Personality and Polity* (New York: Oxford University Press).
- Knight, J. and Johnson, J. (1997), 'What Sort of Equality Does Deliberative Democracy Require?', in J. Bohman and W. Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 279–320.
- Kornhauser, L.A. and Sager, L. (1986), 'Unpacking the Court', *Yale Law Journal*, 96, pp. 82–117.
- Lafont, C. (2004), 'Moral Objectivity and Reasonable Agreement: Can Realism be reconciled with Kantian Constructivism?', *Ratio Juris*, 17(1), pp. 27–51.
- Mackie, G. (2003), *Democracy Defended* (Cambridge: Cambridge University Press).
- Manin, B. (1987), 'On Legitimacy and Political Deliberation', *Political Theory*, 15(3), pp. 338–68.
- Manin, B. (1997), *The Principles of Representative Government* (Cambridge: Cambridge University Press).
- Mansbridge, J. (1983), *Beyond Adversary Democracy*, 2nd edn (Chicago: University of Chicago Press).
- Mansbridge, J. (1992), 'A Deliberative Theory of Interest Representation', in M. Petracca (ed.), *The Politics of Interests. Interest Groups Transformed* (Boulder: Westview Press), pp. 32–57.
- Martí, J.L. (2004), *Autogobierno deliberativo: Una defensa de la democracia deliberativa participativa*, doctoral dissertation, Pompeu Fabra University in Barcelona, unpublished manuscript.
- Martí, J.L. (2005), 'The Sources of Legitimacy of Political Decisions: Between Procedure and Substance', in L. Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot: Ashgate), pp. 259–81.
- McLean, I. and Hewitt, F. (1994), 'Introduction', in I. McLean and F. Hewitt (eds), *Condorcet. Foundations of Social Choice and Political Theory* (Aldershot: Edward Elgar), pp. 3–90.
- Nino, C.S. (1996), *The Constitution of Deliberative Democracy* (New Haven, CT: Yale University Press).
- Pettit, P. (1997), *Republicanism. A Theory of Freedom and Government* (Oxford: Oxford University Press).
- Pettit, P. (2001), *A Theory of Freedom* (Cambridge: Polity Press).
- Pettit, P. (2003), 'Deliberative Democracy, the Discursive Dilemma, and Republican Theory', in J.S. Fishkin and P. Laslett (eds), *Debating Deliberative Democracy* (Oxford: Blackwell), pp. 138–62.
- Przeworski, A. (1998), 'Deliberation and Ideological Domination', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 140–60.
- Rawls, J. (1993), *Political Liberalism* (New York: Columbia University Press).
- Rehg, W. (1997), 'Legitimacy and Deliberation in the Epistemic Conception of Democracy: Between Estlund and Habermas', *The Modern Schoolman*, 74, pp. 355–74.

- Rehg, W. (1999), 'Intractable Conflicts and Moral Objectivity: A Dialogical Problem-Based Approach', *Inquiry*, 42, pp. 229–48.
- Riker, W.H. (1982), *Liberalism against Populism. A Confrontation between the Theory of Democracy and the Theory of Social Choice* (San Francisco: Freeman).
- Riker, W.H. (1986), *The Art of Political Manipulation* (New Haven, CT: Yale University Press).
- Rosenkrantz, C. (1999), 'The Epistemic Theory of Democracy Revisited', in H. Hongju Koh and R. Slye (eds), *Deliberative Democracy and Human Rights* (New Haven, CT: Yale University Press), pp. 235–46.
- Rousseau, J.-J. [1762] (1992), *Du contrat social* (Paris: Flammarion).
- Sanders, L. (1997), 'Against Deliberation', *Political Theory*, 25(3), pp. 347–76.
- Schumpeter, J.A. [1942] (1946), *Capitalism, Socialism and Democracy*, 2nd edn (New York: Harper).
- Shklar, J. [1969] (1985), *Men and Citizens. A Study in Rousseau's Social Theory* (Cambridge: Cambridge University Press).
- Skinner, Q. (1998), *Liberty before Liberalism* (Cambridge: Cambridge University Press).
- Stokes, S.C. (1998), 'Pathologies of Deliberation', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 123–39.
- Sunstein, C. (1985), 'Interest Groups in American Public Law', *Stanford Law Review*, 38, pp. 29–87.
- Sunstein, C. (1988), 'Beyond the Republican Revival', *Yale Law Journal*, 97, pp. 1539–90.
- Sunstein, C. (1991), 'Preferences and Politics', *Philosophy and Public Affairs*, 20(3), pp. 3–34.
- Sunstein, C. (1993), *The Partial Constitution* (Cambridge, MA: Harvard University Press).
- Truman, D. [1959] (1968), *The Governmental Process* (New York: Alfred A. Knopf).
- Waldron, J. (1999a), *Law and Disagreement* (Oxford: Clarendon Press).
- Waldron, J. (1999b), 'Deliberation, Disagreement, and Voting', in H. Hongju Koh and R. Slye (eds), *Deliberative Democracy and Human Rights* (New Haven, CT: Yale University Press), pp. 210–26.
- Young, I.M. (2001), 'Activist Challenges to Deliberative Democracy', *Political Theory*, 29(5), pp. 670–90.

Chapter 3

The Value Added by Theories of Deliberative Democracy *Where (Not) to Look*

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Introduction

Theories of deliberative democracy (TDD) now enjoy widespread academic and political attention. Their popularity and policy relevance may in part stem from their express disquiet with current conditions for political debate in Western democracies. Yet scrutiny reveals that TDD differ as to their aims and diagnoses of these various democratic deficiencies. It should not be a surprise that different theories aspire to address quite different yet important questions. A greater cause for concern is that what unites TDD may fail to set them apart from other, competing democratic theories. This is not to deny the laudable objective of some TDD to emphasize areas of agreement with rival theories (Gutmann and Thompson, 2004, p. 138). Yet when we seek to bring the insights of some TDD to bear on institutional assessment and design we find that some of the prevalent theoretical ideal types and distinctions must be reconsidered and revised. In particular, research on TDD with an eye to empirical implications should not focus exclusively on the ideal types Jon Elster and Jürgen Habermas introduce for other purposes. The most plausible alternative democratic theories do not assume completely self-interested voters with exogenously formed preferences engaged in 0-sum bargaining with only threats and promises. To disconfirm that

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ideal type does not lend support to a TDD, and does not exhibit its value added compared to the best alternatives.

The present state of the literature makes it clear that both theoretical and empirical questions remain unresolved. Further rigorous theoretical analysis is required about such philosophical questions as the reasons to value political participation and the relationship between procedures and validity. In addition, much empirical research is needed in order to assess existing democratic arrangements and proposed improvements. Such research must be informed by the outcome of the theoretical disagreements within normative democratic theory, since the different theories will have quite different empirical implications. Empirical research is also highly relevant for those who claim that their favored TDD only complements rather than replaces other forms of decision-making and theories of democracy (for example, Gutmann and Thompson, 2004). These claims must be substantiated by an account of the normative or explanatory value added of this perspective: how the deliberative element accounts for otherwise surprising normative or empirical findings, and how institutions must reflect their added insights (Bohman, 1998). Even such modest claims require that the theories should be clear about their main claims, scope conditions, indicators, and alleged consequences of such deliberation.

Even those TDD that do not allow for empirical testing will often have institutional implications that rely on empirical generalizations. For instance, theories that hold political decisions to be normatively legitimate only if they are the result of a democratic deliberation suitably defined cannot easily be tested empirically if they reject somewhat process independent standards of legitimacy. Even these theories may presumably draw on philosophically informed empirical research to identify and lay out their implications regarding institutions, to help guide our assessment of the political orders we jointly maintain and live in.

At least five theoretical issues deserve attention if we want empirical research to confirm or disconfirm particular TDD. (1) What are the characteristics and the main claims of interesting and distinct TDD? (2) Which are the best alternative theories and their implications? (3) Does deliberation actually occur in ways that only some TDD can explain? (4) Which institutional and cultural factors are conducive to normatively attractive deliberation, and under what conditions? (5) How just, reasonable or legitimate are the outcomes of a proposed theory, both when its norms are generally complied with and under conditions of partial compliance? The present brief reflections contribute to the first two of these topics, to help identify the theoretical work required to proceed with relevant empirical research. I shall argue that this task requires a reconfiguration of the theoretical ideal types and distinctions prevalent in the literature on TDD.

This focus on the explanatory value added of TDD by means of an empirical research agenda highlights two weaknesses of some of the literature. Section 2 explains how some of the influential literature on deliberative democracy uses "deliberation" in too broad a sense. This point is briefly substantiated by Jon Elster's influential discussion. A second weakness is that the competing theories

used as backdrop for statements of TDD are presented as “ideal type” straw men rather than selected as the *best* competitors. Section 3 shows how TDD often have been contrasted with a particularly narrow version of rational choice theory and bargaining theory, instead of more plausible competitors. Unfortunately, this straw man has been labeled “liberal” in ways that has caused confusion. Some research on alleged sightings of deliberation in the European Union (EU) institutions illustrates the methodological challenges of such skewed comparisons. Section 4 argues that TDD must identify their main claims more carefully against the best contenders in each case so as to allow better empirical research.

The critical upshot of these remarks notwithstanding, they emerge from a position largely sympathetic to some of the shared assumptions of deliberative theorists about the need for public deliberation about the common good. Section 1 substantiates this shared basis, and highlights some of the empirically important variations among TDD that affect the research agendas indicated in Section 4. The first section lays out some elements of a Liberal Contractualist TDD that focuses on the need for citizens to sometimes cast their vote according to their reflective preferences for the common good, on the basis of public processes of “Reflective Equilibrium.” Liberal Contractualism of the kind sketched below shares some but not all features with the theories of Joshua Cohen, Samuel Freeman, Frank I. Michelman, Brian Barry and John Rawls. This account is called “liberal” partly to remind us that some “deliberative” theorists define liberalism in a particular and often misleading way. Those definitions of “liberal” – or of “liberalism’s hard core of principles” (Dryzek, 2000, p. 10) – may be inaccurate as regards the history of liberal democratic thought (see Held, 1996). Be that as it may, and more important for our purposes, the criticisms directed by TDD against this variety of “liberalism” fail to apply to several recent self-defined liberal political theorists. Recent contributions by some deliberative theorists explore these shared grounds (for example, Dryzek and List, 2003), and those efforts should be welcomed.

1 Fragments of a Liberal Contractualist Theory of Deliberative Democracy

A full presentation and defense of a particular TDD is beyond the scope of these reflections, but five central features of a Liberal Contractualist version serve to show some significant variations among TDD, and the relevance of empirical research (Follesdal, 2000; Gutmann and Thompson, 2004, pp. 21–39). For our purposes, Liberal Contractualism may be described as a tradition of contractualist political theory that includes such authors as Brian Barry, John Rawls and T.M. Scanlon. The contractualist account of normative legitimacy holds that the principles of legitimacy we should hold institutions to, are those that the persons affected would unanimously consent to under conditions that secure and recognize their status as appropriately free and equal. These standards of legitimacy are specified by consideration of what interests and principles no

one could reasonably reject as a basis, given their mutual interest in acting on such non-rejectable grounds. Hence the phrase contractualist. This commitment is honed by the claim that institutions are legitimate only if they can be justified by arguments in the form of a social contract of some specific kind. The notion of possible consent allows us to bring the vague ideals of equal dignity to bear on the questions of legitimacy and institutional design.

With regard to the role of deliberation in democratic institutions, I here merely lay out several elements I believe to be compatible with – but not implications of – this liberal contractualist perspective. These components form part of a distinct TDD. Firstly, the *objects* of public deliberation are in the first instance the law-making system and other central issues of “constitutional essentials and basic justice” (Rawls, 1999b; Michelman, 2000, pp. 1066–67; Dryzek, 2000). In comparison, other TDD may hold that deliberation should determine decisions over a more extensive scope, for instance that deliberation should address all or much law-making (Habermas, 1996, pp. 110, 135; Gutmann and Thompson, 2004).

Secondly, citizens’ moral duty on these occasions is *to vote according to their sense of justice*. They should only vote on their preferences for their private good insofar as this is compatible with what they think justice requires. “Justice” is here closely tied to “public reason”: what they believe that all have reason to accept as citizens. This is an expression of their highest-order *sense of justice*, a highest-order preference “to cooperate on fair terms with others for reciprocal advantage.” They are hence prepared to form and adjust their other preferences and ultimate values to those of their fellow citizens (Freeman, 2000, p. 377; Rawls, 1999a, p. 165; Cohen, 1998; Scanlon, 1998, p. 162).

Thirdly, citizens’ sense of justice and political judgments are developed and maintained in *institutionally specified arenas* of “public deliberation focused on the common good” where “citizens or their representatives actually seek to give one another mutually acceptable reasons to justify the laws they adopt” (Cohen, 1989; Gutmann and Thompson, 2002). These arenas must allow free and open discussion among participants, and be accessible to ordinary citizens. These conditions may overlap extensively with Habermas’s ideal speech conditions. Some theorists would hold that the relevant arenas are those that Habermas includes in the “political public sphere”; for our purposes here liberal contractualism goes with Rawls’s narrower “public political forum”: the discourse of judges and government officials, and the oratory and statements of candidates to public office. I take this to include the important arenas of intra- and inter-party discussion and contestation (Habermas, 1983 and 1998, p. 152; Michelman, 1996, pp. 314–15; Rawls, 1999b, p. 134).

Fourthly, the deliberation in these arenas should not only concern and affect factual beliefs and the best choice of means or strategies for given ends. The discussions should also *shape individuals’ ultimate values*, including their conceptions of a legitimate political order, citizenship, and the common good (Cohen, 1989; Pettit, 2001; Elster, 1998b).

Fifthly, this particular TDD holds that such preference formation occurs in processes of *reflective equilibrium* (Rawls, 1971 and 1999b, p. 136; Daniels, 2003; Goodin, 1992, p. 151). Individually or jointly, people adjust their initial considered moral judgments or preferences according to several standards of rational acceptability. The outcome is a more consistent and coherent set of such judgments.

Several features help us detect the occurrence of this process, and to compare and explore alternative theories. Note, firstly, that the provisional starting points are not value free. They include judgments about particular situations, as well as preferences over moral principles, conceptions of the individual, one's self image, the state and so on, and "second-order judgments" concerning standards of reasoning, formal and substantive requirements on moral principles. Thus, the process of reflective equilibrium is not primarily one that transforms egoists into other-regarding persons; rather, it concerns normative changes more generally. Many starting points may well be other-regarding judgments including preferences over outcomes that largely affect others, the effect being to remind individuals of them, and strengthen and change or specify these preferences.

The standards brought to bear on our various judgments and preferences include logical consistency, logical coherence and simplicity, and other means of maximizing credibility. Empirical "background theories" and generalizations may also affect the resulting judgments. The second-order and empirical judgments create sufficient structure to allow critical reflection regarding any particular judgment, to check whether we can endorse them (Blackburn, 1981).

This process of reflective equilibrium includes two processes of preference change. Changes "from above" occur when we adjust particular judgments to better match general moral principles and second order judgments. Changes "from below" occur when we adjust or invent general principles or conceptions to provide a better match (Goodin, 1992, p. 151). These changes in ultimate preferences are regarded as rational when they are compatible with or improve the consistency of accepted normative judgments. This is different from the external pressure from elites and the public for consistency if that merely strengthens the agent's experience of embarrassment when unable to give "appropriate" argument, or when violating external "norms of appropriateness" (March and Simon, 1993; March and Olsen, 1995). The process of reflective equilibrium assumes that the agent is motivated out of an *internalized* concern for consistency, experienced as moral or cognitive inappropriateness or "dissonance," to avoid "a direct clash between the judgments a person makes and the judgments required by the attitudes he or she holds" (Scanlon, 1998, p. 25; Festinger, 1957; Harmon-Jones and Mills, 1999).

This theory holds that there may be several standards for assessing the outcome of deliberation. These standards are sufficiently independent of the actual processes to judge whether their actual outcomes are correct or incorrect. The right to political participation of this form may be assigned an intrinsic value. Some standards for assessing deliberative processes may also be defended as constitutive

of the individual's ability to participate in deliberation, such as freedom of speech. Others may be conditions for such participation on equal terms, such as nourishment and education. Further standards may secure urgent interests in ways that are unrejectable by anyone who seeks reasons that are acceptable to all. It follows that this TDD does not assume that deliberative processes of reflective equilibrium should be implemented in all institutions. Instead, this is partly an empirical question about the likely effects of such processes in the "public political forum," in the background culture, or in diplomatic arenas (Michelman, 1996, p. 315; Risse, 2000; Estlund, 1997; Scanlon, 1982. For other views, see Dryzek, 1990 and 1992, p. 411; and Cohen, 1997, p. 79).

The process of reflective equilibrium does not guarantee an end point with the normatively best set of judgments. It is also doubtful whether more inclusive and open-minded processes of reflective equilibrium reliably increase the consistency and coherence of the resulting judgments (Elster, 2003, p. 148). Such monotonicity should not be assumed, but must be studied by considering effects, for example, of unequal starting positions, partial compliance, and other problems of non-ideal theory and the second best (Lipsey and Lancaster, 1956; Rawls, 1971; Elster, 1998a; *pace* Neyer, 1999, p. 225). Incomplete inclusion may foster more group think, exclusionary policies, or collusion, illustrated by corporatism and interest group pluralism. Likewise, participants may face grave risks under partial compliance, if only some are motivated by a sense of justice (Elster, 2003). The standards of communicative rationality can help determine the extent of departure from the ideal (Dryzek, 1990, p. 87). However, this does not indicate the quality of institutional changes, for instance whether to increase opportunities for deliberation or instead create non-deliberative institutions. Empirical research may help determine how to reduce these risks and costs and still foster a sense of justice. Even if the process of reflective equilibrium were to yield an ideally consistent set of judgments, this set is not unique; in particular there may be several, equally rational, legitimate and normatively permissible institutional solutions to problems (see Habermas, 1993, pp. 59–60).

Finally, recall that this Liberal Contractualist TDD is centrally concerned with the kinds of reasons citizens should take into account for certain issues, namely where basic justice and vital interests are at stake. On other occasions, voting according to one's own interest may be unproblematic (Barry, 1991; Habermas, 1993, p. 63). So deliberation is not an alternative to voting, nor is voting merely a second best response to time constraints. To the contrary, deliberation and voting are two important components of legitimate democratic rule (Bohman, 1998; *pace* Eriksen, 2000, p. 49). Careful research is needed to assess the values of deliberation and of voting (Knight and Johnson, 1994; Dryzek and List, 2003; Bohman, 1998).

2 Beyond Broad Definitions of Deliberation

The term “deliberative democracy” is sometimes used in a much broader sense than this Liberal Contractualist version. Some of these usages pose difficulties for theoretical analysis and empirical research. Consider Jon Elster’s definition of deliberation (Elster, 1998b, p. 9).

Elster has a jointly exhaustive tripartite account of how common decisions are made without initial consensus: by arguing, bargaining, or voting, – or in combination (Elster, 1998b, p. 4). Deliberation is said to include all arguing, and indeed any appeals to reasons among participants “committed to the values of rationality and impartiality.” In bargaining, the “outcome is determined by the bargaining mechanism and the bargaining power of the parties – that is, the resources that enable them to make credible threats and promises” (Elster, 1998b, p. 6). In contrast, all use of reason and argument beyond the presentation of threats and promises counts as deliberation. Rational deliberation is said to aim at preference transformation through arguing. This process may lead to transformation of ultimate ends. But “deliberation” is also used about changes in instrumental preferences over strategies, for instance on the basis of better factual information about means (Elster, 1998b, pp. 7–8; Przeworski, 1998; Nino, 1996; Risse, 2000, p. 7). So any shift in preferences over outcomes not wrought by threats or promises counts as deliberation (Eriksen, 2000, pp. 58–59).

This wide definition makes it difficult to identify a distinct and interesting phenomenon of deliberation different from *other* theories of democratic decision-making. This is not to deny that the exchange of arguments and points of view affect participants’ attitudes and soundness of their empirical views, perhaps especially in face-to-face settings (see Fishkin, 1997 and elsewhere). The concern is rather that few normative theories of democracy would deny the role of such learning processes. Thus, a concern for preference change through learning is not a feature of deliberative democracy that distinguishes it from other competing or supplementary theories of democracy. Indeed, this broad definition of deliberation would not seem conducive to some of the important research questions to determine the value added of TDD: whether and which institutions should include learning as part of the decision-making process; what sorts of trustworthy institutions foster transformation of ultimate ends that reliably lead to more just or valid results; or how to ensure stable compliance with institutions that must handle the gamut of negotiations, threats, and changes in ultimate ends, among actors with a mix of self-interest and justice motives, and with a blend of common and conflicting interests (see Mansbridge, 1980).

3 Beyond Straw Men Alternatives

A second weakness of deliberative theories is that they are often contrasted with a particular rational-choice theory that assumes self-interested bargaining

or market behavior. Schumpeter and Downs are often cited as main opponents (Miller, 1992, p. 57; Elster, 2003). For instance, Habermas correctly criticizes what some US scholars unfortunately call a “liberal conception of democracy” where “voting decisions have the same structure as the acts of choice made by market participants” (Habermas, 1996, p. 272; Bohman and Rehg, 1997b, p. xiii). It “asks people to consider no one’s interest but their own” (Michelman, 1989, p. 293), with no role for other-regarding commitments or a shared sense of justice:

Given an indissoluble pluralism of pre-political values and interests that are at best aggregated with equal weight in the political process, politics loses all reference to the normative core of a public use of practical reason. (Habermas, 1996, p. 274)

As an ideal type, this conception of democracy might perhaps illustrate differences of emphasis and approach. Yet it fails as the best plausible alternative to TDD, for three reasons. Firstly, this theory assumes that voters are egoists with only self-interested ultimate values and ideals. Social choice theory is agnostic on this issue, and allows that actors’ preferences may be selfish or altruistic. The central theoretical assumption is rather that actors perceive the political process as instrumental and choose on the basis of assessment of the alternatives, instead of on the basis of impulsive or unreflective “appropriate” choices (Elster, 2003). Elster nevertheless criticizes social choice theories in general for their assumption that agents only have “prepolitical,” “given” self-oriented, private preferences that do not consider how actions affect other people (Elster, 2003, p. 10). Habermas’s and Elster’s criticism therefore only holds against a subset of social choice theories. In contrast, even such democratic theorists as Downs and Schumpeter assumed that voters are somewhat altruistic and committed to “abide by the rules of the democratic game,” including respect for freedom of speech (Schumpeter, 1976, pp. 272, 301; Downs, 1957, p. 27). Thus, these theorists can hardly be said to assume that democratic politics is only about negotiations among egoists.

Secondly, Elster’s conception of bargaining is narrow, concerned with the mutual presentation of threats and promises. Pure bargaining is illustrated by the 0-sum game of “divide-a-dollar”, where cooperation is possible yet severely limited. This model excludes variable-sum solutions and other cooperative and non-cooperative games. It also ignores a broad range of democratic theories, for instance those that study the political parties’ creative search for win-win options and coalitions. So neither Schumpeter nor Downs fit this model. Indeed, not even Adam Smith’s account of market behavior is bargaining in Elster’s sense, since markets involve win-win cooperation and other-regarding communication:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity, but to their self-love, and never talk to them of our own necessities but of their advantages. (Smith, 1954, pp. 26–27)

Thirdly, this model assumes that preference formation is exogenous to the democratic process. This ideal type may possibly serve valuable theoretical objectives, but it hinders other philosophically stringent as well as empirical research. Indeed, Elster acknowledges that this is not faithful to Schumpeter's own view (Elster, 2003, p. 139; see Schumpeter, 1976, pp. 272, 301). And this premise is ascribed to a "liberal" democratic theory by a range of self-described "deliberative theorists" – though some of them acknowledge that this is but one strand of liberalism (Miller, 1992; Dryzek, 2000, p. 10). Again, we find that several democratic theories agree on the importance of preference formation within the political process (Schattschneider, 1960, pp. 37, 68, 74; Downs, 1957, p. 57; Riker, 1982, p. 172). Whatever interesting disagreement there is does not concern whether preference formation occurs within the political process, but rather the mechanisms of preference formation, and the benefits and risks of deliberative processes in the general public, and hence the optimal institutional arrangements.

The upshot of these observations is that research on TDD should not focus exclusively on the ideal types Elster and Habermas introduce for other purposes. The most plausible alternative democratic theories do not assume completely self-interested voters with exogenously formed preferences engaged in 0-sum bargaining with only threats and promises. To disconfirm that ideal type does not lend support to a TDD, and does not show us its value added compared to best alternatives.

With regard to empirical research, I submit that one important task is to identify preference changes that would only be expected by TDD. To illustrate the challenges we face, consider Joerges's and Neyer's interesting studies of decision processes in EU Committees. Neyer distinguished two forms of international negotiations to solve problems of interdependence: "strategic bargaining to maximize particular utilities at the expense of others and deliberative problem-solving to maximize collective utilities" (Neyer, 1999, p. 227). They found that members of EU food committees adjust their preferences in light of each others' preferences. This was said to support "deliberative supranationalism." Since the parties take some other affected parties into account, Joerges and Neyer concluded that the deliberation has communicative elements (Joerges and Neyer, 1997; see Eriksen, 2000). Unfortunately, their methodology and definitions of bargaining and deliberation do not distinguish between preference changes stemming from a concern for mutual advantage under complex interdependence, and changes wrought by a sense of justice. By Neyer's definition, "deliberation" includes what is otherwise known as integrative bargaining (Fisher and Ury, 1987; Raiffa, 1982). So while Neyer's empirical findings are important in their own right, they do not give evidence of a distinctive "deliberative" process that other theories cannot explain.

Empirical research concerning evidence for TDD as an alternative or as a complementary theory must specify plausible competitors and their implications. If we want to use "rational choice" or "bargaining theory" as a competing

alternative, we might try to develop empirically falsifiable “thin rational choice theories” with Bayesian updating, where the agents have some other-regarding ultimate preferences – such as a sense of justice. The most plausible contenders might also assume bounded rationality and hold that agents seek to satisfy rather than maximize preference satisfaction (Simon, 1959). To construct such plausible alternatives requires that we understand the central claims of the various TDD. Unfortunately this is not always clear.

4 If Deliberative Democracy is the Answer, What is the Question?

Theorists who explore the empirical implications of a TDD must identify the main claims of the theory. Different TDD respond to different puzzles and make different claims regarding actual or preferred behavior and institutions. The choice of best alternative accounts must therefore depend on the particular TDD. The following brief remarks indicate some central ambiguities that should be addressed by theorists interested in empirical exploration and tests.

Some empirical research is relevant for a wide range of TDD. For instance, Steiner, Bächtiger, Spörndli and Steenbergen’s empirical Discourse Quality Index (DQI) compares four different parliaments as deliberative arenas (Steiner et al., 2005). The aim is to determine how closely real speech acts approximate ideal speech acts. Such findings are helpful even though they cannot directly guide institutional design. One reason for caution is that considerations of partial compliance and theories of the second-best teach us that more transparent, more inclusive arenas are not always preferable (Goodin, 1993; Stokes, 1998; Johnson, 1998; Przeworski, 1998; Naurin, 2004). An important question that requires sustained empirical analysis is when deliberative institutions are likely to have desired effects. DQI or a successor may guide adjustments of institutions to foster better processes of deliberation and reflective equilibrium. When do institutions realize their “transformative potential” (Ackerman, 1980, p. 353) – to the surprise of competing theories? “Epistemic” TDD may also be interested in whether, and when, deliberative arrangements lead to more just conclusions than non-deliberative institutions (Bohman and Rehg, 1997a). Steiner, Bächtiger, Spörndli and Steenbergen’s comparison between the different parliamentary cultures in Switzerland, Germany, the United Kingdom and the US starts to answer these questions.

The claim of TDD sometimes seems to be that *some reasoned preference change occurs*. This is hardly surprising, since a wide range of theories predicts that agents change their choice of *means* or strategies in light of new beliefs about the world. Decision-makers often acquire new information about the likely behavior of other actors, and new options emerge, to change the set of alternatives or their pay-offs (Raiffa, 1982; Luban, 1985; Fisher and Ury, 1987). But in contrast to deliberative theories, these theories may not specify the mechanisms of deliberative change. Other theories might predict that the decisions are seldom made on the basis of

means-ends reasoning but rather from a sense of what is appropriate behavior according to rules regulating such situations (March and Simon, 1993). This may be a process of reflective equilibrium if the decision makers have internalized the rules, and reflect on which rules to apply and how to weigh them.

If the claim is that deliberation and preference change occurs about *ultimate values*, different alternative theories should be considered. Standard rational choice and social choice theories might not aspire to explain such phenomena fully, while other theories might. Consider changes in the received conception of “sovereignty” – that domestic governments enjoy international legal immunity regarding policy decisions. Many regard this as an ultimate value since sovereignty is “constitutive” of states in the system of states. Keohane argues that this conception changes, since sovereignty is seen less as a barrier and more as a bargaining resource, especially in Europe (Keohane, 1995, p. 175 ff.). Keohane does not seem to explore the mechanisms of this change, while a TDD may seek to explain it as the result of public processes of reflective equilibrium among interlocutors with a sense of justice. This claim should be compared with other theories, such as Moravcsik’s. He might interpret this change as an intended strategy by governments to secure their national economic interests under complex interdependence (Moravcsik, 1998). Again, his theory does not seem to explore the mechanism of preference change.

Other competing theories may explain changes in ultimate values as group think, false consciousness, or adaptive preference formation (Elster, 1983, p. 128; and 1998a). “Social constructivism,” theories of cognitive dissonance and reflective New Institutionalism may turn out to be either compatible with TDD or be alternatives (Checkel and Moravcsik, 2001; Checkel, 2004; Harmon-Jones and Mills, 1999; March and Olsen, 1989 and 1995). Empirical studies on cognitive dissonance, “process-tracing” and “triangulation” may confirm or disconfirm some of these theories in particular circumstances (Gheciu, 2005; Lewis, 2005).

Habermas’s version of TDD generates several propositions that can be tested or specified by empirical research. For instance, he claims that a deliberate “democratic process itself can provide the necessary guarantees for the social integration of an increasingly differentiated society” (Habermas, 1998, p. 133). Empirical research is needed to identify institutional arrangements that secure these effects. We may also seek empirical evidence for behavioral differences between strategic and communicative actions, or between moral, ethical and technical discourses (Rehg and Bohman, 1996, p. 92). For instance, we might seek evidence that agents “switch from an orientation to reaching understanding to that of a strategically acting subject concerned with his own success” (Habermas, 1993, p. 78).

The Liberal Contractualist TDD holds that public arenas are important sites for processes of “reflective equilibrium,” and claims that citizens must sometimes vote on their sense of justice. Agents should constrain their pursuit of self-interest by considerations of fairness and the common good when crafting party platforms and at the voting booth. Empirically, we might research whether citizens appeal to

the common good and phrase their arguments in ways that other theories would not expect. Good “test” cases could be situations where other theories predict that powerful actors will ignore others, but where the powerful nevertheless show restraint or are urged by others to do so. Another research topic is whether voters and politicians do in fact distinguish between situations where they pursue their own interest and situations where they think they should vote according to their sense of justice.

Conclusion

Theories of deliberative democracy enjoy widespread academic and political attention and scrutiny. They also face important methodological challenges, because the term “deliberation” has been used very broadly and because contrasts often are drawn with “ideal type” straw men rather than with the best competing theories of democracy.

The Liberal Contractualist theory presented contains some features specific to deliberative theories of democracy. Citizens must sometimes cast their vote according to their reflective preferences for the common good, acquired through public processes of “Reflective Equilibrium.” This and other theories of deliberative democracy should be developed to yield testable implications that differ from their best competitors. Empirical research may also correct and supplement the theories of deliberative democracy to help identify conditions and institutions for such deliberation among reflective citizens. This combination of theoretical and empirical research is crucial to show whether deliberative democratic theory indeed yields new and sound insights.

References

- Ackerman, B. (1980), *Social Justice in the Liberal State* (New Haven, CT: Yale University Press).
- Barry, B. [1979] (1991), ‘Is Democracy Special?’, in B. Barry (ed.), *Democracy and Power* (Oxford: Oxford University Press), pp. 24–60.
- Blackburn, S.W. (1981), ‘Reply: Rule-Following and Moral Realism’, in S.H. Holtzman and C.M. Leich (eds), *Wittgenstein: to Follow a Rule* (London: Routledge), pp. 163–87.
- Bohman, J. (1998), ‘The Coming of Age of Deliberative Democracy’, *Journal of Political Philosophy*, 6(4), pp. 400–25.
- Bohman, J. and Rehg, W. (1997a), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press).
- Bohman, J. and Rehg, W. (1997b), ‘Introduction’, in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. ix–xxx.
- Checkel, J.T. (2004), ‘Social Constructivisms in Global and European Politics: a Review Essay’, *Review of International Studies*, 30, pp. 229–44.

- Checkel, J.T. and Moravcsik, A. (2001), 'A Constructivist Research Program in EU Studies?', *European Union Politics*, 2(2), pp. 219–49.
- Cohen, J. (1989), 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity* (Oxford: Blackwell), pp. 17–34.
- Cohen, J. [1989] (1997), 'Deliberation and Democratic Legitimacy', in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 67–91.
- Cohen, J. (1998), 'Democracy and Liberty', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 185–231.
- Daniels, N. (2003), 'Reflective Equilibrium', in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Summer 2003 Edition, <http://plato.stanford.edu/archives/sum2003/>.
- Downs, A. (1957), *An Economic Theory of Democracy* (New York: Harper).
- Dryzek, J.S. (1990), *Discursive Democracy: Politics, Policy, and Political Science* (Cambridge: Cambridge University Press).
- Dryzek, J.S. (1992), 'How Far Is It From Virginia and Rochester to Frankfurt? Public Choice as Critical Theory', *British Journal of Political Science*, 22, pp. 397–417.
- Dryzek, J.S. (2000), *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press).
- Dryzek, J.S. and List, C. (2003), 'Social Choice Theory and Deliberative Democracy: a Reconciliation', *British Journal of Political Science*, 33, pp. 1–28.
- Elster, J. (1983), *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press; Paris: Maison Des Sciences De L'Homme).
- Elster, J. (ed.) (1998a), *Deliberative Democracy* (Cambridge: Cambridge University Press).
- Elster, J. (1998b), 'Introduction', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 1–18.
- Elster, J. [1986] (2003), 'The Market and the Forum: Three Varieties of Political Theory', in T. Christiano (ed.), *Philosophy and Democracy* (Oxford: Oxford University Press), pp. 138–58.
- Eriksen, E.O. (2000), 'Deliberative Supranationalism in the EU', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration Through Deliberation?* (London: Routledge), pp. 42–64.
- Estlund, D. (1997), 'Beyond Fairness and Deliberation: the Epistemic Dimension of Democratic Authority', in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press), pp. 173–204.
- Festinger, L. (1957), *A Theory of Cognitive Dissonance* (Evanston, IL: Row Peterson and Co).
- Fisher, R. and Ury, W. [1981] (1987), *Getting to Yes* (Boston: Penguin).
- Fishkin, J.S. (1997), *The Voice of the People (expanded version)* (New Haven, CT: Yale University Press).
- Follesdal, A. (2000), 'Subsidiarity and Democratic Deliberation', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration Through Deliberation?* (London: Routledge), pp. 85–110.
- Freeman, S. (2000), 'Deliberative Democracy: a Sympathetic Comment', *Philosophy and Public Affairs*, 29(4), pp. 371–418.
- Gheciu, A. (2005), 'Security Institutions as Agents of Socialization? NATO and Post-Cold War Central and Eastern Europe', *International Organization*, 59(4), pp. 973–1012.
- Goodin, R.E. (1992), *Motivating Political Morality* (Oxford: Blackwell).

- Goodin, R.E. (1993), 'Democracy, Preferences and Paternalism', *Policy Sciences*, 26(3), pp. 229–47.
- Gutmann, A. and Thompson, D. (2002), 'Deliberative Democracy Beyond Process', *Journal of Political Philosophy*, 10, pp. 153–74.
- Gutmann, A. and Thompson, D. (2004), *Why Deliberative Democracy* (Princeton, NJ: Princeton University Press).
- Habermas, J. (1983), 'Discourse Ethics: Notes on a Program of Philosophical Justification', in J. Habermas, *Moral Consciousness and Communicative Action* (Original 'Diskursethik – Notizen zu einem Begründungsprogramm', in J. Habermas (1983), *Moralbewußtsein und kommunikatives Handeln*), trans. C. Lenhardt and S.W. Nicholsen (Cambridge, MA: MIT Press), pp. 43–115.
- Habermas, J. [1991] (1993), *Justification and Application: Remarks on Discourse Ethics*, trans. C. Cronin (Cambridge, MA: MIT Press).
- Habermas, J. [1992] (1996), *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press).
- Habermas, J. [1996] (1998), 'The Nation, the Rule of Law, and Democracy', in J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press), pp. 129–53.
- Harmon-Jones, E. and Mills, J. (eds) (1999), *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology* (Washington, DC: Braun-Brumfield).
- Held, D. (1996), *Models of Democracy*, 2nd edn (Stanford, CA: Stanford University Press).
- Joerges, C. and Neyer, J. (1997), 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', *European Law Journal*, 3, pp. 274–300.
- Johnson, J. (1998) 'Arguing for Deliberation: Some Skeptical Considerations', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 161–84.
- Keohane, R.O. (1995), 'Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society', in H.H. Holm and G. Sorensen (eds), *Whose World Order? Uneven Globalization and the End of the Cold War* (Boulder: Westview Press), pp. 165–86.
- Knight, J. and Johnson, J. (1994), 'Aggregation and Deliberation: on the Possibility of Democratic Legitimacy', *Political Theory*, 22, pp. 277–96.
- Lewis, J. (2005) 'The Janus Face of Brussels: Socialization and Everyday Decision-making in the European Union', *International Organization*, 59(4), pp. 937–72.
- Lipsey, R. and Lancaster, K. (1956), 'The General Theory of the Second-Best', *Review of Economic Studies*, 24(1), pp. 11–32.
- Luban, D. (1985), 'Bargaining and Compromise: Recent Work on Negotiation and Informal Justice', *Philosophy and Public Affairs*, 14(4), pp. 397–416.
- March, J.G. and Olsen, J.P. (1989), *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press).
- March, J.G. and Olsen, J.P. (1995), *Democratic Governance* (New York: Free Press).
- March, J.G. and Simon, H.A. [1958] (1993), *Organizations*, 2nd edn (London: Blackwell).
- Mansbridge, J.J. (1980), *Beyond Adversary Democracy* (New York: Basic Books).
- Michelman, F. (1989), 'Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation', *Tennessee Law Review*, 56, pp. 291–319.

- Michelman, F.I. (1996), 'Between Facts and Norms Jürgen Habermas', *Journal of Philosophy*, 93(6), pp. 307–15.
- Michelman, F.I. (2000), 'W(h)ither the Constitution?', *Cardozo Law Review*, 21, pp. 1063–83.
- Miller, D. (1992), 'Deliberative Democracy and Social Choice', *Political Studies*, 40, pp. 54–68.
- Moravcsik, A. (1998), *The Choice for Europe: Social Purpose and State Power From Messina to Maastricht* (Cornell: Cornell University Press).
- Naurin, D. (2004), 'Transparency and Legitimacy', in L. Dobson and A. Follesdal (eds), *Political Theory and the European Constitution* (London: Routledge), pp. 139–50.
- Neyer, J. (1999), 'The Comitology Challenge to Analytical Integration Theory', in C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart), pp. 219–38.
- Nino, C.S. (1996), *The Constitution of Deliberative Democracy* (New Haven, CT: Yale University Press).
- Pettit, P. (2001), 'Deliberative Democracy and the Discursive Dilemma', *Philosophical Issues*, 11, pp. 268–99.
- Przeworski, A. (1998), 'Deliberation and Ideological Domination', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 140–60.
- Raiffa, H. (1982), *The Art and Science of Negotiation* (Cambridge, MA: Harvard University Press).
- Rawls, J. (1971) *A Theory of Justice* (Cambridge, MA: Harvard University Press).
- Rawls, J. [1982] (1999a), 'Social Unity and Primary Goods', *Collected Papers*, in A.K. Sen and B. Williams (eds), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press), pp. 159–85.
- Rawls, J. [1997] (1999b), 'The Idea of Public Reason Revisited', in J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press), pp. 129–80.
- Rehg, W. and Bohman, J. (1996), 'Discourse and Democracy: The Formal and Informal Bases of Legitimacy in Habermas's *Faktizität und Geltung*', *Journal of Political Philosophy*, 4(1), pp. 79–99.
- Riker, W.H. (1982), *Liberalism Against Populism* (San Francisco: W.H. Freeman).
- Risse, T. (2000), 'Let's Argue: Communicative Action in World Politics', *International Organization*, 54, pp. 1–39.
- Scanlon, T.M. (1982), 'Contractualism and Utilitarianism', in A.K. Sen and B. Williams (eds), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press), pp. 103–28.
- Scanlon, T.M. (1998), *What we Owe to Each Other* (Cambridge, MA: Harvard University Press).
- Schattschneider, E.E. (1960), *The Semi-Sovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston).
- Schumpeter, J.A. [1943] (1976), *Capitalism, Socialism and Democracy* (London: Allen and Unwin).
- Simon, H.A. (1959), *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations* (New York: Free Press).
- Smith, A. [1776] (1954), *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Dent).

- Steiner, J., Bächtiger, A., Spörndli, M. and Steenbergen, M.R. (2005), *Deliberative Politics in Action: Crossnational Study of Parliamentary Debates* (Cambridge: Cambridge University Press).
- Stokes, S.C. (1998), 'Pathologies of Deliberation', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 123–39.

PART II
How to Deliberate

Chapter 4

Democracy and the Real Speech Situation

David Estlund

1 The Ideal Deliberative Situation

Jürgen Habermas spawned a new way of thinking about the moral dimensions of democracy with the innovative concept of an “ideal speech situation.” That, at any rate, is the famous phrase, deriving from Habermas’s general account of descriptive truth as whatever could survive a certain idealized structure of interpersonal communication. Actually, the idea of Habermas’s that is more relevant to politics is his conception of an ideal practical deliberation, and the two are not just the same.¹ Nevertheless, the “ideal speech situation” is an evocative phrase that has caught on, and we can safely treat it as the overarching idea that unifies Habermas’s approaches to descriptive and normative validity. The Habermasian idea is that democratic legitimacy and authority might be explained if actual democratic practice could be shown to produce laws and policies that would have met with unanimous agreement in a certain ideal deliberative situation. One natural basis for thinking some actual democratic practice had this feature would be if it resembled ideal deliberative practice very closely. Some have been led to call for a democratic politics that seeks to resemble ideal deliberations,² though I will give reason to doubt that this is Habermas’s view. More importantly, I will argue that it is an implausible view. The Habermasian approach is central to my topic, but my aim is not at all exegetical. Rather, I want to describe and defend a model of civility in political participation that gives a principled place for sharp, disruptive, and even suppressive participation under the right circumstances, without jettisoning the whole idea of an ideal deliberative situation. I will suggest that this view, which I call *wide civility*, should be more congenial to Habermasians than they might think, but that is secondary.

Some, including Habermas himself, hope that the ideal speech situation could supply a philosophical explication of truth itself, or at least of objective validity of

¹ For a good discussion and guide to the texts, see Thomas McCarthy’s classic discussion (1979).

² A clear and influential example is Joshua Cohen, who writes: “The ideal deliberative procedure provides a model for institutions, a model that they should mirror, so far as possible” (Cohen, 1989, p. 26).

normative statements, without appealing to anything outside of our own rational and communicative capacities exercised in real life. The merits of that ambition are outside of my concern here. My own interest in the ideal deliberation is as a plausible epistemic device – a way of collectively coming to correct answers and decisions – whether the standards or facts of the matter are somehow independent of us or not. Nothing here depends on whether we think of the truth as discovered or made by ideal collective deliberation.

In the ideal deliberative situation, all affected people (or proxies for them) are given an equal say, untainted by prejudice or by differences in wealth, power, or dishonesty. This puts it roughly, of course, but it is enough for my purposes. This sort of ideal deliberative situation has important epistemic virtues in contexts of collective political decision-making. It brings together diverse perspectives, places a wide variety of reasons and arguments before the public, and prevents inequalities of power or status from skewing the results, which will then tend to reflect the weight of the reasons that apply. In short, such a deliberation is likely to produce good decisions.

Should norms of citizen participation aim at making real deliberative institutions and practices as much like the ideal deliberation situation as possible? Should actual institutions be designed to mirror the ideal deliberative situation so far as possible? In this paper, I argue that it would not be desirable for public political deliberations to resemble the ideal deliberative situation even if it were possible. Moreover, even if it were desirable, there would be the question of what to do about deviations when they arise. I will argue that citizens should not generally act to promote the resemblance between actual deliberation and ideal deliberation, since this would often mean letting deviations by others skew the results of the process. The conclusions here are significant both for theory and for practice. On the theory side, I hope to account for the important role played in democratic politics by sharp and disruptive political activity, including activity that interferes with communication. Theories that locate the core of democratic legitimacy or authority in public processes of deliberation about political issues can seem to treat sharp or disruptive political activity as marginal, as unfortunate last resorts. This is unsatisfying, since much of democracy's promise stems from our historical experience with brilliant and original forms of direct action. This idea that the paradigm of responsible democratic activity is the calm giving and receiving of reasons stems from failing to put the ideal deliberative situation in its proper theoretical place. It is not something to be emulated in practice, but a tool of thought and analysis by which appropriate sites for political engagement can be identified. Political behavior does not and should not take place in anything resembling the ideal deliberative situation, and so the deliberative mode of behavior is not privileged in practice.

2 Making it Real: The Town Meeting

Alexander Meiklejohn famously discussed the traditional New England town meeting in order to illustrate how certain restrictions on expression are compatible with – indeed necessary for – a meaningful freedom of speech (Meiklejohn, 1960). He argued that without rules forbidding such things as talking out of turn, disobeying the moderator, speaking far off the appointed topic, etc., the quality of the deliberation at the meeting on the topics at hand would be harmed. He pointed out that even under such restrictions on speech, participants would be free to express their view of the matters at stake, whatever their view might be. There remains, in short, freedom of speech. Even though we know it is bound to fall short, the town meeting is a real deliberative forum in which the ideal deliberative situation is realized about as well we could expect to find anywhere. As in the ideal deliberation, there are severe restrictions, and yet there is also freedom of expression. These are, respectively, the *restrictive* and the *liberating* aspects of the ideal deliberative situation, and, to a lesser extent, of deliberative contexts that approximate it. The restrictions might be justified on grounds of fairness or individual rights. They also might be justified by the aim of insulating the exchange of reasons from the distorting influence of power of various kinds. This is an epistemic advantage of the restrictive rules. I want to start here, in the town meeting, and then ask whether it is a reasonable aspiration to extend even this imperfect version of ideal deliberation to communication in society at large. I will argue that it is not. It is not only the pure ideal but also more realistic approximations such as this one that I argue are inappropriate models for political deliberation generally.

The town meeting is a useful starting point for several reasons. In a town meeting the rules tend to be exceptionally clear. I do not mean only the rules of procedure, or the rules that will be enforced, but also the rules of good behavior. The official rules of a town meeting are distinct from the standards of civility or good meeting behavior. For example, the official rules may, by their silence on the matter, permit a recognized speaker to ridicule opponents in a way calculated to disturb the meeting, but that would not settle whether this was within the speaker's duties of civility. This distinction in a meeting context mimics the structure in a broader political context, where there are laws permitting and regulating expression, but also a separate set of standards of civility with no force except that of a citizen's duty. The structure of a deliberative forum is made up of both parts, which I will refer to as institutional and moral norms respectively. They are restrictions in two different senses, but for my purposes it will not be necessary always to note that difference.

Given the epistemic advantages of these restrictions on communication in the town meeting (as well as whatever non-epistemic moral value they might have), should communication in society generally be similarly structured, so that political decisions can arise from a process with the same moral and epistemic virtues? I will answer "no."

3 How Society is Unlike a Meeting

Public communication is a vast category of human behavior. If there is any temptation to extend the norms and restrictions of ideal deliberation to public communication generally, it is because there is no sharp line defining which public communication is politically relevant. American jurisprudence around the first amendment's guarantee of freedom of expression is often troubled by this point. Even if it is desirable to have very robust protection for political expression, it is difficult to say for sure which categories of expression could not be political and therefore fall outside the strongest protection. Our question is not the first amendment question about when speech may be interfered with by legal regulation. We are considering institutional rules and moral norms for the conduct of expression. Still, if the aim is to shape institutions of political deliberation the same difficulty arises. It is difficult to say what is political expression and what is not. That difficulty could be avoided if the whole domain of public communication were put under the discipline of institutions and norms that are meant to resemble ideal political deliberation. Call this proposal the *wide mirroring doctrine*. It says that public communication, conceived as one large forum, ought to mirror the ideal deliberative forum so far as possible.

To see why the wide mirroring doctrine is unattractive, it is useful to focus on the restrictive aspect of the ideal deliberation. Recall, all have equal access to the forum, and all address the question of justice or the common good (even if people have differing conceptions of it). Even apart from any sanctions or enforcement mechanisms, these are restrictive. This is not yet to say that the restrictions are not worth it, but first we should appreciate that they are indeed restrictive. Consider a few examples of possible public communication that would seem to be precluded by the norms and rules of the ideal deliberation:

- Kurt has the money and experience to purchase and run a small publishing house. He publishes books of poetry by himself and his friends. Most poets do not have this sort of access to publication, and so the access enjoyed by Kurt and his friends is unequal, violating the equal access feature of ideal deliberation.
- Emma, after much study, has come to believe that political states are illegitimate. She makes a point of avoiding the statist assumptions of the political discourse of her time. Emma never addresses political issues in terms of what is just or best for the people of her own nation, preferring to imagine alternative modes of social organization. She and her fellow citizens only rarely find themselves addressing a common question about justice or the common good. This violates the common question feature of ideal deliberation.
- Francis is a film maker, whose work subtly but definitely influences the perspectives and views of millions of people. This is not owing to any rational arguments, which are entirely absent from his films. It is owing to his skill in leading his audience to certain conclusions by working on their emotions

and impulses, violating the restriction that limits communication to explicit reason-giving.

These are just a few examples. What I hope they show, in case it needed showing, is that many valuable kinds of public communication would be incompatible with the restrictions in the ideal deliberative situation. This does not settle whether there should be such restrictions, since there are also disadvantages to contexts of communication in which these various restrictions are not adhered to. Each of the restrictions is meant to guard against something that is, other things equal, worth guarding against. Even outside the more directly political forms of expression, it is not desirable to have an idea's influence increase because of the power or rhetorical skill of the idea's proponent, much less because it plays to prejudices on the basis of race, gender, or class. Since external sanctions are not at issue, it might seem as though it would be preferable if these norms were in place throughout society, in that people enforced them on themselves. The examples of Kurt, Emma, and Francis strongly suggest, I believe, that even the self-imposed norms of ideal deliberation would, on balance, not be a good thing in society generally. There are too many valuable products of the human mind that would be suppressed if the egalitarian and public-spirited norms of the ideal deliberation were to characterize all areas of public communication.

4 Ordinary Politics

We have looked at the narrow formal political context of a New England town meeting, and at the very broad domain of public communication generally. We turn now to what I will call the *informal political public sphere*, a forum with a scope that is intermediate between the other two. This is the domain of political speeches, candidate or citizen debates, opinion journalism, letters to the editor, political advertising, political demonstrations, political art and expression, and so on. Roughly, it is the political activity of non-officials, or officials outside their formal institutions such as the legislature. Even though the boundaries are not definite or clear between political and non-political areas of the informal, non-official public sphere, there is a rough distinction that is hard to deny. The norms that should govern the political part are, I will argue, different and more restrictive than those that should govern the non-political part, and yet not as restrictive as the norms appropriate to the most formal parts of the political public sphere such as official decision-making meetings of legislators. This intermediate domain is the world of ordinary politics, and so the norms that apply here are absolutely central to the conception of a citizen's role and duties in the political process. Since this domain is informal, there are no rules of the kind that characterize official meetings, except, that is, for any laws that might regulate informal political expression. If we ask what form we want communication in this sphere to take, and we assume broad legal protection of freedom of expression, the emphasis

falls on moral norms. I will speak mainly, then, of the shape of citizens' duties of civility (leaving it as an open question how far civility requires politeness).

The informal political sphere is intermediate between formal politics, and non- (or hardly-) politics, and the norms appropriate to it reflect its intermediate position. On the one hand, the informal political sphere exists alongside the relatively non-political areas of public communication, and so it is relieved of the burden of ensuring, within its own scope, outlets for brilliance, passion, creativity, provocation, and so on. These are provided for to some extent by the light restrictions in the non-political public sphere. On the other hand, the absence of the deliberative norms has its costs. It would be epistemically costly to let power, position, and passion determine the course of political decision-making. This might seem to suggest that the informal political sphere should be governed by the deliberative norms. Two questions arise: would this be desirable if it were possible? Even if it were desirable, how should deviations be dealt with?

First, would it be desirable, if it were possible, for non-official public conduct of political deliberations to hew to the norms of the ideal deliberative situation? With one important caveat, I believe the answer is yes. The caveat is that since the boundaries between the political and the non-political areas of public communication are so unclear, imposing the deliberative norms on the political sphere would be bound to impose them to some extent on the gray areas between political and non-political communication, risking a chilling effect on expression that really ought to be free of these restrictions. Nevertheless, this does not mean that the restrictions are not desirable in the definite cases of political expression. They are desirable here for the same reasons they are desirable in the New England town meeting.

Still, there are differences between the formal contexts of the town meeting and the informal political sphere that suggest they must be treated differently. Even if it were desirable for the deliberative norms to be respected by all in the informal political sphere, nothing even approximating this is likely. This presents a profound version of the problem of second-best. The problem of second-best, in general terms, is the fact (when it is one) that when one of a number of desiderata is not satisfied, the other desiderata are no longer appropriate. That is, a situation that departs even further from the original list of desiderata may be better than one that more closely conforms to them.³ In the informal political sphere, since serious deviations are sure to occur, it is important to see that the best response might be certain further deviations. This is the crux of my rejection of the mirroring doctrine, the suggestion that real deliberations should mirror, so far as possible, ideal ones.

The mirroring doctrine suggests shaping the duty of civility by positing a duty to behave in the ways that participants would behave in the ideal deliberation, at least as far as each person can. The wide version would apply this to all public

³ The idea was initially formulated in an economic context. See Lipsey and Lancaster (1956).

communication. Narrower versions would apply it to all political communication, or even only to formal political deliberation (I will support that narrowest version). On the mirroring view, the ideal sets each person's duties irrespective of how other participants are actually, in the real deliberative situation, behaving. Some of our duties are fixed irrespective of the behavior of others, such as the duty not to torture innocent people for the thrill of it. Other duties set one standard of behavior when others are complying with a similar standard, and a different standard otherwise. Consider the duty to drive on the right hand side of the road in the US, as the law requires. This is certainly a duty so long as most others are complying with the law, but the duty lapses if most people are driving on the left. Or consider the duty not to interrupt in discussion. It is a duty that probably only applies to the case in which most people are refraining from interrupting. If interruption is already rampant then non-interruption may no longer be required.

Let us call duties of this kind, ones that apply only so long as other people are, for the most part, also complying, "collective action duties." They raise a number of interesting questions, but my interest is in exploring what comes of the duty when the collective action breaks down. The original duty lapses, but what, if anything arises in its place? The duties of civility are best seen as collective action duties, ones that have one content when people are generally complying with the highest standard, but then a new substitute content when that is not so – when general compliance breaks down. Notice that I do not say that anything goes when compliance breaks down. Rather, one's duties change, adjusting to that circumstance. So the question becomes, what is the new content of the duty of civility when there is no general compliance with the initial high standards? What we need is what we might refer to as a *breakdown theory*, a principled account of this new substitute duty of civility. It will vary, no doubt, according to the sort of breakdown that is in question.

We might respond to a breakdown of high standards of civility by supposing that civility no longer has a place at all. No holds barred, we may now do as we please. But that would seem to depend on showing that no new standard of civility can serve, even partly, the same purposes and values as the one that has broken down. If a new standard can serve these purposes, this is a reason for thinking of them as coming into force. The account offered here is based on the idea that when the features of ideal democratic deliberation are not generally met, there are often new standards that will serve, although not necessarily as effectively, the same purposes and values that gave the initial high standards their point.

We can apply this point, in a quick preliminary way, to the mirroring doctrine. It says that actual political behavior should resemble, so far as possible, behavior in the ideal deliberative situation. Suppose this is plausible so long as compliance is widespread. There is still the question of what to do when compliance is not widespread. It is not obvious that the duty to comply with power-free deliberative norms remains intact. In particular, when power enters the fray on one side in a dispute, the norm that tells us to refrain from using power in that way neither

remains intact, nor means no holds are barred. This rejection of the wide mirroring doctrine, as I will go on to argue, is the best way to account for the role of political action that is disruptive of reasoning and communication, including many familiar sharp political tactics.

5 Marcuse as a Precursor

Herbert Marcuse offers perhaps the best known defense of sharp and disruptive interventions in political expression, and I believe his theory is usefully interpreted as a “breakdown theory” of this kind (Marcuse, 1969). It will help to sketch an interpretation of Marcuse’s reasoning even though his question is not quite ours. His reasoning, or at least a line of reasoning suggested by his essay, fits naturally with an emphasis on the epistemic value of public political deliberation and so it gives an idea of how such an emphasis might treat behavior on the boundaries of civility. Marcuse wonders when private citizens might permissibly interfere with public political expression, a question he takes up from Mill in order to offer a different answer. But since that question is one about permissible interference with expression, it is narrower than the general question of civility, which asks what kinds of public political expression are morally permissible and consistent with one’s responsibilities as a citizen. Still, Marcusean interference with expression – say, by picketing or heckling – is certainly one kind of behavior that would be condemned by narrow standards of civility if they are given by the aim of approximating the ideal deliberative situation. Marcuse, in effect, defends a wider, more permissive conception of civility according to which such interference is indeed permitted.

Marcuse agrees with Mill on a great deal (Mill, 1989). He agrees with Mill that there are objectively correct answers to many normative political questions (Marcuse, 1969, p. 89). He also evidently agrees with Mill that under favorable conditions the truth will tend to prevail in the course of full open public deliberation.⁴ He agrees with Mill that among the set of conditions that are most favorable to the social discovery of truth is a widespread tolerance. By “tolerance” Marcuse means restraining oneself from interfering with the expression by others of views with which one strongly disagrees. Tolerance is not only one among the social conditions favorable to the social discovery of truth; that epistemic function is what gives tolerance its point. As Marcuse succinctly says, “the *telos* of tolerance is truth” (Marcuse, 1969, p. 90).

⁴ Marcuse speaks of “freedom of thought and expression as preconditions of finding the way to freedom” (Marcuse, 1969, p. 88). While he never clearly says that tolerance would promote truth under proper conditions, the structure of his argument seems to assume this, at least for the sake of argument. He argues that the conditions under which pure tolerance might be thought to support truth do not, anyway, obtain.

Tolerance does not, by itself, promote truth, however. It promotes truth only in conjunction with certain other conditions. This gives rise to questions that Mill said little about: what are the other conditions that join with tolerance to promote truth? What is the effect of tolerance when those other conditions are violated in various ways? What implications does this have for the practical question facing a citizen: "ought I to be tolerant of this highly disagreeable view?". Marcuse offers a rough account of the circumstances of tolerance and an argument that they are pervasively violated at least in modern America.

On Marcuse's view, wider standards of civility come into their own when there is a failure or breakdown in the conditions in which tolerance serves its purpose. Applied to the matter of civility in political expression, the breakdown approach asks what is the point of narrow civility? If we follow Mill's and Marcuse's approaches to tolerance of expression, we will answer that an important part of narrow civility's point is part of an arrangement in which the exchange of ideas will tend to promote true or at least objectively better views and social decisions. The *telos* of civility is, in part, truth. Plainly this is not its only point, but it is worth seeing what follows from its having this point.

Assuming, with Marcuse and Mill, that the value of orderly deliberation is that it promotes the truth, or wisdom, or quality of the resulting social decisions, narrow civility no longer promotes the truth once the other components of an orderly but free deliberation are missing and if standards allowing deviations from narrow civility could serve to remedy the epistemic situation. In general, the defective background conditions permit transgression of narrow civility for remedial purposes, but only within the constraints of a wider civility. For convenience I will refer to this normative structure as one of "constrained transgression."

How do wider standards of civility serve the epistemic goal in these defective conditions? Marcuse's own argument does not discuss the context of a town meeting, but its structure is similar and instructive. He argued that in this era there is a systematic cluster of interests (especially those associated with owners of productive capital) that have disproportionate control over the course of public, especially political, discussion. As a result, certain favored points of view can be made to attract more support on grounds other than their merits – the actual reasons that exist in their favor. Behavior outside of the narrow bounds that would make sense under more ideal conditions is permitted in order to partially restore the truth-promoting value of public discussion.

From an epistemic viewpoint, the relevant breakdown might be said to consist of *power's interference with reason*⁵ (the crucial idea here is countervailing distortion, so its application is not limited to views of the ideal deliberation in

⁵ Of course, reason could itself be called a kind of power. A deeper objection would be to claim that this kind of power is not normatively less objectionable than any other. That sort of critique cannot be considered here. See Estlund (2001b) (a reply to comments on Estlund, 2001a).

which the only thing counted as a distortion is power). The justification for wider standards of civility in these conditions is that they partially remedy the power imbalance. More precisely, they use countervailing power to remedy epistemic distortion wrought by the initial insertion of power. Marcuse's strategy of selective intolerance through private acts of suppression does so by reducing the power of dominant viewpoints. The wider standard of civil expression does so by increasing the power of non-dominant points of view. Marcuse's approach is subtractive, while my idea of wide civility is additive, but both have as their rationale the remediation of certain deviations from an epistemically valuable ideal deliberative arrangement.

The circumstances of narrow civility in political expression, then, include the condition of power's non-interference with reason. It would be absurd to think that this condition could be fully met in any real context of public political expression, but that does not deprive the idea of normative significance. Habermas, Marcuse's leading successor in what is known as the Frankfurt School of critical social theory, adopts the idea of power's non-interference with truth as the core of his moral and political theory without supposing that it is a condition that could ever really be met. Habermas holds that a legitimate political arrangement is whatever would, hypothetically, be unanimously accepted in a practical discourse situation involving all affected in which, roughly, power does not interfere with reason.⁶ It might seem that since power always is actually interfering with reason, this account will leave it entirely to the philosopher, rather than to any public process, to ascertain the conditions of justice or legitimate government. Habermas, however, insists that the philosopher cannot credibly claim to know what such an ideal discourse would produce absent actual discourse (Habermas, 1990, p. 67). But actual discourse always falls short of the ideal discourse, and normative conclusions must be drawn by concentrating on these discrepancies. The greater the shortfall, the less the moral legitimacy of the normative conclusion since this enlarges the biasing role of the philosopher's own particular perspective. Marcuse's view is often criticized as arrogantly bypassing public discussion and presuming to know its proper conclusions. On the contrary, Marcuse's view is most charitably read as advocating remedial interventions in the discursive system so as to restore some presumptive normative significance to its conclusions. One strategy that is suggested by this approach is not to try to generate the conclusions by a solitary application of reason, but, as far as possible, to approximate real social conditions in which either power does not interfere with reason *or, failing that, find some remedial feature that would support our ability to infer from the imperfect real discourse conclusions about what would have been accepted if it had been ideal*. Such a view admits from the beginning that real discourses are not ideal, but still gives the idea of ideal discourse – the idea of power not interfering with reason – a central critical role.

⁶ See Habermas (1979, p. 186; 1999, pp. 31, 34, 259, and 1996, pp. 103–104).

The importance of these points for our purposes is the sobering fact that the conditions in which narrow civility has its distinctive epistemic point are always violated to a greater or lesser extent. Power is always interfering with reason. When the shortfall is great the question is whether narrow standards of civility are any longer the ones called for by the guiding idea of a public discourse in which conclusions are driven as much as possible by reason rather than power. If we stick to the epistemic point of standards of civil political expression, we will be led to a new more permissive set of standards in which advocates of the view that is disadvantaged by the appearance of power may permissibly press their own viewpoint with an added degree of power. The more permissive standard is defended on the grounds that this might countervail the anti-rational effect of the initial pollution of the discourse by systemic power that irrationally favors one side.

When power distributions trigger wider standards of civility this dispensation is not given to all speakers whatever their message. It is only remedial if wider standards are given selectively to those whose viewpoints are being denied their due hearing by an imbalance of power.

The constraints of a wider idea of civility are naturally suggested on this account. Even on a Marcusean analysis there would be no apparent justification for such extreme suppression of a message that it disappears from public awareness altogether. The power imbalance argument provides only a basis for leveling the playing field in order to partly recover the epistemic virtues of freedom of expression that Mill emphasized.

6 The Ideal Speech Situation in its Place

Habermas's concept of an "ideal speech situation," an ideal situation of deliberation in which only reason makes a difference has inspired many theorists of "deliberative democracy." The idea is sometimes used to suggest that laws and policies derive legitimacy from having been produced by a process that approximates the ideal deliberative situation. Habermas himself states the criterion of legitimacy differently: laws are legitimate that *could have* been unanimously agreed in an ideal deliberation. This hypothetical standard might seem to conflict with Habermas's overall insistence that actual deliberations are necessary in order to avoid the philosopher's armchair speculation about what would happen in the hypothetical case. One natural way of reconciling the two would be to suppose that actual deliberations should be as close to the ideal as possible so that the product of actual deliberations will give us good evidence about what could have been agreed in the ideal deliberative situation. This results in a narrow conception of civility – of the duties of citizens in their participation in political deliberation – that consists primarily if not entirely of the giving and receiving of reasons.

There is an alternative way of reconciling the role of the ideal deliberation with the emphasis on actual deliberation, and it seems closer to what Habermas

himself had in mind. Contrary to a common interpretation of his work, Habermas does not believe that actual institutions should resemble an ideal deliberative situation as much as possible. It is not just that this is unrealistic or utopian; he argues that it is not even desirable. It is preferable to have a "wild," "anarchic," and "unrestricted" public sphere on which formal political institutions can draw, even though this does open the informal public sphere to morally undesirable biases and inequalities. Habermas is not explicit about the value of a less disciplined informal public sphere. Also, it is not quite clear what the importance is of the idea of an ideal deliberative situation if it is not to be emulated in society at large. There are a few possible answers suggested by Habermas's discussion.⁷

First, why is it desirable to have an unruly informal political sphere, one in which equal access, time, and power are not guaranteed? One obvious reason is that the informal public sphere will be the source of ideas whose value lies outside the political, and so whose origins in egalitarian conditions will tend to matter less. Secondly, even politics benefits from a rich and productive background culture. Even if not every product of public deliberation has the potential to enrich political thinking, an environment that includes boldness, surprise, and offense is one that will have a wider variety of original ideas, gestures, and confrontations from which to draw in political thinking. Much of this raw material would never exist in a setting structured so as to prevent any influence other than the forceless force of the better argument.

If the ideal deliberation is not to be emulated in society at large, what is the importance or value of the ideal? One part of an answer is that the ideal deliberation is apparently to be emulated in more formal political institutions, a point to which I will return. A second part of the answer is that the ideal deliberative situation, even existing only in thought, serves as a template against which to judge reality in order to identify and deal with deviations. This naturally raises the question of what is to be done when such deviations are identified, since we know that approximating the ideal is not the goal. That is the question to which my suggestions about breakdown theory in general, and more specifically countervailing deviations, are meant to provide part of an answer.

The goal of making deliberative heaven on earth, of seeking to make real political institutions resemble as closely as possible the structure of the ideal deliberative situation, leads to an implausibly narrow conception of the public sphere and of the duties of civility. An alternative way of using both the idea of an ideal deliberative situation and actual deliberative processes is a breakdown theory of the kind sketched in this paper. The ideal serves as a template for identifying breakdowns, which are common and inevitable. Actual practice can be adjusted in light of those deviations, not to re-establish resemblance to the ideal, but to bring forces to bear, rational or not, that countervail the effect of the

⁷ My interpretation puts a lot of weight on Habermas's discussion in Habermas (1996, chs 7 and 8). For one important passage about the advantages of "unrestricted communication," see Habermas (1996, pp. 307–308).

initial deviations so far as possible. The result is not any static structure at all, but a dynamic process of deviation and response, aimed at grounding the supposition that the results could have been agreed in an ideal deliberative situation. This approach, for which there is support in Habermas's own writing, seems to be the best way of avoiding the narrow overly polite conception of duties of civility that might seem to be implied by the central role given to the ideal deliberative situation, while still giving that idea a central theoretical role.

The interest of this approach is not mainly in its endorsement of protest, emotional political appeals, and judicious use of power politics. That is a fairly conventional and time-honored view. It is, perhaps, more interesting to locate this view in a conception of political deliberation that gives a central theoretical role to the ideal in which only the forceless force of the better argument prevails. A second feature of this approach that goes beyond the endorsement of sharp politics is its ability to scale the wider conception of civility in a graduated way, without letting the duty of civility collapse just whenever its higher standards are not being generally met.

It is important to ask, as many asked of Marcuse's view, whether a policy of countervailing deviation from narrow norms of civility risks escalating the conflict in dangerous ways. The fact that there is often some risk of this kind is certainly not a fatal problem for the view. Civil disobedience is also a way of escalating a dispute, and often risks further retaliation and escalation, but this is not decisive against it in general terms. The risks of escalation would be weighed and judgment exercised in the use of countervailing power as they must be in the choice whether to resort to civil disobedience.

If one instance of power is countervailed by another it might seem as though it has been neutralized and the power-free ideal has been reinstated. Sometimes, of course, power can actually be neutralized, as when a weapon is brandished but then destroyed or removed from the scene. But countervailing uses of power as I have used that idea here will not normally neutralize the original insertion of power. If you put a gun to my head, and I put my gun to your head in reply, your use of power has been (at least to some extent) countervailed, in the sense that its ability to skew the deliberations has been scaled back by my response. Still, the power-free ideal of the ideal speech situation or the ideal epistemic deliberation has not been restored. Mutual assured destruction might be the best way to countervail the first destructive threat, but it is not the ideal speech situation restored. It is a profound deviation from that situation in an effort to achieve something else: a tendency to get the same results as the (very different) ideal speech situation would have gotten. Such deviations would not need to be based on the hope of restoring something closely resembling the ideal. The deviations would be justified by their countervailing epistemic effects even if there is no prospect of a rosier future.

7 Should Formal Politics Be Narrowly Civil? (Why not Fight Fire with Fire There Too?)

As we saw, the narrow norms of ideal deliberation would be epistemically too restrictive and costly if they were to characterize public communication generally. Even the informal political sphere should not be overly disciplined by those narrow norms, but there the strict deliberative ideal should be used as a yardstick to measure deviations. The deviations need to be addressed creatively, however, and not always by simply holding one's own behavior to the standards that others have breached. This leaves the formal political sphere, deliberative settings in which selected participants have formalized roles and responsibilities, and in which legally binding decisions are made. Should these formal political settings operate by the more restrictive approach, trying to resemble the structure of the ideal deliberative situation as closely as possible?

If the informal public sphere is sufficiently unrestricted, then perhaps there is a place for the more restricted discursive forms of interaction specifically in legal fora such as courts and legislatures.⁸ But what is to be gained? The reasons given for a wider more permissive regime in the informal sphere might seem to apply to the formal sphere too. The breakdown model developed here would seem to imply that even in the legislature there will be deviations from ideal discursive interaction, and that countervailing responses, pulling the structure only further from the ideal, will often be the best way of grounding the presumption that the outcome could have been agreed in an ideal deliberation. Why posit the narrow rules of civility that would be appropriate in the counterfactual situation of an ideal deliberative situation even here, in formal politics? Why not fight fire, if it should break out, with fire even in the formal political domain?

The answer, I think, is that formal politics can come closer to the ideal than other settings. This, combined with the availability of the other more permissive contexts for communication, means that there are likely to be more epistemic benefits than costs from applying the narrower norms of civility in formal political settings. We should accept a narrow mirroring doctrine at least with respect to standards of civility: standards of civility in formal political deliberation ought to resemble as far as possible the standards of behavior assumed in ideal practical deliberation.

Even discussion on the floor of the representative assembly (the context in which the term "deliberative democracy" was first devised; Bessette, 1980) will never mirror ideal deliberation very closely. Representatives are unlikely always to speak sincerely, to refrain from using power or position in lieu of argument, to put forward only their views on the common good, and so on. In spite of all this,

⁸ This is how I interpret Habermas's discussion in Habermas (1996, ch. 7). For example: "The normative self-understanding of deliberative politics certainly requires a discursive mode of sociation *for the legal community*, but this mode does not extend to the whole of society in which the constitutionally organized political system is *embedded*" (Habermas, 1996, pp. 301–302).

we structure deliberation in those formal settings by elaborate rules of order and norms of civility. The restrictions that are typical in those fora are far more severe than we could hope to justify in informal political settings, much less for public communication generally. If they do not really approximate the ideal deliberative situation, is there any real justification for those narrow norms? Perhaps they are nothing but a charade, a bit of theater to encourage the public to feel that this is a genuinely deliberative forum, even though it is no more deliberative than social life generally (which is to say, not very).

We need to look for some difference, some reason why formal politics should be governed by narrow civility while the rest of public communication is not. One of the differences between the formal and the informal political spheres is that the formal political sphere exists in a system of public communication that includes wider more permissive standards everywhere outside of formal politics. The deliberative norms in one context are not as restrictive overall if one is free to take his or her ideas to a different context that is more permissive. If informal politics employs wider standards than formal politics, then the epistemic cost of imposing the narrow standards in the formal realm is reduced. For example, consider a debate in the assembly about farm subsidies, and suppose that farm interest groups are richer than the opponents of subsidies. This leads to a larger number of representatives lining up to support subsidies in order to attract the campaign funding from the farm lobby. This rationally distorting role of money (if necessary, the reader should fix up the example to make it so) violates ideal deliberative norms. Under narrow standards of civility within the assembly, it would be impermissible to respond by, say, playing recorded sounds of ringing cash registers and mooing cattle every time a representative spoke in favor of subsidies. This has an epistemic cost, insofar as it might let the initial deviation skew the results without any effective response. But the creative use of loudspeakers, or other non-discursive direct actions, is available (not just legally, but according to the wider norms of civility I have advocated) outside the assembly in the domain of informal ordinary politics. That reduces the epistemic cost of the stricter standards in the formal realm. That is a consideration that is not available to justify strict standards of civility in the informal sphere, since there is nowhere else to go other than reverting to relatively non-political expression in order to fall under more permissive standards, thereby diluting and weakening the intended message.

This suggests that there is some reason for a division of labor between the informal and formal political spheres. The formal sphere aims for some of the reason-tracking virtues of the ideal deliberation, by imposing restrictive norms governing the proceedings. The informal political sphere operates without those confining norms in order to allow the inevitable deviations to be balanced out by carefully devised counter-deviations. So far, though, this is just an argument for a division of labor between the formal and informal political spheres. We do not yet have any clear reason to assign the more restrictive norms to the formal political sphere rather than to the informal political sphere. I want to conclude by very briefly pointing to some reasons for thinking the formal sphere is especially

well-suited to the more restrictive deliberative norms, at least so long as the informal sphere and the general public sphere are less rigid.

The formal political sphere is different in some important ways. First, it is relatively clear what counts as internal to the context of the assembly and what does not. For this reason, it is relatively clear when rules would apply and when not. The boundaries between the informal political sphere and the non-political public sphere are less clear. Second, the formal political sphere consumes only a small fraction of life. Restrictions in this forum are not, in a certain sense, as restrictive, since much of life takes place in the less restrictive informal political sphere or in the general public sphere. This is not just the point that there is a division of labor between the formal and informal spheres. The formal sphere is a smaller part of life, by any measure, than the informal. Third, the behavior of participants in the formal political sphere is more easily monitored. The number of people involved is small and they are publicly visible. This works together with the final point, namely, that reputation pays. In the formal political sphere participants are punished by the public for untoward behavior as the public sees it.

What these features suggest is that restrictive norms meant to encourage discursive reasoning on equal terms might be less vulnerable to non-compliance, and so more effective, in formal political contexts than in the informal political sphere or in society generally. Moreover, the epistemic costs of these restrictions would be smaller there, partly because the other more permissive settings exist, and partly because the formal settings are a relatively small part of communicative life. Narrow civility might, after all, have a place in real institutions, namely in the conduct of formal political deliberations, at least when things have not gone too badly wrong.

Conclusion

My aim has been to argue that the idea of an ideal situation of political deliberation is indeed a potent tool in normative democratic theory, but that its role is not as something to be emulated or mirrored in public discourse or even in political discourse. Its role is mainly as a template to lay over actual deliberations in order to identify (not always to mourn) deviations. Once they are identified, the question is what should be done about them. The mirroring doctrine argues that resemblance to the ideal should be maximized. The view I have described, wide civility, rejects the mirroring view, since promoting that kind of resemblance to the ideal would often require acquiescence in the face of serious distortions of the process of deliberation, skewing not only the process but also the decisions that are likely to result. Wide civility calls for countervailing deviations where a countervailing measure can be devised. It is still an account of civility since even these measures are morally constrained not to merely pursue selfish or sectarian interests as far as one can. Fire may be fought with fire, but a spark may not be fought with a flame thrower. Wide civility folds a lot of sharp, disruptive, and

even informally suppressive political activity into a broadly deliberative approach to democratic politics, recovering a crucial part of democracy's moral promise as we know it from historical experience. The specific content and limits of wide civility under various conditions is a further question;⁹ the important thing to keep in mind is that it does have limits, and that this can be accounted for by the remedial role that it plays in the account I have described.

Having said all that, however, there is, after all, some reason for formal political deliberation – a narrow context surrounded by other outlets for discourse – to be governed by a narrow conception of civility. Political discourse generally is not like a New England town meeting. On the other hand, New England town meetings and to a lesser extent other formal political deliberative settings are.

References

- Bessette, J.M. (1980), 'Deliberative Democracy: The Majority Principle in Republican Government', in I.R.A. Goldwin and W.A. Schambra (eds), *How Democratic is the Constitution?* (Washington: American Enterprise Institute), pp. 102–16.
- Cohen, J. (1989), 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity* (New York: Blackwell), pp. 17–34.
- Estlund, D. (2001a), 'Deliberation Down and Dirty: Must Political Expression Be Civil?', in T.R. Hensley (ed.), *The Boundaries of Freedom of Expression and Order in American Democracy* (Kent, OH: Kent State University Press), pp. 49–67.
- Estlund, D. (2001b), 'Deliberation and Wide Civility: Response to the Discussants', in T.R. Hensley (ed.), *The Boundaries of Freedom of Expression and Order in American Democracy* (Kent, OH: Kent State University Press), pp. 76–79.
- Habermas, J. [1976] (1979), *Communication and the Evolution of Society* (Boston: Beacon Press).
- Habermas, J. [1983] (1990), 'Discourse Ethics: Notes on a Program of Political Justification', in J. Habermas, *Moral Consciousness and Communicative Action* (Cambridge, MA: MIT Press), pp. 43–115.
- Habermas, J. [1992] (1996), *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press).
- Habermas, J. [1996] (1999), *The Inclusion of the Other*, trans. C. Cronin and P. De Greiff, (Cambridge, MA: MIT Press).
- Lipsey, R.G. and Lancaster, K.J. (1956), 'The General Theory of Second Best', *Review of Economic Studies*, 24(1), pp. 11–32.
- Marcuse, H. (1969), 'Repressive Tolerance', in P. Wolff, B. Moore. and H. Marcuse (eds), *A Critique of Pure Tolerance* (Boston: Beacon Press), pp. 81–117.
- McCarthy, T. (1979), *The Critical Theory of Jürgen Habermas* (Cambridge, MA: MIT Press).
- Meiklejohn, A. (1960), *Political Freedom* (New York: Harper).
- Mill, J.S. [1859] (1989), *On Liberty* (Cambridge: Cambridge University Press).

⁹ I reflect on one concrete example of actual political protest in this context in Estlund (2001a).

Chapter 5

Depoliticizing Democracy

Philip Pettit¹

Introduction

It is now widely accepted as an ideal that democracy should be as deliberative as possible. Democracy should not involve a tussle between different interest groups or lobbies in which the numbers matter more than the arguments. And it should not be a system in which the only arguments that matter are those that voters conduct in an attempt to determine where their private or sectional advantage lies. Democracy, it is said, should promote public deliberation among citizens and authorities as to what does best for the society as a whole and should elicit decision-making on that basis.

But the ideal of deliberative democracy has two components – the deliberative and the democratic – and often they pull apart. In this chapter I look, in the next section, at a series of problems that arise on the deliberative front, arguing that their resolution requires various degrees of depoliticization. And then I ask in the Section 2 whether the depoliticizing responses that those problems require are antithetical to the ideal of democracy. I argue that they are not in tension with the ideal, if that ideal is cast in the relatively revisionary, two-dimensional form that I favor.²

1 Deliberation Requires Depoliticization

Electoral Interests and Deliberation

I assume that the prospect of plebiscitary government is infeasible and indeed that it would be wholly inimical to the cause of deliberation, so that democratic government is inevitably representative government (see Pettit, 2003). What are the prospects for deliberative government, then, if control is left wholly or mainly to

¹ My thanks to Jerry Masur for helpful comments and recommendations. Among other things, he drew my attention to a piece that fits broadly with the spirit of my own paper: Seidenfeld (1992).

² The chapter draws freely on ideas presented in different forms elsewhere. See Pettit (1997, 1999, 2000, 2001a, 2001b, 2002b and 2003). The first part of this chapter reproduces, with some small variations, a section of Pettit (2001a).

representatives in parliament, or to a government with a parliamentary majority, or to an elected administration? A number of problems argue for depoliticizing moves.

A first problem arises from the fact that even if elected officials have the interests of the community as a whole at heart, they are still bound to be responsive to their own interest, or their party's interest, in being re-elected. If electoral interests of this kind are engaged in some of the policy-making decisions over which representatives have political control, then they cannot be reliably expected to decide those issues by reference just to considerations of the common good. *Nemo iudex in sua causa* (no one to be judge in his or her own cause). The principle applies as much to those in politically elective office as it does to those in judicial and related areas.

One obvious area in which the principle applies is that of deciding on electoral boundaries and the number of representatives to be assigned to each area. And here many countries have taken note of the problem under discussion and have depoliticized the decisions in question. Electoral commissions may be subject to the ultimate control of parliament – parliament may have hands-off control, as it were – but they are designed precisely to meet the sort of problem we are dealing with. They take the decisions away from the direct influence of representatives – thereby, incidentally, relieving representatives of the need to fight many fruitless battles – and they are forced to make the decisions under conditions where considerations of the common good, and only such considerations, are very likely to rule. Their decisions have to be justified by strict guidelines that have had to be accepted by those on all sides of politics, and if the commissions fail to present a satisfactory justification – to give democratically persuasive reasons for their decisions – then they will certainly face a public and political outcry.

There are a number of areas of decision-making where democracies have depoliticized decision, for fear of allowing electoral interests dictate what government does; the outstanding example is interest-rate policy and exchange-rate policy, where relatively autonomous central banks are routinely given charge. But there are novel areas too where electoral interests are likely to militate against the deliberative quality of democratic decision-making, depriving considerations of the common good of the weight they are properly given.

Here I mention one example that is particularly striking, since it comes up day after day in national and state politics. The example is the way the governments privilege, or at least are assumed to privilege, marginal seats in the exercise of various forms of discretion. If a government faces a decision that will benefit one constituency or another, and if it has a powerful party-related interest for benefiting one of them, then there is little or no hope that it will be guided just by considerations of the common good. Or at least that will be so, if it enjoys political control over the decision. Once again, then, the ideal of deliberative democracy will be compromised.

Just as electoral commissions depoliticize boundary and related decisions, and allow them to be made in a deliberatively democratic way, so the cause of

deliberation would argue for introducing a similar system that would guard against privileging marginal seats. The commission would operate at arm's length from parliament and government, and might be required to review and approve any proposed government expenditures – at least expenditures above a certain amount – that benefit constituencies which are marginal in a stipulated degree. I cannot speak in this context to how exactly such a commission might be constituted but I think that anyone who takes the ideal of deliberative democracy seriously must have an interest in investigating the feasibility of such a depoliticizing institution.

Popular Passion and Deliberation

There are other less direct ways in which electoral interests can play a role in undermining the deliberative element in the deliberative democratic ideal and the remaining three problems illustrate them. Electoral interests raise problems so far as they ensure that rather than letting the common good crystallize and rule, as deliberative democracy would require, they invest power in other sources of influence: popular passion, aspirational morality and sectional interest.

The problem with popular passion can be illustrated in the area of criminal sentencing policy.³ Imagine that a certain pattern of policing and sanctioning is working quite well across a broad range of criminal activity, and working in such a way that imprisonment is not often imposed; community service is the sanction of first resort. And think now of how the pursuit of electoral advantage might lead to a politics that generates a much more severe and costly rate of imprisonment, and do so without achieving any compensatory advantage: might do so, indeed, while allowing the level of crime to rise.

No matter how well the criminal system is working in a polity, there is always going to be a case, sooner or later, where a convicted offender who received a relatively light sentence, say community service, would not have committed a later crime had they actually been put in prison. The later crime may involve some horrific event, like an attack on a child or a brutal rape or an armed assault. And if it does, then the politician who cares to make a big noise about this event can be sure of whipping up public passion around the issue and, given that such noise sells newspapers and attracts television viewers, can be assured of getting support from the media. Thus we can easily see why such a politician or a party, particularly one out of government, can have political advantage to make from denouncing the existing, relatively lenient pattern of sentencing, calling for heavier sentences, even perhaps for capital punishment. They can activate a politics of passion in which they appear as the only individual or the only group really concerned about the sort of horrible crime in question. They can call into existence what

³ For a more detailed treatment, see Pettit (2002b). The analysis there draws on dynamics first identified in MacDonagh (1977). See also Greenberg (2002).

Montesquieu called a tyranny of the avengers, letting loose a rule of knee-jerk emotional politics that works systematically against the common good.

This phenomenon has marked politics all over the Western world in the last decade or two. A well known illustration of this effect is provided by the second public debate between the candidates in the 1988 campaign for the presidency of the United States. As governor of Massachusetts, Michael Dukakis had maintained a regime of comparatively lighter, criminal sentencing than was common in other States. Despite the fact that the crime figures for Massachusetts compared favorably with those elsewhere in the US, he came under severe criticism – and arguably lost the initiative in the election – when his opponent, George Bush, drew attention to a particular, heinous crime that the more lenient measures had made possible; this was committed by Willy Horton, a prisoner on furlough under a Massachusetts State program.⁴ Dukakis was readily presented as soft on crime, and became an object lesson to politicians the world over. The message was: never allow yourself to be upstaged in the expression of popular horror at criminal acts; always stay at the front of the pack that bays for revenge.⁵

How might this sort of affront to deliberative democracy be rectified? Once again, the only hope would seem to lie in depoliticization. It would require parliament to appoint a commission representative of relevant bodies of expertise and opinion, as well as of the people as a whole, to oversee criminal sentencing. It would give it a brief to establish sentencing guidelines, to monitor any changes made in existing practice, and to judge on those changes by the aggregate benefits and costs to the community. Parliament might well retain ultimate control over such a commission but by putting its control at arm's length in such a manner – by retaining only the hands-off sort of control that parliaments have over electoral commissions – it would serve that cause of deliberative democracy rather better than does the status quo.

Aspirational Morality and Deliberation

So much for a case where passion rules in place of the considerations of the common good that deliberative democracy would prioritize. A second sort of example illustrates the way in which people's aspirational morality – empowered by electoral interests – may rule in place of such considerations.

Imagine that prostitution is legalized within quite specific limits in a community, with brothels being subject to strict regulation, and street soliciting prohibited. Most people in the community will think that prostitution is morally undesirable – it offends against a range of aspirational ideals, religious and otherwise – but the fact is, let us assume, that it serves the common good better to have a legalized, regulated system of prostitution rather than allowing it operate in the criminal underworld. In such an underworld, prostitutes would have no

⁴ On the force of vivid examples in argument, see Tversky and Kahneman (1982).

⁵ For background see <http://www.kennesaw.edu/pols/3380/pres/1988.html>.

protection from the law against exploitation and abuse, and they would have less opportunity and incentive to guard against sexual diseases.

As in the previous example, it is easy to see how in such a situation a politician or party might find political advantage in denouncing the government for allowing prostitution to continue in the society, thereby giving it a sort of recognition and acceptance. The individual or party might easily appeal to people's perfectly reasonable ideals, challenging them to say whether or not they countenance prostitution and eliciting a fair measure of support among the large majority who do not. They can reasonably hope to activate a politics of moralism, in which the options are presented in a false, dichotomous light: denounce prostitution or give it recognition. In this light, there is no attention given to the possibility of denouncing prostitution at a moral level, while recognizing that it is impossible to stamp it out by legal and political means and that it is better to have a legalized, regulated system rather than moving in a prohibitionist direction. Were a politician or party to succeed in getting this sort of issue considered in a referendum, or made into a central electoral question, then they might well hope to win. Certainly they might hope to attract many voters to their side.

In the previous example, politicians might have hoped to attract voters to their side through focusing on a couple of horrific abuses, relying on vivid examples to arouse people's passions and to move them more than any number of aggregate statistics. In this example they can hope to attract voters to their side through invoking widely held and quite intelligible ideals rather than passions as such. When people are asked to vote on the legalization of something like prostitution, they are not individually asked to decide whether there should be a regulated or a prohibitionist system; were they asked that question, then of course the thing to do would be to consider the overall consequences of each arrangement and make a rational choice between the two. They are asked to give their opinion of the options at stake, and that question has the cast of an inquiry after their moral stand, so that many people will respond with a negative judgment on prostitution.⁶

As people may be expected to respond in this way to prostitution, so in general we may expect them to respond in like manner to all of those questions in public life where personal, aspirational ideals are intimately engaged. The best current example of another such question, of course, arises in the area of addictive drugs. Those politicians who take the high moral ground on that issue can do so in the assurance that this is good politics: good politics but not necessarily good government.

As with the cases involving the rule of people's passions, there is very good reason in cases of the moralistic kind to consider the formation of a depoliticized forum, at arm's length from parliament, which can offer guidelines on what sorts of activities amongst those offending against most people's moral ideals ought to be legalized; and in the case of legalization, on how they ought to be regulated.

⁶ For an identification and explanation of the problem, see Brennan and Lomasky (1993).

This body could represent different sectors of popular opinion and professional expertise and would be able to take a long-term view, informed by sustained monitoring, of the costs and benefits of different overtures. While subject to the ultimate control of parliament, it would surely give a boost to the rule of deliberative democracy in public life.

Sectional Interest and Deliberation

A third and last example of how electoral interests can indirectly jeopardize the ideal of deliberative democracy arises where politicians actively canvass and obtain the reactions of people to various government proposals and then defend the position they take on the basis of which lobby represents itself most effectively. The problem here, familiar to students of public choice, is that if an overture advantages a large number of people in a small measure but disadvantages a small number of people in a large measure, then the disadvantaged will have both a stronger incentive and a better opportunity to organize themselves into an effective lobby (Olson, 1965). The problem bedevils discussion of a wide number of public issues, ranging from where to establish main roads, to where to build prisons and public utilities, to where to situate airports, and the like. It reduces the operation of democracy on most such questions to a process of overblown rhetoric and mutual abuse, in which there is nothing remotely resembling deliberation about the demands of the common good. It is not now popular passion or aspirational morality that undermines the rule of reason but good, old-fashioned self-interest.

As the other problems suggest that we should look to the possibility of depoliticizing the area of decision-making in question, thus allowing democracy to remain deliberative, so this sort of problem naturally invites a similar response. And there is a depoliticizing proposal actively in circulation, which has now been trialed in a number of countries, whereby the difficulty might be overcome. James Fishkin of the University of Texas introduced the idea, which he describes as that of a deliberative opinion poll (Fishkin, 1997). What it involves is taking a random, statistical sample of the population – perhaps a group of about 300 – and then bringing them together for a period of discussion and information-gathering before polling their opinions. Such a deliberative opinion poll would surely serve deliberative democracy well in many of the sorts of areas mentioned in this third category, for it would give those in government an excellent sense of the balance of informed opinion in the society as a whole. It would enable political debate to operate at a significant remove from the intensity of lobby politics.

2 Depoliticization is Consistent with Democracy

The problems rehearsed in the first part of this paper are all of a familiar kind and in going through them I have probably been laboring the obvious. Not everyone

will agree that the line required in each case for solving those problems – for giving deliberation a central place in government – is one of depoliticization: one of reducing the hands-on power of the people's elected representatives. But I hope that many will agree, on the basis of the examples provided, that such depoliticization often makes sense. And so the question arises as to whether the depoliticization required is inimical to the ideal of democracy. I shall argue that it is not. More specifically, I shall argue that it is not inimical to democracy, under one of two saliently different interpretations of the ideal.

Two Views of the Ideal of Democracy

Perhaps the most familiar conception of the role of democracy is that it serves as the means whereby a people as a whole asserts its collective will: its own will as distinct from the will of a dictator or an elite or a foreign power. On this conception, democracy is an ideal for a people that parallels the ideal of autonomy for an individual. The democratic people is an autonomous people: a people which gives laws to itself, rather than have them emanate from an alien or heteronomous source.

If democracy is understood in this way, then only those aspects of popular control will be relevant to democratic government(s) that enable the people as a whole to assert itself. The primary means of collective self-assertion will be the plebiscite or referendum. The secondary will be the electoral choice of parliamentary representatives and an associated administration on the basis of their policy program, and the maintenance of electoral control by the requirement of seeking re-election, debating in parliament with opposition representatives, and dealing with public opinion.

But there is an alternative conception of the role of democracy, which also surfaces from time to time in popular and philosophical discussions. According to this conception, the people should control government democratically because that is the only mode of control under which those reasons can be expected to guide government that are recognized in common deliberation as the valuations relevant to determining public policy. This conception represents democracy, not as a regime for the expression of the collective will, but rather as a dispensation for the empowerment of public valuation.

Let people debate public policy, as democratic electorates and parliaments routinely do, and certain considerations will inevitably emerge as those that everyone countenances as relevant, that everyone expects everyone to countenance as relevant, that everyone expects everyone to expect everyone to countenance as relevant, and so on.⁷ In cases where people do not agree on the detailed weightings that such different considerations should carry – most cases, perhaps – common considerations of the kind envisaged may argue for the resolution

⁷ “And so on” may be glossed to mean: and for any higher-order question in this sequence, people are disposed to form similar, confirmatory expectations.

of public issues by particular procedures: say, by reference to majority voting among representatives, or by referral to a presumptively impartial committee or umpire, or even by lot.

Considerations that would not pass muster in public debate about what government should do include self-seeking observations to the effect that such and such an initiative would give one section of the population an advantage over others, as well as expressions of what is required by an ideal or cause that is not shared by all. The considerations that are likely to be accepted as relevant on all sides come in two broad categories. First, neutral considerations that concern the general prosperity of the society, or its efficacy in attaining agreed ends, or the assurance available to each that no other members enjoy any particular privilege, and so on. And second, those more personal complaints that members of different groups may raise against various proposals and that secure acceptance as reasonable: "That's going to make life difficult for those of us who are poor/who belong to an ethnic minority/who live in rural areas [...]."

So far as deliberation filters out certain considerations, such as those that are commonly countenanced in the society, the role of democracy may be cast as one of ensuring that government is conducted as those common reasons or valuations dictate, and only as they – at least in ultimate principle – dictate. I refer to the reasons or valuations empowered in this way as public. They are public both in the sense of being valuations that determine how public issues should be resolved – what public decisions should be taken or what mode of public decision-making should be used – and in the sense of being valuations that are endorsed by the public: that is, endorsed in common among members of the public.

If democracy is meant to be a system whereby the collective will of the people rules, via representative government, then the depoliticization required by deliberation must be seen as inimical to the democratic ideal.⁸ The considerations raised in the first part of the paper show that if deliberation is to predominate, then the power of those representatives must be passed on in various areas to appointed boards and officials. But so far as power is given to the unelected in this manner, the democratic empowerment of the collective will is inevitably compromised. Those attached to this image of democracy cannot be relaxed about depoliticization, then. They must think that it is undemocratic and they must recognize that the demands of deliberation – assuming that deliberation requires depoliticization – are in conflict with the demands of democracy. They must see deliberative democracy as an impossible, or at least dubiously coherent, ideal.

Things look very different, however, under the alternative conception of the democratic ideal. In the remainder of this paper I offer a more detailed account of that conception and I try to show how it makes room for a significant degree of depoliticization.

⁸ Thus, see the proposal to eschew the use of the term "democracy" defended in Rubin (2001).

I do not offer any defense here of the conception of democracy as the empowerment of public valuation rather than collective will but two remarks in its favor are worth mentioning. The first is that there is no metaphysical difficulty about the idea of common valuation that besets, notoriously, the idea of collective will.⁹ And the second is that there is considerable normative attraction in the idea of common valuation dictating what happens in government; this is encoded in the traditional, republican idea of empowering the common good (Pettit, 2004).

The Two-dimensional Ideal of Democracy

If democracy is conceived as a system for empowering the public reasons recognized among a people – their common valuations – rather than the will of that people considered as a collective agent, then two dimensions of control are going to be relevant in the determination of policy. It is going to be important that public valuations rule, in the sense that the initiatives they support tend to be reliably identified and implemented; they are not overlooked. And it is going to be important that only public valuations rule, in the sense that whatever initiatives are adopted are justifiable by reasons that are commonly recognized as relevant in the public arena. They may be directly justifiable by reference to those reasons or they may be adopted under procedures that are justifiable in that way.

The first requirement, in an established phrase, is that institutions be designed so as to avoid false negatives: that is, failures to perceive options that public valuation would support. The second requirement is that institutions be designed so as to avoid false positives: that is, misperceptions or misrepresentations of what public valuation supports; in particular, the misidentification of policies that are prompted only by factional or sectional interest as initiatives that enjoy the support of such valuation.

Electoral institutions are the obvious means whereby the first of these desiderata can be promoted. Such institutions will give people the power of choosing representatives. In seeking election, those representatives will compete in proposing initiatives, and so compete in the search for initiatives that public reasons might support. And, just as importantly, they will be disciplined by considerations of re-election or public opinion or parliamentary challenge to stick to whatever programs the people endorse. Electoral competition and discipline of this kind ought to ensure that the candidates and parties involved will have a powerful initiative to seek out policies that are supported by public valuation – these ought to be electorally attractive, after all – and to implement them in government; it sought to guard against false negatives. Or at least it ought to do so in the degree to which the competition is not distorted, as it routinely is, by

⁹ The core difficulty with the notion of collective will is that it presupposes collective agency, and that the existence conditions for a collective agent are too demanding for a large-scale populace or electorate to satisfy. See List and Pettit (2002).

the pressures associated with campaign financing, lobby-group pressure, and so on.

But how is the second desideratum to be promoted, with institutions guarding against false positives? False positives are likely to materialize under electoral institutions in one of two ways. Either in virtue of a tyranny of the majority, as when majority interests surface in elections and carry the day against what commonly endorsed reasons would support. Or in virtue of a tyranny of the elite, as when those who are insiders by dint of office or connection or wealth are able to hide what is going on in the corridors of power and to intrude their own interests into the determination of policy. If electoral institutions are the obvious means of guarding against false negatives in government, then what institutions can serve to guard against false positives?

What is needed, I suggest, are institutions that are broadly contestatory in character. Those individuals or groupings who believe that power is not being exercised in the common interest – not being guided by public valuation – must be in a position to challenge a government decision, arguing with some prospect of success that it is not well supported by the public reasons recognized in the community and should therefore be amended or rejected. The people must be individually enabled to act as editors of the laws and policies that the representatives author – and author in their collective name.

The editorial metaphor helps to highlight the contestatory power that the people can be given. Consider the ways in which the editors of a newspaper will exercise control over would-be authors. First of all, they will inevitably have virtual control of every piece published, even if they do not causally intervene in the authorship; the fact that it was possible for them to intervene in the event of an article not passing muster means that they have to assume responsibility for it, equally with the author.¹⁰ Second, the editors will have inhibitory control of many pieces they publish, so far as the authors anticipate their reactions and self-censor in the attempt to secure smooth publication. And third, the editors may have interventional control so far as they take exception to a piece and reject it or amend it or enter into negotiation with the author as to how it should be revised.

These three forms of control are likely to be enjoyed by ordinary people so far as there are contestatory institutions available for them to make their voice heard. They will have virtual control over government laws and decrees even in the absence of any intervention, because the fact that they do not contest those decisions will be partly responsible for the shape the decisions assume. They will have inhibitory control over government so far as the authorities are wary of activating any protest or appeal against their actions. And of course they will have

¹⁰ I introduced this distinction, in a rather different context, in Pettit (1995); reprinted with revisions in Pettit (2002a).

interventional control so far as they actually do contest decisions of government and have an effect upon them.¹¹

Not only does the editorial metaphor point us in this way to three different aspects of contestatory control. It also suggests two modes in which the interventional variety of contestatory control may be implemented and the other varieties indirectly shaped. Journals and newspapers will facilitate contestation by enabling their editors to contest submissions they do not like. But they will also make arrangements to ease the burden of such one-by-one contestation. They will adopt arrangements for forestalling as well as facilitating contestation, setting out guidelines that authors should meet in their submissions, requiring authors to consult with editors in advance about matters of style and argument, and so on.

It is clear, in parallel, that there is ample democratic room for making arrangements that forestall, as well as arrangements that facilitate contestation. Forestalling initiatives will involve putting in place constraints that are designed to reduce the burden of contestation, making it less likely that government behaves in a manner that people will want to question and change. They will introduce regulative arrangements that protect against those sorts of abuses that flout the demands of public reason and would reliably generate successful contestation.

Depoliticization under the Two-dimensional Ideal

Depoliticization is an inherent part of a two-dimensional democracy. This is true, in the first place, of the arrangements needed for facilitating contestation. The bodies and officials responsible for hearing such contestations – courts, tribunals, ombudsmen, and the like – will have to be distinct from the elected fora and personnel that gave rise to the laws and decrees that are being contested. Otherwise there would be little or no hope of having a process that genuinely tested those laws and decrees for the extent to which they answer to public valuation. Certainly there would be no hope of having a process that would command the confidence of those making the contestation.

But depoliticization is even more obviously a part of the institutions necessary for forestalling contestation, reducing the contestatory burden. These institutions are likely to come in three varieties: constitutional constraints, consultative procedures and arm's-length appointments. And all of those devices involve depoliticization of the kind discussed in the first section.

¹¹ Notice that only the third of these forms of control involves direct causal efficacy. Control in the other cases materializes so far as what government does is counterfactually dependent on the views of the people – were those views other than they are, then government action would differ accordingly – but this counterfactual dependency does not require active causal influence. It is important to recognize that democratic control need not involve causal control if the full potential of democracy is to be appreciated. The point is only rarely noticed, however; one example is in Harrison (1993).

Constitutional constraints will put in place sanctions against governmental behavior that would certainly be contested, were it to materialize, and contested with good, palpable reason. This mode of regulation pre-empts the reasonable contestation that such behavior would elicit, and renders it unnecessary. Constitutional constraints will have a genuinely inhibiting effect on government, however, only so far as there is a constitutional court – whether in the European or American mould – that operates independently and impartially. And if it is to be independent and impartial – certainly if it is to be believed to be such – then that sort of court must operate away from the control of politics.

Procedures for consultation also promise to reduce contestatory burdens. These procedures would require governments in various areas of policy to put out its proposals for public discussion and feedback. They would ease the contestatory burden in a democratic society by giving people an *ex ante* opportunity to raise questions about proposed laws and decrees, and perhaps to help shape them, rather than restricting contestation to an *ex post* appellate form. These too will require depoliticization, being reliable only insofar as governments are forced to do the job impartially, rather than seeking out the opinions of their friends; they may require, for example, the sort of deliberative opinion poll mentioned earlier.

Depoliticization is likely to be at its most intense, however, in arrangements for officials and boards that operate at arm's-length from elected representatives. These will create various roles or bodies to which people are appointed by an established procedure, and then allocate to them decisions that it would be dangerous to leave in the hands of representatives: dangerous, because of the temptations that elected representatives would have to let their choices be dictated by inappropriate considerations. In particular, it will involve this in areas where such appointments are not already required for making contestation possible or for making constitutional constraints and consultative procedures effective. I am thinking of appointments in roles like those of the auditor or statistician or equality commissioner or to bodies such as that of the census bureau.

Conclusion

We saw in the first part of this paper that if deliberation is really supposed to rule in public life, then there is no option but to depoliticize public decisions in various ways. Does this mean that the cause of public deliberation tells against the ideal of democracy? Yes, if democracy just means empowering the collective will. No, so we have argued, if it means empowering public valuation: more specifically, empowering those considerations that people countenance as relevant to decisions on public policy. The ideal of a deliberative democracy, then, is not incoherent. But it is an ideal with a certain paradoxical aspect. As war is too important to be left in the hands of the generals, democracy – deliberative democracy – is too important to be left in the hands of the politicians. No democratization without depoliticization.

References

- Brennan, G. and Lomasky, L. (1993), *Democracy and Decision: The Pure Theory of Electoral Preference* (Oxford: Oxford University Press).
- Fishkin, J.S. (1997), *The Voice of the People: Public Opinion and Democracy* (New Haven, CT: Yale University Press).
- Greenberg, D.F. (2002), 'Striking Out in Democracy', *Punishment and Society*, 4, pp. 237–52.
- Harrison, R. (1993), *Democracy* (London: Routledge).
- List, C. and Pettit, P. (2002), 'The Aggregation of Sets of Judgments: An Impossibility Result', *Economics and Philosophy*, 18, pp. 89–110.
- MacDonagh, O. (1977), *Early Victorian Government* (London: Weidenfeld and Nicolson).
- Olson, M. (1965), *The Logic of Collective Action* (Cambridge, MA: Harvard University Press).
- Pettit, P. (1995), 'The Virtual Reality of Homo Economicus', *Monist*, 78, pp. 308–29.
- Pettit, P. (1997), *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press).
- Pettit, P. (1999), 'Republican Freedom and Contestatory Democratization', in I. Shapiro and C. Hacker-Cordón (eds), *Democracy's Value* (Cambridge: Cambridge University Press), pp. 163–90.
- Pettit, P. (2000), 'Democracy, Electoral and Contestatory', *Nomos*, 42, pp. 105–44.
- Pettit, P. (2001a), 'Deliberative Democracy and the Case for Depoliticizing Government', *University of New South Wales Law Journal*, 24, pp. 724–36.
- Pettit, P. (2001b), *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford: Oxford University Press).
- Pettit, P. (2002a), *Rules, Reasons, and Norms: Selected Essays* (Oxford: Oxford University Press).
- Pettit, P. (2002b), 'Is Criminal Justice Politically Feasible?', *Buffalo Criminal Law Review*, 5, pp. 101–24.
- Pettit, P. (2003), 'Deliberative Democracy, the Discursive Dilemma, and Republican Theory', in J. Fishkin and P. Laslett (eds), *Philosophy, Politics and Society. Vol 7: Debating Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 138–62.
- Pettit, P. (2004), 'The Common Good', in K. Dowding, R.E. Goodin and C. Pateman (eds), *Justice and Democracy: Essays for Brian Barry* (Cambridge: Cambridge University Press), pp. 150–69.
- Rubin, E.L. (2001), 'Getting Past Democracy', *University of Pennsylvania Law Review*, 149, pp. 711–92.
- Seidenfeld, M. (1992), 'A Civic Republican Justification for the Bureaucratic State', *Harvard Law Review*, 105, pp. 1511–76.
- Tversky, A. and Kahneman, D. (1982), 'Judgments of and by Representativeness', in D. Kahneman, P. Slovic and A. Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press), pp. 84–98.

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Chapter 6

Conflict and Self-Interest in Deliberation

Jane Mansbridge¹

1 Integrating Conflict and Self-interest into Deliberation

To today's generation of democratic theorists falls the task of finding ways to integrate normatively the legitimation of ongoing conflict in material interests with a larger commitment to the public good. Accomplishing this goal requires repudiating the position that self-interest has no legitimate role in deliberation, along with the position that negotiation and even bargaining in all their forms are contradictory to, and thus must be excluded from, democratic deliberation.

Whenever questions of common concern have distributive implications, conflicts in material and other interests will arise. In such situations, a fair resolution almost always requires not only acknowledging but also exploring these conflicts, some of which cannot be simply subsumed into an overarching common good. Refusing to allow on the table statements of self-interest and the reciprocal questioning of self-interest inhibits self- and mutual understanding and makes it almost impossible to craft even relatively fair partial resolutions to the ongoing conflict.

Among the irreducible plurality of goals of democratic deliberation, the purpose of democratic decision makes paramount the clarification of interests broadly understood. No decision putatively for the common good is normatively legitimate if created by ignoring conflicting interests. In practice, moreover, decisions made on the basis of interests (including interests in the common good) that are relatively well understood and behind which the parties to the decision can continue to stand will last longer and be better for the group than decisions made on the basis of interests that are less well-examined or understood. As a consequence, the rational and emotionally-based elements of deliberation that propel a decision-making group toward consensus or conflict should be judged not only by how well these elements help a group forge a common good that can

¹ I would like to thank participants in the Granada IVR workshop on deliberative democracy and its discontents, on 25 and 27 May, 2005, particularly Samantha Besson, Cristina Lafont, and José Luis Martí, for their comments on a paper that included a much condensed version of this argument, and H el ene Landemore for her reading. The work on this paper was supported by a fellowship at the Radcliffe Institute.

command genuine consensus but also by how well these elements help clarify conflicts. Those conflicts then require disposition by either negotiation or some aggregative form of democracy such as majority rule. By clarifying "interests," I mean that a good deliberative process should clarify, as well as possible in any given circumstances, what the citizens involved would prefer if they had access to all information, including information about the others involved. I call these hypothetical enlightened preferences "interests."²

Democratic deliberation also has other goals, including forging the bonds of solidarity that help to solve collective action problems. Collective action problems arise from the many goods humans need that must be supplied jointly but are "non-excludable" in the sense that once provided, no one can be excluded from their benefits. From national defense, clean air and ample fish populations through clean dishes in the cupboard, when a society cannot exclude those who do not contribute from reaping the benefits of the good, the self-interest of those who will benefit provides an incentive to "free ride" on the contributions of others. The most efficient societies, as well as often the most just, solve many

² See Mansbridge (1980 and 1996). Particularly in Europe, the word "interest" connotes objective, static or eternal states discoverable through reason or revolutionary action and "revealed" by removing the sources of oppression or repression. I want to discard these connotations, while retaining some distinction between surface preferences (or prereflective understandings) and understandings that are more considered, emotionally and rationally, and more thoroughly tested in action. Tests of a "considered" understanding in this sense might include: 1) its formation in as close an approximation as possible to free, equal and unconstrained communication (the circularity involved in the test of interests being what would emerge in a good deliberation and the test of a good deliberation being that it illuminates interests reflects what I consider an inevitable symbiosis between the two concepts); 2) the vitality of the contest for adopting alternatives within which a given understanding developed, including the divergence of opposing ideas in that contest and the degree of life preserved in the excluded alternatives (Mansbridge, 1996); 3) the reflective conclusions of those who have changed their understandings of their interests. The preferences and interests into which deliberation should provide insight may be self-regarding, other-regarding, or ideal-regarding. I thus use the word "interest" in its American, rather than European sense to include foundational (that is, identity-constituting) ideal-regarding commitments as well as material needs and wants. I then use the term "self-interest" to mean narrow material self-regarding interests in contrast to other-regarding or ideal-regarding interests. Transforming identities transforms interests. With this definition, interests can be seen as "enlightened preferences" (with "enlightenment" seen as the product of experience and emotional understanding as well as of simple cognition) as well as changeable and contested. Congruently, Robert Dahl argues that "alternative procedures for making decisions ought to be evaluated according to the opportunities they furnish citizens for acquiring an understanding of means and ends, of one's interests and the expected consequences of policies for interests, not only for oneself but for all other relevant persons as well. Insofar as a citizen's good or interests requires attention to a public good or general interest, then citizens ought to have the opportunity to acquire an understanding of these matters" (Dahl, 1989, pp. 111–12).

such collective action problems by appealing for contributions to a “moral core” within each individual that consists both of cognitive commitments to principles of duty, fulfillment of promises, and the like and of more emotionally-based reasons for making the good of others one’s own. The larger the moral core that prompts voluntary contribution, the smaller the need for state or social coercion (Mansbridge, 2001). Deliberative processes, which include talking with others, recognizing the real commitments of others to the common good, pooling talents and insights, experiencing interdependence, and together making the sometimes small sacrifices of other options that all decisions require, can activate, maintain, and even create (as well as undermine) this moral core of principled commitment and identification. When we speak of the “transformations” that deliberation makes possible, we often have in mind processes that help forge elements of this moral core. In practice such processes are sometimes, but not always, congruent with the first goal of clarifying interests.

Other goals of deliberation, both in democracies and elsewhere, include the quest for mutual understanding, understood not as a means to an end but as an intrinsically valuable human good, and the expression and reflection of respect for the individual persons in the interaction, also a good in itself.

This assessment of the normative goals of deliberation in democracy applies to deliberations intended to end in a decision binding on the participants. In the pluralist ideal that I propose here, the participants sometimes rightly differ from one another both in their opinions and in their material interests, and some of the ensuing conflicts in interests rightly cannot without distortion be subsumed in a larger common good. Pluralist deliberative theorists must thus help parse out the appropriate role for conflict and self-interest in deliberation both when the group is trying to forge a common good and when interests fundamentally conflict.

The bulk of this analysis evaluates conflict and self-interest in deliberation in the light of the four goals of clarifying interests, forging solidarity, searching for understanding, and expressing or reflecting equal respect. It treats conflict and self-interest as valued components of an ideal democratic state and argues for the normative legitimacy, among democratic methods, of bargaining, negotiating, and voting. It also suggests that in practice the recognition of conflict and the expression of self-interest can help to illuminate interests, forge common bonds, and even promote mutual understanding and respect.

2 The Early Habermas and the Tradition in which He Wrote

The positive valuing of conflict and self-interest promoted here explicitly contravenes a prominent European philosophical tradition that has had great weight in discussions of deliberative democracy. Visible most clearly in the early work of Jürgen Habermas but also in the work of Hannah Arendt and Carl Schmitt, that tradition insists that the source of law should never be merely the people’s will in matters of conflicting interest but always and only the exercise

of reason on matters of the common good. In this tradition democracies take their legitimacy (and should make "law") only from this exercise of reason.³ This tradition excludes from "deliberative democracy" the elements of conflicting interests and self-interest that I argue should play legitimate and important roles in democratic deliberation.

In 1962 Jürgen Habermas contended in his *Habilitationsschrift* (post-doctoral dissertation, or "professor's thesis"), later translated into English as *The Structural Transformation of the Public Sphere* (1989), that "the bourgeois public sphere" in the eighteenth century was characterized by the "people's public use of their reason" (Habermas, 1989, p. 26) in "rational-critical debate." He characterized this rational-critical debate as renouncing any "form of a claim to rule" and standing thus in opposition to "domination" (Habermas, 1989, p. 28). It rested only on "the standards of 'reason'" (Habermas, 1989, p. 28) and "the authority of the better argument" (Habermas, 1989, p. 36) on matters of "common concern" (Habermas, 1989, p. 37).⁴ "[T]he public process of critical debate," he wrote, "lay claim to being in accord with reason; intrinsic to the idea of a public opinion born of the power of the better argument was the claim to that morally pretentious rationality that strove to discover what was at once just and right" (Habermas, 1989, p. 54).

In line with many German theorists of the nineteenth and early twentieth centuries, Habermas opposed "the concept of law as an expression of will" and promoted in contrast "the concept of law as an expression of reason" (Habermas, 1989, p. 81), approvingly quoting Carl Schmitt as saying, "law is not the will of one or of many people, but something rational-universal; not *voluntas*, but *ratio*" (Habermas, 1989, p. 81).⁵ Describing the golden era before the negative "transformation" of the public sphere, Habermas wrote, "although construed as 'power', legislation was supposed to be the result not of a political will, but of rational agreement" (*idem*). Similarly, public opinion was held to be a refining mechanism that allowed reason, not will, to emerge:

³ The lineage of this tradition goes back at least to Aristotle, who wrote, "The law is reason unaffected by desire" (Aristotle, 1988, 1287a34).

⁴ After coining the phrase, "the power of the better argument" (Habermas, 1989, pp. 30, 41, 54), Habermas repeated this formulation frequently (for example, Habermas, 1984, p. 25). He later used the much-quoted phrase, "an ideal speech situation" (Habermas, 1982, pp. 235, 255), to describe communication not distorted by power, but rarely repeated this formulation (Thomas McCarthy, personal communication). Habermas also famously distinguished sharply between "communicative" action, aimed at achieving understanding, and "strategic" action, which includes, among other things, bargaining over conflicting material interests (Habermas, 1984), conceiving these two forms of action as deeply opposed and therefore presumably inimical in a single deliberative setting.

⁵ Ellen Kennedy's (1988) introduction to her translation of Schmitt's *The Crisis of Parliamentary Democracy* reveals how widely held this view was among certain German philosophers.

Public opinion was in principle opposed to arbitrariness and subject to the laws immanent in a public composed of critically debating private persons in such a way that the property of being the supreme will [...] could strictly speaking not be attributed to it at all. (Habermas, 1989, p. 81)

Public debate was supposed to transform *voluntas* into a *ratio* that in the public competition of private arguments came into being as the consensus about what was practically necessary in the interest of all. (Habermas, 1989, pp. 82–83)

The structural transformation that Habermas lamented came about, he believed, in the move from common to conflicting interests. Before this transformation, “the model of a public sphere in the political realm [...] claimed the convergence of public opinion with reason” (Habermas, 1989, p. 130). It was thus supposed to be “objectively possible (through reliance on an order of nature or, what amounted to the same, an organization of society strictly oriented to the general interest) to keep conflicts of interest [...] to a minimum” (Habermas, 1989, p. 131). Even the “firm rules of equality and frankness, under a code of self-protection and courteousness” that structured discussion in environs such as the coffeehouses were “based on a justifiable trust that within the public – presupposing its shared class interest – friend-or-foe relations were in fact impossible” (Habermas, 1989, p. 131). Yet once “the public was expanded” by the press and presumably by an extended franchise,

conflicts hitherto pushed aside into the private sphere now emerged in public. [...] The public sphere, which now had to deal with these demands, became an arena of competing interests fought out in the coarser forms of violent conflict. Laws passed under “the pressure of the street” could hardly be understood any longer as embodying the reasonable consensus of publicly debating private persons. They corresponded more or less overtly to the compromise between competing private interests. [...] The unreconciled interests which, with the broadening of the public, flooded the public sphere were represented in a divided public opinion and turned public opinion (in the form of the currently dominant opinion) into a coercive force, whereas it had once been supposed to dissolve any kind of coercion into the compulsion of reason. (Habermas, 1989, pp. 132–33)

After this transformation, political thinkers had to resign themselves to “the inability to resolve rationally the competition of interests in the public sphere” (Habermas, 1989, p. 144). Society was now “forced to relinquish even the flimsiest pretense of being a sphere in which the influence of power was suspended” (Habermas, 1989, p. 144) and became “a mere nexus of coercive constraints” (Habermas, 1989, p. 145). Once “[...] the masses [...] succeeded in translating economic antagonisms into political conflicts” (Habermas, 1989, p. 146), “the foundation for a relatively homogeneous public composed of private citizens engaged in rational-critical debate was [...] shaken” (Habermas, 1989, p. 179) and “competition between organized private interests” entered the fray. “The consensus developed in rational-critical public debate [...] yielded to compromise

fought out or simply imposed nonpublicly. The laws that come into existence in this way can no longer be vindicated as regards their elements of 'truth' [...]" (Habermas, 1989, p. 179). Any consensus that might arise in these conditions "does not seriously have much in common with the final unanimity wrought by a time-consuming process of mutual enlightenment, for the 'general interest' on the basis of which alone a rational agreement between publicly competing opinions could freely be reached has disappeared" (Habermas, 1989, p. 195). After this transformation, it was no longer possible "within the political public sphere to resolve conflicts on the basis of relatively homogeneous interests and by means of relatively reasonable forms of deliberation" (Habermas, 1989, pp. 197–98), no longer possible "to encase the parliamentary conflict settlements in a system of abstract and general laws with a claim to rationality and permanence," because economic decisions were no longer made by the market "in principle [...] apolitically" but were now settled in the political system. This transformation made a politics based on "reason" no longer possible:

[A]s soon as private interests, collectively organized, were compelled to assume political form, the public sphere necessarily became an arena in which conflicts also had to be settled that transformed the structure of political compromise from the ground up. The public sphere was burdened with the tasks of settling conflicts of interest that could not be accommodated within the classical forms of parliamentary consensus and agreement; their settlements bore the mark of their origins in the market. Compromise literally had to be haggled out, produced temporarily through pressure and counterpressure and supported only through the unstable equilibrium of power constellations between state apparatus and interest groups. Political decisions were made within the new forms of "bargaining" that evolved alongside the older forms of the exercise of power: hierarchy and democracy. (Habermas, 1989, p. 198)

To Habermas's dismay, sometimes the "haggling out of compromises" even "moved to extraparliamentary sites" in the German neocorporate system of blessing with state support agreements on wages and working conditions reached by organized unions and business. In his view, "the creation of collective bargaining regulations so shatters the forms of the old style public sphere (founded on trust in the power of reason) and the antagonism between interests which lies at its basis objectively affords so little chance for a legislation in accord with liberal criteria that these compromises are kept away from the procedure of parliamentary legislation" (Habermas, 1989, p. 199). This new system produced a form of "compromise formation that is largely a matter of organization-internal maneuvering," far from the old ideal of "the power-free flow of communication within a single public" and "neutrality as regards interests" (Habermas, 1989, p. 202).

Habermas thus agreed with Carl Schmitt, who wrote in 1923 that the parliament was no longer an "assembly of wise men chosen as individual personalities by privileged strata, who sought to convince each other through arguments in public discussion on the assumption that the subsequent decision reached by the majority would be what was true and right for the national welfare" (Schmitt, 1988, quoted

in Habermas, 1989, pp. 205–206). For Habermas, once irreconcilable conflict emerges, “public opinion” in the strict sense (public rationality exercised on a general interest) is almost impossible. Today, for example, “the unresolved plurality of competing interests [...] makes it doubtful whether there can ever emerge a general interest of the kind to which a public opinion could refer as a criterion. A structurally ineradicable antagonism of interests would set narrow boundaries for a public sphere [...]” (Habermas, 1989, p. 234).

A few years later, in a preface to the second edition of his 1923 work, Schmitt deplored the dominance of conflicting interests in the Weimar parliament and the lapse of what he called *Diskussion*. By “discussion” Schmitt did not mean any form of talk:

“Discussion” here has a particular meaning and does not simply mean negotiation. [...] Discussion means an exchange of opinion that is governed by the purpose of persuading one’s opponent through argument of the truth or justice of something, or allowing oneself to be persuaded of something as true and just. Gentz [...] puts it well: [...] that laws [should] arise out of a conflict of opinions (not out of a struggle of interests). To discussion belong shared convictions as premises, the willingness to be persuaded, independence of party ties, freedom from selfish interests. [...] By contrast conduct that is not concerned with discovering what is rationally correct, but with calculating particular interests and the chances of winning and with carrying these through according to one’s own interests is also directed by all sorts of speeches and declarations. But these are not discussions in the specific sense.⁶

In that 1923 work, Schmitt saw in the parliament of the Weimar Republic the demise of a tradition of “public discussion, that is, reason” which he explicitly contrasted to “force.”⁷ In his view, proponents in the class struggle in the Weimar

⁶ Schmitt (1988b, pp. 4–6). Two paragraphs after this he refers to the “definitions of parliamentarism which one still finds today in Anglo-Saxon and French writings and which are apparently little known in Germany, definitions in which parliamentarism appears essentially as ‘government by discussion’ [...]” (Schmitt, 1988b, p. 7). The phrase, “government by discussion,” which derives from Harold Laski, appears in English, and is repeated in English two paragraphs later, with the comment that gives rise to his title: “The belief in parliamentarism, in government by discussion, belongs to the intellectual world of liberalism. It does not belong to democracy” (Schmitt, 1988b, p. 8). I thank Isaac Nakhimovsky for pointing out these English phrases, which underscore Schmitt’s point that he is drawing from what he conceives as a non-Germanic tradition.

⁷ Schmitt (1988a, p. 49), quoting Eugene Forçade (1853). In this passage, Schmitt wrote of this tradition: “For the sense of justice of an entire historical epoch, [openness and discussion] seemed to be essential and indispensable. What was to be secured through the balance guaranteed by openness and discussion was nothing less than truth and justice itself. One believed that naked power and force – for liberal, *Rechtstaat* thinking, an evil in itself, ‘the way of beasts,’ as Locke said – could be overcome through openness and discussion alone, and the victory of right over might achieved. There is an utterly typical expression for this way of thinking: ‘discussion in place of force’.” In a footnote, having

Republic had no scruples at using the “kind of force” in which the enemy “is not to be educated, but eliminated. [...] a real and bloody struggle” based on “the direct use of force,” requiring on occasion that one “spill blood.”⁸

Schmitt wrote these thoughts one year after Joseph Schumpeter had suggested that extending the franchise had doomed parliamentary deliberation. In Schumpeter’s view, universal suffrage had produced party machines and organizations that used irrational appeals to the masses. This fact alone, he argued, “disposes of rational argument [...]” Now “agitation and victories outside [parliament] will be more important than a good speech in the house. [...] That has destroyed the original sense of parliament, broken its original technique, made its activity look like a farce.”⁹ Although parties that had come to represent particular social classes could reach compromises, he wrote, they had “basically nothing to deliberate or discuss with one another.”¹⁰

Forty years later, Hannah Arendt similarly contrasted deliberation and interests:

Opinions are formed in a process of open discussion and public debate [...]. The same is not true for questions of interest and welfare, which can be ascertained objectively, and where the need for action and decision arises out of the various conflicts among interest groups. Through pressure groups, lobbies and other devices, the voters can indeed influence the actions of their representatives with respect to interest, that is, they can force their representatives to execute their wishes at the expense of the wishes and interests of other groups of voters. In all these instances the voter acts out of concern with his private life and well-being, and the residue of power he still holds in his hands resembles rather the reckless coercion with which a blackmailer forces his victim into obedience than the power that arises out of joint action and joint deliberation. (Arendt, 1965, pp. 272–73)

Arendt thus excluded not only the conflict of material interests but also the power as coercion that majority rule entails from the realm of legitimate democracy.

Jürgen Habermas’s thought has evolved considerably in the forty-three years since his *Transformation of the Public Sphere*, published about the same time as Arendt’s conclusions on these matters. Yet he has never in that time allowed any legitimacy to the aggregative aspect of democracy, which rests to some degree on coercive power (for example, in theory, on the equal power of every voter), which Arendt compared to the “reckless coercion” of the blackmailer. Habermas has nevertheless moved toward some acceptance of “strategic” action (aimed at winning) in addition to his preferred “communicative” action (aimed

credited Eugene Forçade with this phrase, Schmitt then cites Lamartine (1831 and 1850) on the contrast between discussion and power or force (Schmitt, 1988a, p. 103, n. 49).

⁸ Schmitt (1988a, p. 64). He entitled his next chapter, “Irrationalist Theories of the Direct Use of Force.”

⁹ Schumpeter (1922, pp. 329–30), quoted in Kennedy (1988, p. xxvii).

¹⁰ Schumpeter (1922). I have adopted Kennedy’s analysis on this point.

at understanding) in democratic politics. In a 1976 article that mostly lauded Hannah Arendt for opposing any use of coercive power in politics, he lightly criticized her for not giving strategic action any role at all in the “realm of the political” (Habermas, 1985, p. 182). As he delicately put it, strategic action “has taken place also within the city walls” (Habermas, 1985, p. 182); thus “we cannot exclude the element of strategic action from the concept of the political” (Habermas, 1989, p. 183). Both then and now, however, Habermas has never accorded the word “legitimate” to strategic action, with its concern for acquiring and exercising political power. Rather, as he put it then, “legitimate power arises among those who form common convictions in communication free from coercion” (Habermas, 1989, p. 183). In his analysis, common convictions formed in coercion-free communication *create* the legitimate power for which strategic actors then *compete*, in ways that can be “normalized” (Habermas, 1989, p. 182) and “institutionalized” (Habermas, 1989, p. 183). In *Between Facts and Norms*, his most recent major work, Habermas continues to claim that “only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of *all* citizens in a discursive process of legislation that in turn has been legally constituted” (Habermas, 1996, p. 110, emphasis mine).¹¹ In Habermas’s view the justificatory apparatus that in a situation of conflicting interests legitimizes the exercise of political power by some citizens over others has no value in itself.

3 What’s Wrong with this Picture?

Conflict in Material Interests

It is not easy to value both conflict and commonality, giving each a respected place in the political arena. Many commentators slip either into the position of praising only the common good and whatever political transformations occur in that direction or, in a self-assumed “realist” vein, praising conflict as necessary, vital, even manly, while denigrating the search for commonality as unrealistic, soft, obscurantist, or hegemonic. Although democratic theorists are usually comfortable with and even enthusiastic about conflicting opinions, it has proved harder, both in theory and practice, to integrate conflicting material interests with a focus on the common good.

In ancient Athens, although a common maxim defined politics as “hurting your enemies and helping your friends,” the overall goal was *homonoia*, or

¹¹ He also retains Arendt’s understanding of political participation, which would make a vote based on self-interest an act of violence (*Gewalt*) (Habermas, 1996, pp. 147–49). See Mansbridge, 1996. See also Fraser on Habermas not admitting private interests to the public sphere (Habermas, 1996, p. 59) and restricting discourse in public spheres to deliberation about the common good (Habermas, 1996, pp. 62, 70 ff.; Fraser, 1997).

unanimity.¹² Majority rule, as far as we can piece out, was a time-saving substitute for consensus, not, as it slowly became from the seventeenth to the twenty-first centuries in the west, a form of “force” theoretically justified by hypothetical agreement.¹³ Without clear evidence, we may tentatively conclude that in the democratic deliberations of ancient Athens conflicting interests were expected to be subsumed in the discussion of the greater good. By the end of the twentieth century in the United States, however, an evolving national democratic politics based on significantly conflicting interests had accustomed citizens to a transformed meaning of majority rule, in which it was normatively proper, at least on occasion, for participants to vote their self-interests, with the equal vote implicitly aggregating those conflicting interests into a utilitarian solution best for the greatest number.¹⁴

In practice, all modern democracies on the national scale have evolved to mix consensual and aggregative forms. Whether we call these forms the “market and the forum” (Elster, 1986) or “adversary and unitary democracy” (Mansbridge, 1980), most practicing democracies have found both necessary. In some instances a group rightly tries to deliberate to consensus. In others that group, recognizing

¹² Plato has Meno describe a man’s excellence (*arête*) as consisting in “managing the city’s affairs capably, and so that he will help his friends and injure his foes while taking care to come to no harm himself” (Plato, *Meno* 71e; see also *The Republic* 331e, in Dover, 1974, pp. 180–83; Pearson, 1962, pp. 87–88, and Connor, 1971, p. 42 ff. indicate that the maxim of helping friends and injuring foes was a common formulation in this era). Political clubs also managed lawsuits and elections for their members and in votes of ostracism acted like political machines, supplying voters with ballots of potsherd marked in advance with one man’s name (Breed and Seaman, 1971; Connor, 1971). Nevertheless, *homonoia* (literally “being of one mind”) was the central and dominant ideal (Mansbridge, 1980, ch. 2, notes 16–18). See also Ober (1989, p. 297).

¹³ The first normative argument that I have discovered for the self-protective use of the vote in a setting understood as a conflict of interests came in 1647, when Colonel Rainborough, in the Putney Debates, implied that the poor needed an equal vote in order to defend themselves from the rich (Woodhouse, 1951, pp. 59, 67). Congruently but obscurely Locke later wrote of majority rule that, “it being necessary for that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority,” perhaps implying that majority rule is a bloodless substitute for violence. Yet he also argued in the same sentence that “every individual that united into it [that body] agreed that it should [be one body]; and so every one is bound by that consent to be concluded by the majority” (Locke, 1960, II.8.96), thus providing Kendall (1941) and others with a non-coercive interpretation of Locke’s understanding of majority rule.

¹⁴ Brian Barry (1965) has pointed out that if each voter votes his or her self-interest, in some circumstances a majority-rule process can aggregate those votes into a utilitarian function that in theory should produce more happiness than any other. However, if some intend their votes as opinions on the common good and others intend theirs as expressions of self-interest, the vote aggregates unlike entities, “apples and oranges,” and makes less democratic sense.

the endurance of fundamental conflicts, rightly negotiates a fair bargain or adopts some procedure such as proportional outcomes or majority rule to reach an authoritative decision.

Although scholars to date have usually termed only the consensual procedure "deliberative," negotiation and voting also require discussions that weigh the different elements of an issue and are aimed at mutual justification and understanding. Even in the "aggregative," "market," or "adversary" mode of democracy, deliberation must identify the contours of the conflicts about which the group bargains, negotiates, or votes. Indeed, early in the debates over participatory democracy, Peter Bachrach pointed out that in some circumstances democratic participation should produce *more* conflict, as workers, for example, discover that the reality they experience is not what the management or owners had said it was (Bachrach, 1974). That insight is as important today as when Bachrach first voiced it. When members of a subordinate group are kept subordinate in part by the normalization and naturalization of their oppression, only by talking together about their experiences can they even develop a language for thinking through and understanding their interests. Only by entering into discussions with others who have conflicting interests can they understand the costs to others of what is good for them, the practical constraints of their desires, the possible joint solutions available, and that which each party holds most dear. In such cases, deliberation produces more conflict along with more self- and mutual understanding.

In situations that mix common and conflicting interests, deliberation proceeds and ought to proceed in a series of stages, which, if one could actually separate each from the others, might be called "pre-deliberation," "full deliberation," and "negotiation." The lines between these stages are not temporally tight. But because each stage in its own way encompasses a kind of deliberation, we can think of these to some degree as three stages of deliberation, followed by a separate stage of fair aggregation. The first and last stages of pre-deliberation and negotiation, while not normatively necessary, are often descriptively accurate and in many cases normatively both desirable and legitimate.

In the first "pre-deliberative" stage, or caucus of the likeminded (a stage Rousseau would have condemned), individuals who have or may be able to develop common interests within the conflict need to talk among themselves to begin to understand their interests. Members of subordinate groups in particular often need to develop counter-hegemonical ideas and understandings of their interests. This process occurs primarily when some of those members find a space for deliberation sufficiently removed from the usual sanctions and incentives to develop, through intense and redundant interaction, challenges to the existing worldview.¹⁵ Even within the dominant society, subgroups of likeminded or

¹⁵ Talking together in this "safe space," or "enclave," some members of groups marginalized in the larger society may create a variety of ideas, interpretations, and symbols that challenge existing ways of thinking. Others, less protected from the sanctions and incentives of everyday life, then select from this variation the ideas that they will use

similarly situated participants often need to caucus together before a larger deliberation to examine mutually what they think their interests are.

At a second stage of full-scale deliberation, individuals with common and conflicting interests (usually in conjunction with others similarly situated)¹⁶ enter into discussion with one another. The best discussions clarify both conflict and commonality, and perhaps forge genuine commonality where it had not existed before. Less successful deliberations obscure the outlines of underlying conflict through the many dynamics that either exacerbate animosity or promote false community.¹⁷ In a clarifying deliberation, conflict can lead some to discover how others oppose them and why, just what in their own position is closest to their interests, and how deeply what they hold most dear conflicts with the interests of others. Such conflict produces greater self- and mutual understanding. In a clarifying deliberation, the deliberating parties can also discover that their surface differences masked a common good. They can uncover neglected options that allow all parties to get what is in their interests, or “create value” by finding options that provide more for each than any had previously expected. They can raise the salience of their common interests above their differences by, for example, heightening their opposition to a common enemy. They can decide that the pursuit of the common good is more moral than the pursuit of their individual goods. They can create a common good by committing or recommitting their selves and their identities to the collective. These processes also produce self- and mutual understanding.

to challenge the existing order, in an evolutionary dynamic of variation and selection (Mansbridge, 2005). The oppositional creativity of a protective enclave is exemplified by the contrast in the United States between deaf people, many of whom analyze their situation through a relatively oppositional lens, and blind people, who on the whole do not. The difference between the two groups seems to derive from the separate schools established in the nineteenth century for the deaf, while the blind, being more isolated from one another and more closely integrated into the dominant world, developed neither the group pride of the deaf nor an analysis of their condition as resulting in part from others' acts of marginalization and oppression (Groch, 2001).

¹⁶ “Groups” here mean not only organized groups but also aggregations of individuals with similar interests on an issue.

¹⁷ On the obfuscatory effects of conflict, see Matthew Arnold, who in implicit contrast to J.S. Mill's theory that truth emerges from the conflict of ideas, wrote, “I remember a Nonconformist manufacturer, in a town of the Midland counties, telling me that when he first came there, some years ago, the place had no Dissenters; but he had opened an Independent chapel in it, and now Church and Dissent were pretty equally divided, with sharp contests between them. I said, that seemed a pity. ‘A pity?’ cried he; ‘not at all! Only think of all the zeal and activity which the collision calls forth!’ ‘Ah, but, my dear friend,’ I answered, ‘only think of all the nonsense which you now hold quite firmly, which you would never have held if you had not been contradicting your adversary in it all these years!’” (Arnold, 1957, p. 21).

The problem in practice is that the institutions and procedures that help individuals engage in conflict can also obscure the possibility of a common good, just as the institutions and procedures that help individuals discover or create a common good can also obscure their underlying conflicts.¹⁸ The institutions of adversary democracy, for example, often impede the discovery and creation of commonality while facilitating the emergence of conflict. Similarly, many deliberative processes, designed to aim at understanding, in practice suppress dissent. Without the voices activated by adversary democratic institutions, public deliberation can be severely curtailed and conflicting interests suppressed rather than clarified (Karpowitz and Mansbridge, 2005).¹⁹

Practitioners in the field of conflict resolution necessarily try to help their groups explore both conflict and commonality.²⁰ Functioning legislatures of long standing have also evolved their practices on the basis of implicit normative criteria that foster commonality as well as illuminating conflict. Yet few if any of these practitioners consciously see their efforts as a matter of preserving the best in both conflict and commonality or exploring the necessary trade-offs between the two. Few deliberative groups that successfully achieve both ends describe their processes as fusing conflict and commonality. Nor have democratic theorists made the question a central focus of their concern. Yet if in the stage of full-scale deliberation the parties do not explore and clarify their conflicts in material and other interests as well as fostering their potential for commonality, they will not be able adequately to move to constructive ways of handling that conflict.

When a deliberating group finds that certain strands of conflict cannot be reconciled or subsumed in a larger good or a newly framed understanding of the good of all, the group may turn to what might schematically be considered a third deliberative stage, the stage of negotiation. In negotiation, the members of the group try to craft a decision that all members can accept as better than their best alternative to a negotiated agreement.²¹ In practice, negotiation is rarely a separate stage, entered after deliberation has clarified both commonality and conflict and helped participants forge a common good. Rather, negotiation and

¹⁸ See Fung (2003, pp. 348–49): “Discussions aimed at fostering and clarifying individual preferences, for example, by airing conflicts and advocating conflicting principles, may advance individual rationality while rendering participants less flexible and more self-interested.”

¹⁹ Communities do not require the institutions of adversary democracy for this function. Long-standing groups that make their decisions entirely by consensus, such as the Society of Friends or the Bruderhof, usually institute strong norms regarding the duty (to God or to the others in the group) to stand out against a consensus if a participant believes deeply that it is wrong.

²⁰ For example, Forester (1999). For an early sociological treatment, see Coser (1956).

²¹ For the “best alternative to a negotiated agreement” (or BATNA), see Fisher and Ury (1983).

even bargaining serve important functions in clarifying interests and producing mutual understanding during the full-scale deliberation.

I begin the case for including negotiation and even bargains as legitimate normative elements in both democracy and democratic deliberation by considering the interaction traditionally seen as most antithetical to deliberation: the bargain. To distinguish a bargain from a negotiation, let us define a bargain by stipulation as a self-interested zero-sum interaction in which whatever I gain, you lose and vice versa. In a classic bargain, I want to give you as few apples as possible for as many of your oranges as I can get and you want to give me as few oranges as possible for as many of my apples as you can get. The Oxford English Dictionary, for example, describes the verb "to bargain" as "to try to secure the best possible terms; to haggle over terms," and then describes "to haggle" as "to cavil, wrangle, dispute as to terms; esp. to make difficulties in coming to terms [...]"²² The elements of conflict are clear, as each side tries to secure the best possible terms. The synonym "haggle" particularly connotes "dispute" and making "difficulties." Yet even in a classic bargain, exemplified by haggling at a bazaar, each party's probes and counter-probes assess the relative intensity of their desires. In the process of haggling both you and I can come to understand better the actual intensity of our desires and the costs to us, given the other's desires, of getting what we want. Even in haggling we can increase our self-understanding and our understanding of the other in one narrow way.²³ Moreover, although economists are wrong when they assume that normatively validating background conditions prevail in practice, they are right to point out that in a bargain, or exchange, each party gets something it prefers to the *status quo ante*, or else the bargain will not be consummated. In short, a bargain creates a common good. In some cases, it also creates greater self- and mutual understanding. A fair bargain would be one agreed upon by free and equal parties acting without intent to deceive.

To distinguish between bargaining of this simple surface variety and negotiation, let us define negotiation by stipulation as requiring an exploration beyond the original surface preferences of each party, with the purpose of uncovering some features of the relationship that are not zero-sum. The Oxford English Dictionary captures some of the difference between the two forms of interaction when it defines the verb "to negotiate" as "to communicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some compromise or settlement."

²² To bargain: "To treat with any one as to the terms which one party is to give, and the other to accept, in a transaction between them; to try to secure the best possible terms; to haggle over terms." To haggle: "To cavil, wrangle, dispute as to terms; esp. to make difficulties in coming to terms or in settling a bargain; to stickle."

²³ The heat of bargaining may also lead us to under- or over-value our own or the other's goods. Participants can identify clarificatory and obfuscatory processes in bargaining as well as in other forms of talk and try to structure the interaction to make clarification more common than misunderstanding.

Although a bargain also obviously requires “mutual agreement,” the word “negotiation” in English implies that the participants “communicate,” “confer,” and “discuss” more than they “haggle.” Moreover, although negotiations often produce compromises, which by their nature leave both sides to some degree unsatisfied, they can also produce “integrated” solutions.

Mary Parker Follett, the political theorist and management theorist of the early twentieth century, first pointed out the possibility of what she termed “integrated” solutions to problems (Follett, 1942), which have since been redubbed “win-win” solutions (cf. Fisher and Ury, 1983). Follett’s classic example takes place in a library, where one party wants the window open in order to make the room cooler, but the other does not want a draft. Her solution, to open the window in the next room, gives both parties to the negotiation what they really want. Reaching that solution requires sufficient thought to move from conflicting surface preferences (window open, window closed) to congruent deeper preferences (cooler, no draft) and to devise a solution, not originally in the thought patterns of either party, that satisfies both sets of deeper preferences. To come up with such alternatives, including alternatives to the issues under discussion that give each party more than each had realized was possible before the negotiation, good negotiators must enter as far as possible into the full situation of their counterparts in the negotiation. They need to be able to take the perspective of the other.²⁴

In a good negotiation, both parties help each other explore their deeper preferences and interests to see whether any integrated solutions can be crafted within the realities that constrain them both. In its more advanced stages, such a negotiation requires mutual trust that the other will not exploit strategically information gained in their common exploration. Good negotiation processes thus create the solidarity they then require to move toward integrated solutions. They also promote self- and mutual understanding more than either simple bargaining or a deliberation that refuses to engage self-interest.

Integrated solutions, achieved in such a manner, produce a common good. This form of common good is created by explicitly putting what look like conflicting interests on the table. Negotiations even build agreement by incorporating mere bargains, in which each side compromises by giving up something it desires or

²⁴ Galinsky, Maddux and Ku (2005) conclude on the basis of their laboratory experiments that cognitive “perspective-taking,” or being able to see the world through another’s eyes, can help negotiators understand underlying interests, structure creative agreements, expand the pie, and arrive at a solution in which all participants have gained all they can without the others losing (“Pareto efficiency”). In studies that primed for two types of perspective-taking, the cognitive (“Try to understand what they are thinking”) and emotional (“Try to understand what it would feel like”), the participants primed for cognitive perspective-taking did better than the controls in a series of different kinds of negotiations (some potentially integrative, some mixed integrative and zero-sum, or distributive), while those primed for emotional perspective-taking (here termed “empathy”) did either insignificantly better or in some cases worse than the controls.

gains through exchanging a package of goods more desirable than the package held before.²⁵

Simone Chambers has begun the process of integrating bargaining into a Habermasian framework of legitimate democracy. Attempting to reconcile Habermas's work with more adversary traditions in political theory, she begins by advancing the contingent and non-dichotomous guideline that "the more the issue under public discussion involves deep foundational issues of justice the more important rational consensus becomes" (Chambers, 1996, p. 187). "But," she continues, "fair compromises and majority decisions are legitimate to the extent that citizens believe there are good reasons to settle for these decisions [sic] rules" (Chambers, 1996, p. 188). More recently, she defines "a legitimate political order" as "one that could be *justified* to all those living under its laws" (Chambers, 2003, p. 308, her emphasis), with the justification covering bargaining whenever citizens have been able "to deliberate and decide when and where bargaining is a fair and appropriate method of dispute resolution" (Chambers, 2003, p. 309).²⁶ When deliberating citizens decide "when and where bargaining is fair and appropriate," however, they must use some criteria for "fair and appropriate" other than deliberation itself. A bargain, I have suggested, is fair to the degree that the parties are equal and free in their background conditions and do not intend to deceive one another in their interaction. In an overall structure of equality and freedom, with neither party having greater power than another to coerce the other or promote a false belief, it is legitimate for me to give as few apples as possible for your oranges, for you to give me as few oranges as possible for my apples, and for the eventual distribution of apples and oranges between us to result solely from the bargain we made. The fairness of any bargain or negotiation depends, like the legitimacy of deliberation and aggregation through the vote, on background conditions of liberty and equality. Indeed, unless we define "reasoned agreement" explicitly to exclude considerations of material self-interest, the outcomes of fair bargains and negotiations meet the criteria that Joshua Cohen enunciated with his principle that "outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals" (Cohen, 1989, p. 22).²⁷

²⁵ See Held (1970) (also Mansbridge, 1998) on aggregative as well as unitary understandings of the common good.

²⁶ Chambers attributes this view to Habermas (Chambers, 1996). My own reading suggests the more rigorous claim that statutes are legitimate only when all citizens give their assent in a legally constituted discursive process (Habermas, 1996, p. 110; see above section 2). If Habermas does now accept bargains, negotiations, and majority rule (with its inevitable component of coercive power) as legitimate democratic processes, it would be useful to make this evolution in his thought more explicit.

²⁷ For analytic clarity, we could distinguish between "unitary" (or "consensual" or "classical") deliberation, with its dependence on classical "reasons," its aim at consensus and its exclusion of bargaining and negotiation, and "pluralist" deliberation, with its incorporation of self-interest and conflict and its inclusion of bargaining and negotiation.

In practice, bargains can also create a form of solidarity based on the mutual respect of individuals who know that their counterparts understand them and their own situation realistically. Studying constituent assemblies, Elster (1998, p. 100) found that behind closed doors the political actors engaged in more bargaining than in open assemblies. Coding legislative transcripts in four countries, Steiner and his colleagues (Steiner et al., 2004) found that in such closed arenas legislators also expressed more respect toward the claims of others than in open assemblies. It would not be far-fetched to conclude that the processes of bargaining and negotiation generated, in addition to external expressions of respect for the claims of others, actual respect for those claims as well.

In short, I contend that to the degree that bargains and negotiations produce their outcomes in conditions of freedom, equality, and non-deception, those outcomes should be considered democratically legitimate. Moreover, to the degree that bargains and negotiations play a role in the collective weighing of alternatives, they should be considered an integral part of democratic deliberation. Carl Schmitt himself described his deliberative ideal as “[d]iscussing, balancing, engaging in principled negotiations” (Schmitt, 1988a, p. 51).

Sometimes, however, all the talk in the world will not produce agreement, even of the negotiated and bargained kind. At this stage deliberation in its various forms may be said to be over, and a polity or group needs to turn to a final stage of aggregating conflicting interests, justified by a (usually hypothetical) meta-agreement that the rules of aggregation are in some sense “fair.”²⁸

Majority rule is the most common form of democratic procedure for aggregation. The implicit citizen agreement to abide by majority rule, however, depends on an underlying structure of sufficient cross-cutting political, social and economic cleavages for each individual to have differing numbers of allies on different issues, and thus will win on some issues of importance and lose on others. With such an underlying structure, individuals in a position of meta-agreement might unanimously agree to a system of majority rule. By contrast, in segmented polities, where important lines of political, social, economic, cultural, and religious cleavage coincide, the members of a minority on one issue will find

Such terminology would position pluralist deliberation as an independent democratic ideal, not merely an adaptation to reality.

²⁸ Even in the deliberative tradition many theorists agree that majority decisions are at some point democratically legitimate, at least, in Chambers’ words, “to the extent that citizens believe there are good reasons to settle” for these decision rules (Chambers, 1996, p. 188; see also pp. 308, 311). Bernard Manin (1987, pp. 352, 359) and Seyla Benhabib (1996, pp. 68, 72), for example, entertain plural bases of legitimacy, including majority rule. Manin goes so far as to give “the majority principle” equal status with deliberation, arguing that “It is the conjunction of these elements [deliberation and the majority principle] that creates legitimacy” (Manin, 1987, p. 360). James Bohman concludes, “Few deliberative democrats now think of deliberation independently from voting or bargaining. The question is only how to make them more consistent with deliberation rather than undermining it” (Bohman, 1998, p. 415).

themselves in the minority on most other important issues. Each individual can then expect either to win or lose all the time on most issues of importance to that individual. With this kind of underlying structure, individuals in a meta-agreement would never unanimously agree to a political system governed by majority rule, but would require instead some form of proportional outcomes or consociationalism.²⁹

Both in its majority rule and consociational forms, what I have called “adversary democracy” is intended to do no more than aggregate conflicting interests fairly. It comes into play as a default practice when the quest for a substantive common good fails. Yet it has its own intrinsic claims on legitimacy, based on each member of the polity having, in theory, equal power over the outcome.³⁰ When in practice the mechanisms designed to produce consensus instead produce conformity, adversary procedures are normatively preferable to the procedures of consensus. When interests do in fact conflict, fair aggregation through the vote has the normative advantages of both making conflict explicit and temporarily resolving that conflict in a way that uses individual political equality as a legitimating mechanism.

In practice, of course, no polity can achieve either the conditions of liberty and equality, including equal power for each participant that legitimates adversary democracy or the conditions of liberty, equality, and absence of power required for ideal deliberation. Both the adversary and the consensual ideals are regulative ideals, in the sense of being standards at which to aim rather than thresholds below which acts are illegitimate. Because each of these ideals is in practice never fully achievable, the decisions of no real polity are ever fully legitimate, even if those decisions are reached by consensus in conditions of relative freedom and equality. Legitimacy is thus a spectrum rather than a dichotomy and decisions will always be only more or less legitimate. Sometimes decisions taken by majority rule will be more legitimate than decisions taken by deliberating to consensus.

Agonistic democrats are right to point out that because of the irreducibly contested reality of the human situation, neither consensual nor adversary decisions in fact fully settle any situation. They also rightly point out that we should not even yearn for the goal of a fully settled decision, as that yearning itself often obscures existing conflicts (see for example, Honig, 1993). Agonistic

²⁹ Barry (1979) and likeminded others are thus incorrect to associate democracy with majority rule *per se*. See Lijphart (1977 and 1999) for “consociationalism” and Mansbridge (1980) for proportional outcomes, a central but neglected feature of consociational systems. Note, however, that in segmented societies even the logic of “taking turns” (Guinier, 1994) or proportional outcomes (of which taking turns is a subset) does not produce equal satisfaction, which requires decentralization or secession.

³⁰ This claim, on the basis of the intrinsic fairness of equality and liberty, has an independent status from, but can play a component role in, claims based on hypothetical agreement or claims (for example, Benhabib, 1996; Chambers, 2003) that the legitimacy of such a decision rule derives from deliberation.

democrats are wrong, however, if, not recognizing that legitimacy lies on a spectrum, they fail to grant relative legitimacy when it has been achieved. Agonistic democrats sometimes see themselves as combating the hegemony of the powerful, who work through the fiction of a settlement without remainders. Yet denying legitimacy of any sort to the decisions of imperfectly democratic polities would often harm the disadvantaged more than it would help them. The pure rule of the powerful, unhindered by policies arrived at by better or worse approximations to the ideals of democratic consensus and adversary democracy, would in most cases benefit the already most advantaged.

To sum up, in judging democratic processes, it is useful analytically to distinguish among elements in a democratic interaction those that schematically comprise a first stage of caucus pre-deliberation, a second stage of full scale deliberation that includes the discovery and creation of a common good and the elucidation of conflict, a third stage that includes the mutual probing of desires required for a bargain and the deeper mutual understanding required in a negotiation, and a final, post-deliberative decision made by some relatively fair form of aggregation. Although none of these practices are in practice ever fully legitimate, they can all approach legitimacy by taking place in conditions that approach full equality and liberty.

Self-interest

In the pluralist ideal of deliberation and democratic decision, concern for self-interest is morally and politically legitimate. Indeed, both to clarify conflict and to facilitate genuine consensus, deliberation must in some circumstances actively legitimate self-interest. Consider again the workers who mistakenly think their interests are fully congruent with those of their employers and who uncover, through discussion with those employers, facts that undermine assumptions that their employers' greater power to set the terms of the debate have led them to make. These workers would not be able to reach this greater self-understanding if the norms of deliberation precluded their thinking in self-interested terms.

Consider another example, of a married couple faced with a choice of jobs for each of the partners in two different cities. Forced into the language of the common good, saying only "we" and never "I," they might falsely structure the choice as involving only the good of the children or "the marriage." The process would respond more authentically to their needs and the outcome would be more just if instead they faced and explored the advantages and disadvantages for each in the two situations and negotiated appropriate side-payments for the loser. When distributive issues arise, preventing self-interest from legitimately entering the deliberation undermines the normative goal of clarifying underlying interests in a way that undermines the deliberators' capacity to achieve just ends through a legitimate procedure. Benjamin Barber (1984) and Jon Elster (1986) have argued that in deliberation only the voice of "we" is normatively acceptable. Yet when

just distributions are at stake, both the “I” voice and the voice of self-interest may be normatively required.³¹

Joshua Cohen and Joel Rogers have recently agreed that statements of self-interest can play an important and legitimate role in deliberation. They write:

Deliberation does not preclude statements of self-interest. The deliberative view holds that expressions of self-interest do not qualify as *justifications* for anything – as statements of reasons in the desired sense. But it admits them as ways to present *information*. For example, a relevant consideration in deliberation, and a possible justification or reason for a policy, is that it represents a fair accommodation of the interests of all, or advances the good of those who are in greatest need. But to know that it does either of these things, we need to know what those interests are, and expressions of self-interest by relevant persons are one way to find that out. Where the deliberative norm cuts is simply that saying ‘this policy is in my (my group’s) interest’ is not itself a reason for adopting a policy, but again it may be very relevant information in choosing among different policies. (Cohen and Rogers, 2003, p. 247)

Yet this distinction does not quite work. In a primordial way, simply stating that something is in one’s interest *is* a justification. Imagine a deliberation in which each individual serially said, “This policy is in my (my group’s) interests,” and each identified the same policy. Further discussion involved only means. If no others were affected, the group would have discovered a common good. No one would have to make a further justification, because simply saying that the policy was in their interest would count as a justification. That the policy meets everyone’s interest counts as a reason “in the desired sense.” Indeed, it counts as the dispositive reason, none other being necessary.

Archon Fung suggests a two stage analysis of deliberation that legitimates self-interest in the stage of the deliberation that clarifies interests but requires that, at the moment of decision, participants consider only the common good.³² His first stage, which he identifies with the stage of public opinion and will-formation, allows individuals to “reach their own considered views” and, among other things,

³¹ Legitimizing self-interest does not imply that either preferences or interests need be static. One’s preferences can easily change whenever it becomes clear that a new means to a given and statically held end is superior to one’s previously preferred means. Even one’s interests, or enlightened preferences, can change with changes in one’s identity, as reasons, arguments and facts join with one’s perceptions of one’s own experiences to create, for example, convictions of justice and injustice that then affect one’s identity. Deliberation usually cannot illuminate and clarify interests in ways that incorporate changes in goals and even interests without including appeals to the emotions. See for example, Nussbaum (1995); Rorty (1985); Marcus (2002); Marcus, Neuman and MacKuen (2000); Hall (2005); and Mansbridge et al. (2006).

³² This formula seems intended to mirror Habermas’s (1996) “two track” process of deliberation in the public sphere and the legislature. Fung makes it clear that one goal of deliberation is to clarify participants’ views (Fung, 2003, pp. 348, 350, 356), preferences (Fung, 2003, pp. 348, 350, 356), and values (Fung, 2003, pp. 356, 359).

“to realize and effectively assert [their] rational self-interests” (Fung, 2003, p. 344). This stage of discussion appropriately encompasses the kind of “instrumental rationality” in which “individuals advance their own [...] ends” as well as their collective ends through discussion (Fung, 2003, p. 348). It also appropriately includes “testimony, story-telling, relating needs, principled advocacy, and the airing of conflicts and tensions” (Fung, 2003, p. 344).³³ In the later stage of “reasoned social choice” or “reasonableness,” by contrast, participants “constrain the pursuit of their own self-interest according to the norms of justification.” In this later stage,

[r]easonableness may require participants to restrain themselves when others offer compelling reasons based on common group interests or commonly held norms such as respect, reciprocity, and fairness. For example, reasonableness may require someone to withdraw his support from a proposal that would best advance his own self-interest because others are more needy. (Fung, 2003, p. 348)

Thus in Fung’s two-stage process, at some point in deliberation, and certainly at the moment of decision, the common good should prevail over self-interest: “[W]hen each participant decides what the social choice should be, she should choose the proposal backed by the most compelling reasons” (Habermas, 1989, p. 344). At that point each participant should “not vote for the option that best advances his own self-interest, but rather for the choice that seems most reasonable” (Fung and Wright, 2003, pp. 17–18).

Yet Fung allows a fair bargain, based on both self-interest and political equality: “You do for me this time, and I do for you the next time around” (Fung, 2003, p. 344) even at this second stage, indicating that where choices are inherently zero-sum and in other contexts of fundamental conflict, “reasonableness” can include fair aggregative formulae that balance narrow self-interests. The subtle way that bargains slip into Fung’s second stage suggests that cordoning off self-interest to a separate sphere temporally prior to social choice fails to acknowledge fully the importance of self-interest throughout the deliberative process.

One could perhaps embrace both self-interest and classic deliberative goals by postulating that interest clarification could legitimately go on up to the very instant of social choice, with legitimate social choice including the outcomes of bargains based on a combination of self-interest and a principle of fairness. Then the appropriate normative principle could be: “In *deliberation*, clarify common and conflicting interests; in *choice*, vote for the substantive common good or, if this is not available, for the outcome of a fair bargain or negotiation, and if these are not available, for your self-interest in a voting scheme that aggregates interests fairly.” Such a principle would encompass the full range of legitimately democratic options, including majority rule, if it acknowledged that when there is no obvious common good other than aggregation, simply voting for one’s self-interest can further the fair aggregative process.

³³ Fung here responds to the critiques of Young (1996 and 2000), and Sanders (1997).

Banning from deliberation or from legitimate democratic procedures either bargaining and negotiating over conflicting material interests or the expression and pursuit of self-interest makes it harder for those whose preferences are induced by hegemonic external conditions to probe and clarify their own underlying interests. Banning these considerations from deliberation also makes it harder to distribute justly the sacrifice required in decisions where the conflicts are zero-sum. Banning these considerations from deliberation even makes it harder even to know if any such zero-sum conflict exists. As with conflict, denying the very legitimacy of self-interest keeps the parties to that deliberation from building their solidarity, mutual understanding and mutual respect on solid ground.

Conclusion

Two deliberative traditions have grown up, side by side and intertwining, the one associated to some degree with the academic discipline of philosophy and the other to some degree with the discipline of political science. In the more philosophical tradition, only reasoned deliberation aimed at the common good produces legitimate democratic decision. This ideal derives from a deep critique of modern democracy for incorporating the pursuit of self-interest in contrast to reasoning about the common good. In the tradition associated more with political science, democracies have mixed sources of legitimation that include both deliberation and fair aggregation. Deliberative democrats in this tradition promote deliberation without claiming that it is the sole source of legitimacy.

From this second, pluralist perspective, “deliberation” can have many goals, one of which must be to clarify the interests implicated in a decision. The process must therefore include not only building bridges between individuals and aiming at a rationally motivated consensus but also illuminating conflicts, including conflicts in material self-interest, that might previously have been obscured. Along with basing solidarity, mutual understanding and mutual respect on the full complexity of people’s lives, pluralist deliberation incorporates all forms of communication that clarify both common and conflicting interests.

Simone Chambers has noted that over the past few years, “deliberative theory has moved away from a consensus-centered teleology – contestation and indeed the agonistic side of democracy now have their place – and it is more sensitive to pluralism.”³⁴ Deliberative democrats, however, have always placed a high value

³⁴ Chambers (2003, p. 321, citations omitted). Chambers also states that “[g]one, with only a few exceptions is the narrow, highly rationalistic view of reason-giving that stresses a model of impartiality rising above all difference. [...] [M]ost deliberative theory has adopted a flexible and pluralistic idea of reason-giving [and] [...] a definite expansion of the sorts of things that could be considered arguments and reasons” (Chambers, 2003, p. 322). This formula does not make it clear whether material self-interest is allowed among the legitimate “arguments and reasons.” See also Dryzek (2001, pp. 660–63).

on contestation. Conflict in opinion was the very stuff of politics for Jürgen Habermas, Hannah Arendt, Sheldon Wolin, Benjamin Barber, and many others. It is not conflict *per se* but the conflict of material self-interests that for these theorists contaminated the “political.” I have argued that such an understanding of the political, of legitimate democracy, and of deliberation undermines one major goal of democracy itself, which is to produce well-reasoned and fair decisions in conditions that reflect as closely as possible the equality and freedom of each individual.

References

- Arendt, H. [1963] (1965), *On Revolution* (New York: Viking).
- Aristotle [c. 347–322 BCE] (1988), *The Politics*, trans. Jowett/Barnes (Cambridge: Cambridge University Press).
- Arnold, M. [1869] (1957), *Culture and Anarchy*, J.D. Wilson (ed.) (Cambridge: Cambridge University Press).
- Bachrach, P. (1974), ‘Interest, Participation and Democratic Theory’, in J.R. Pennock and J.W. Chapman (eds), *Participation in Politics, Nomos XVI* (New York: Lieber-Atherton), pp. 39–55.
- Barber, B.R. (1984), *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press).
- Barry, B. (1965), *Political Argument* (London: Routledge and Kegan Paul).
- Barry, B. [1979] (1991), ‘Is Democracy Special?’, in B. Barry (ed.), *Democracy and Power* (Oxford: Oxford University Press), pp. 24–60.
- Benhabib, S. (1996), ‘Toward a Deliberative Model of Democratic Legitimacy’, in S. Benhabib (ed.), *Democracy and Difference* (Princeton, NJ: Princeton University Press), pp. 67–94.
- Bohman, J. (1998), ‘Survey Article: The Coming of Age of Deliberative Democracy’, *Journal of Political Philosophy*, 6(4), pp. 400–25.
- Breed, W. and Seaman, S.M. (1971), ‘Indirect Democracy and Social Process in Periclean Athens’, *Social Science Quarterly*, 52, pp. 631–45.
- Chambers, S. (1996), *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Ithaca, NY: Cornell University Press).
- Chambers, S. (2003), ‘Deliberative Democratic Theory’, *Annual Review of Political Science*, 6, pp. 307–26.
- Cohen, J. (1989), ‘Deliberation and Democratic Legitimacy’, in A. Hamlin and P. Pettit (eds), *The Good Polity* (Oxford: Blackwell), pp. 17–34.
- Cohen, J. and Rogers, J. (2003), ‘Power and Reason’, in A. Fung and E.O. Wright (eds), *Deepening Democracy: Experiments in Empowered Participatory Governance* (London: Verso Press), pp. 237–55.
- Connor, W.R. (1971), *The New Politicians of Fifth Century Athens* (Princeton, NJ: Princeton University Press).
- Coser, L. (1956), *The Functions of Social Conflict* (New York: Free Press).
- Dahl, R.A. (1989), *Democracy and Its Critics* (New York: Yale University Press).
- Dover, K. (1974), *Greek Popular Morality in the Time of Plato and Aristotle* (Berkeley: University of California Press).

- Dryzek, J.S. (2001), 'Legitimacy and Economy in Deliberative Democracy', *Political Theory*, 29(5), pp. 651–69.
- Elster, J. (1986), 'The Market and the Forum: Three Varieties of Political Theory', in J. Elster and A. Hylland (eds), *Foundations of Social Choice Theory* (Cambridge: Cambridge University Press), pp. 103–32.
- Elster, J. (1998), 'Deliberation and Constitution Making', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 97–122.
- Fisher, R. and Ury, W. [1981] (1983), *Getting to Yes* (New York: Penguin).
- Follett, M.P. [1925] (1942), 'Constructive Conflict', in H.C. Metcalf and L. Urwick (eds), *Dynamic Administration: The Collected Papers of Mary Parker Follett* (New York: Harper), pp. 30–49.
- Forçade, E. (1853), *Études historiques* (Paris: Michel Levy).
- Forester, J. (1999), *The Deliberative Practitioner: Encouraging Participatory Processes* (Cambridge, MA: MIT Press).
- Fraser, N. [1992] (1997), 'Rethinking the Public Sphere', in N. Fraser, *Justice Interruptus* (New York: Routledge), pp. 69–98.
- Fung, A. (2003), 'Recipes for Public Spheres', *Journal of Political Philosophy*, 11(3), pp. 338–67.
- Fung, A. and Wright, E.O. (2003), 'Thinking about Empowered Participatory Governance', in A. Fung and E.O. Wright (eds), *Deepening Democracy* (London: Verso), pp. 3–42.
- Galinsky, A.D., Maddux, W.W. and Ku, G. (2005), 'Why It Pays to Get inside the Head (But not the Heart) of your Opponent: The Differential Effects of Perspective-taking and Empathy in Strategic Interaction', unpublished manuscript.
- Groch, S. (2001), 'Free Spaces: Creating Oppositional Consciousness in the Disability Rights Movement', in J. Mansbridge and A. Morris (eds), *Oppositional Consciousness. The Subjective Roots of Social Protest* (Chicago: The University of Chicago Press), pp. 65–98.
- Guinier, L. (1994), *The Tyranny of the Majority* (New York: Free Press).
- Gutmann, A. and Thompson, D. (1996), *Democracy and Disagreement* (Cambridge, MA: Harvard University Press).
- Habermas, J. [1962] (1989), *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. T. Burger (Cambridge, MA: MIT Press).
- Habermas, J. [1971] (1985), 'Hannah Arendt: On the Concept of Power', in J. Habermas, *Philosophical-Political Profiles*, trans. F.G. Lawrence (Cambridge, MA: MIT Press), pp. 173–90.
- Habermas, J. [1981] (1984), *The Theory of Communicative Action, vol. I: Reason and the Rationalization of Society*, trans. T. McCarthy (Boston: Beacon Press).
- Habermas, J. (1982), 'A Reply to my Critics', in J.B. Thompson and D. Held (eds), trans. T. McCarthy, *Habermas: Critical Debates* (Cambridge, MA: MIT Press), pp. 219–83.
- Habermas, J. [1992] (1996), *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press).
- Hall, C. (2005), 'Where is the Passion in Deliberative Democracy?', paper prepared for the annual meeting of the American Political Science Association, Washington, DC.
- Held, V. (1970), *The Public Interest and Individual Interests* (New York: Basic Books).
- Honig, B. (1993), *Political Theory and the Displacement of Politics* (Ithaca, NY: Cornell University Press).
- Karpowitz, C.F. and Mansbridge, J. (2005), 'Disagreement and Consensus', *Journal of Public Deliberation*, 1(1), pp. 348–64.

- Kendall, W. (1941), *John Locke and the Doctrine of Majority-rule* (Urbana: The University of Illinois Press).
- Kennedy, E. (1988), 'Introduction: Carl Schmitt's *Parlamentarismus* in Its Historical Context', in C. Schmitt, *The Crisis of Parliamentary Democracy*, E. Kennedy (ed.) (Cambridge, MA: MIT Press), pp. xiii-1.
- Lamartine, A. (1831), *Sur la politique rationnelle* (Paris: C. Gosselin).
- Lamartine, A. [1848] (1850), *Le Passé, le Présent, L'Avenir de la République* (Bruxelles: Société Typographique Belge).
- Lijphart, A. (1977), *Democracy in Plural Societies* (New Haven, CT: Yale University Press).
- Lijphart, A. (1999), *Patterns of Democracy* (New Haven, CT: Yale University Press).
- Locke, J. [1689] (1960), *Two Treatises of Government*, P. Laslett (ed.) (Cambridge: Cambridge University Press).
- Manin, B. (1987), 'On Legitimacy and Political Deliberation', *Political Theory*, 15(3), pp. 338-68.
- Mansbridge, J. (1980), *Beyond Adversary Democracy* (New York: Basic Books).
- Mansbridge, J. (1994), 'Using Power/Fighting Power', *Constellations*, 1(1), pp. 53-73.
- Mansbridge, J. (1996), 'Using Power/Fighting Power: The Polity', in S. Benhabib (ed.), *Democracy and Difference* (Princeton, NJ: Princeton University Press), pp. 46-66.
- Mansbridge, J. (1998), 'On the Contested Nature of the Public Good', in W.W. Powell and E.S. Clemens (eds), *Private Action and the Public Good* (New Haven, CT: Yale University Press), pp. 3-19.
- Mansbridge, J. (2001), 'A "Moral Core" Solution to the Prisoners' Dilemma', in J.W. Scott and D. Keates (eds), *Schools of Thought: Twenty-five Years of Interpretive Social Science* (Princeton, NJ: Princeton University Press), pp. 330-47.
- Mansbridge, J. (2005), 'Cracking Through Hegemonic Ideology: The Logic of Formal Justice', *Social Justice Research*, 18, pp. 335-47.
- Mansbridge, J., Hartz-Karp, J., Amengual, M. and Gastil, J. (2006), 'Norms of Deliberation: An Inductive Study', *The Journal of Public Deliberation*, 2(7), pp. 1-47 (<http://services.bepress.com/jpd/vol2/iss1/art7>).
- Marcus, G.E. (2002), *The Sentimental Citizen* (University Park: Pennsylvania State University Press).
- Marcus, G.E., Neuman, W.R. and MacKuen, M. (2000), *Affective Intelligence and Political Judgment* (Chicago: University of Chicago Press).
- Nussbaum, M.C. (1995), 'Emotions and Women's Capabilities', in M.C. Nussbaum and J. Glover (eds), *Women, Culture, and Development* (Oxford: Oxford University Press), pp. 360-96.
- Ober, J. (1989), *Mass and Elite in Democratic Athens* (Princeton, NJ: Princeton University Press).
- Pearson, L. (1962), *Popular Ethics in Ancient Greece* (Stanford, CA: Stanford University Press).
- Rorty, A.O. (1985), 'Varieties of Rationality, Varieties of Emotion', *Social Science Information*, 24, pp. 343-53.
- Sanders, L.M. (1997), 'Against Deliberation', *Political Theory*, 25, pp. 347-76.
- Schmitt, C. [1923] (1988a), *The Crisis of Parliamentary Democracy*, trans. E. Kennedy (Cambridge, MA: MIT Press).

- Schmitt, C. [1926] (1988b), 'On the Contradiction between Parliamentarism and Democracy', Preface to the Second Edition of *The Crisis of Parliamentary Democracy*, trans. E. Kennedy (Cambridge, MA: MIT Press), pp. 1–17.
- Schumpeter, J. (1922), 'Sozialistische Möglichkeiten von Heute', *Archiv für Sozialwissenschaft und Sozialpolitik*, 48, pp. 305–60.
- Steiner, J., Bächtiger, A., Spörndli, M. and Steenbergen, M.R. (2004), *Deliberative Politics in Action: Analyzing Parliamentary Discourse* (Cambridge: Cambridge University Press).
- Woodhouse, A.S.P. (ed.) (1951), *Puritanism and Liberty: Being the Army Debates (1647–49) from the Clarke Manuscripts* (Chicago: University of Chicago Press).
- Young, I.M. (1996), 'Communication and the Other: Beyond Deliberative Democracy', in S. Benhabib (ed.), *Democracy and Difference* (Princeton, NJ: Princeton University Press), pp. 120–35.
- Young, I.M. (2000), *Inclusion and Democracy* (Oxford: Oxford University Press).

Chapter 7

Framing Public Deliberation and Democratic Legitimacy in the European Union

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Introduction

Public deliberation is so much at the heart of thinking on democratic politics and policy that democracy has been called a system of government by discussion (Majone, 1993). Political parties, the citizens, the legislature, the executive, the court, the media, interest groups and independent experts all engage in a continuous process of debate and reciprocal persuasion. Each stage of deliberation has its own organ and its own independent function. Public deliberation has, however, been carefully institutionalized in modern (parliamentary) democracies. The fundamental idea of democratic legitimacy is that political power is ultimately the power of the public, namely the power of free and equal citizens as a collective body (Rawls, 1993, pp. 136, 217). From a normative perspective it follows that the citizens must be regarded not only as the addressees but also as the authors of the laws that constitute their polity (Gerstenberg, 1997, p. 344).

In recent years, democratic theorists, from different traditions, have re-introduced, as it were, a rather idealized notion of “deliberation” into the homeland of democracy. The label “deliberative” has been applied to everything from representative parliaments to consultative fora of various kinds to more radical notions of democracy in the public sphere (Parkinson, 2003). Deliberative democracy does not preclude voting or bargaining but it places the emphasis on obtaining a shared sense of meaning and a common will, both of which are the product of a communicative process of arguing and counter-arguing (Eriksen and Fossum, 2000, p. 18). In such a perspective, democratic legitimacy does not stem from the aggregation of the preferences of all, but from “the deliberation of all” (Manin, 1987, p. 357). The label “deliberative” is applied not only at various levels within the territorial state but also to a broad range of decision-making and rule-making processes that decenter and even suspend the institutional and normative assumptions of the modern state (Bohman, 2004 and Besson, 2006 in this book).

An argument can be made that the European Union (EU) has been deliberately constructed as a polity to provide an *alternative* to popular (parliamentary)

democracy (Mair, 2005). In these circumstances, scholars of European integration, political scientists, political theorists and lawyers, have already for some years now stressed that certain processes or regimes can be understood within a framework of a more deliberative approach to democracy in addition to the normal (problematic) functioning of representative democracy at that level. Theorists of deliberative democracy and more cosmopolitan models of democracy have, it seems, "discovered" the EU as a rather successful example (at least when compared to looser forms of transnational cooperation) of the institutionalization of sites of "public deliberation" at the transnational or post-national scale.

The terms "public" and "deliberation" are, however, rather loosely used when applied to the EU. The main emphasis and empirical work has taken place with regard to the quality of the deliberation that takes place, although it must be said that no very rigid measurements have been applied to the various practices under examination. Moreover, the sites of "deliberation" in the EU vary from the polity level as such to more specific types of "regimes." Thus, the "deliberation" inherent in the constitution-making processes of the two Conventions of recent years has been explored and analyzed in some depth (Closa and Fossum, 2004 and Fossum and Menendez, 2005). In addition, specific "new" methods of governance such as that practiced (already for some years) by the social partners and the so-called "open method of coordination" as applied in various policy sectors have been analyzed from the perspective of injecting more "deliberation" by a wide spectrum of stakeholders into the governance processes (De la Porte and Nanz, 2004 and Armstrong, 2006).

At the same time, in more institutional terms, comitology committees have been presented as models of what has been termed "deliberative supranationalism" due to the fact that various scientific experts deliberate rather than negotiate with one another during rule-making across a wide spectrum of issue areas (Joerges, 2002 and Eriksen, 1999). In terms of more general institutions as such, some discussion has taken place on the deliberative role of the European Parliament as a representative parliament, as well as in the "Economic and Social Society" which has been busy re-inventing itself as the natural forum for civil society actors and more participatory democracy. The European Commission with its White paper on Governance, launched, in 2001, a debate on ways to make essentially its own role in the decision-making processes (both legislative and executive) both more open and more inclusive, with various implications in terms of a more reflexive approach to policy-making and implementation (European Commission, 2001). Indeed several measures that it has since adopted are putatively geared towards introducing more public deliberation into its processes. The problem in this respect is that the vision underlying the Commission's approach is fundamentally technocratic or bureaucratic (Eriksen, 2001) that would seem to be just about as far removed from the "ideal speech" situation at the heart of theories of deliberative democracy that one can imagine. In other words, before being too complimentary about the newer thinking evidenced in policy-making and practice of decision-taking in the EU, there is a need to examine to what extent

the ideal speech situation is being respected. Moreover, does the deliberation in question genuinely take place in a “public” space? And what is the relationship with increasing the (social) legitimacy of the EU?

The structure of this chapter is as follows. First, I differentiate the types of legitimacy that are used as part of the democratic discourse especially in the EU debate, before exploring the manner the term “deliberation” has been defined and used (Section 1). In section 2, I explore how the terms “public,” “publicity” and “transparency” are used and analyze the different stages in the evolution of the discourse on “transparency” in the EU. Finally, I summarize my findings and draw some conclusions.

1 Framing Deliberative Democracy

Differentiating Types of (Democratic) Legitimacy

Democracy can be conceived not only as a principle of the organization of political life (namely representative or parliamentary democracy etc.), but also, rather more abstractly, as a legitimation principle that ensures the conditions necessary for justification. In other words, democracy is not necessarily consonant with a particular organizational form but rather a principle that sets down the conditions that are necessary for how to get things right in politics. Within contemporary debates on democracy, legitimacy is more often invoked than described and it is more often described than defined. Legitimacy can, in very general terms, be said to represent an umbrella evaluation that, to some extent, transcends specific adverse acts or occurrences; thus, legitimacy is resilient to particular events, yet it is dependent on a history of events (Suchman, 1995, p. 574). Over the years, social scientists have offered a number of definitions of legitimacy, with varying degrees of specificity. At its most abstract level, legitimacy can be considered as the moral ground for obedience to power. It is only when decisions or regimes are legitimate in this way that those who refuse to accept them should be coerced into following them, on the grounds that their refusal is illegitimate.

Social legitimacy One more specific type of legitimacy with moral overtones is what is often referred to as social legitimacy (to distinguish it from a purely formal or legal legitimacy). Social legitimacy refers to the affective loyalty of those who are bound by it, on the basis of deep common interest and/or a strong sense of shared identity. The only communities who fulfill these conditions are nation-states. However democratically legitimate the Member States may be in their own jurisdictions, a sense of social legitimacy will not be created simply by the attribution of rule-making competences to common institutions – although the welfare gains through integration, which should be made possible by the creation of those institutions can be expected to facilitate it. It is precisely with regard to social legitimacy that the EU has a long-standing problem (Weiler, 1991).

In contemporary debates it is often emphasized how alienated many EU citizens feel from the Union's work. In the Commission's opinion:

Member States do not communicate well about what the Union is doing and what they are doing in the Union. Many people do not know the difference between the Institutions. They do not understand who takes the decisions that affect them and do not feel the Institutions act as an effective channel for their views and concerns. (European Commission, 2001, p. 7)

Opening the doors could eliminate some of the alienation citizens experience today. Moreover, communication could play a vital part in bringing the Union and its citizens closer together (European Commission, 1995, p. 9). Improved access to information is thus seen as a means of bringing the public closer to the EU and as a way of stimulating a more informed and involved debate on EU policy. The Commission indeed seems to assume that if the public has greater access to more relevant and more attractively presented information about the EU and its policies, disaffection, skepticism and hostility will decline (Lodge, 1994, pp. 350, 359). Social legitimacy will usually have to be created over time simply by the practice and habit of doing things together, and there is only so much that can be done to accelerate this process by symbol-building campaigns and communication strategies.

Output legitimacy Another way of looking at the legitimacy challenge is through the lens of input legitimacy versus output legitimacy. This is a common way of analyzing democratic legitimacy in the EU. Output legitimacy means that people agree that a particular structure should exist, and even participate in rule-making, because of the benefits it brings. Social acceptance is thus instrumental and conditional, as well as independent of an affective relation. On the whole, the legitimacy of the EU and its decisions has tended to be focused on the output side of the equation (see, in particular, Majone, 1996; Scharpf, 1999) rather than on the input side. The same thinking can be said to dominate in the White Paper on Governance. Basically, the idea of the Commission is that the effectiveness and efficiency of the EU will be enhanced through wider consultation and dialogue with citizens or their organizations in policy-making.

The literature about lobbying in Brussels speaks about the relation between the participation of lobby groups in all stages of policy-making and effectiveness (acceptance of the policy outcomes) and it is conceivable that this is also the case with citizens and other stakeholders (Bignami, 1999, p. 11; Kok et al., 2004, p. 33). If citizens perceive and acknowledge the increased effectiveness and efficiency, the output legitimacy of the EU would be strengthened as a result. The underlying premise is that, when citizens are directly consulted, the policy-makers receive information about the different interests and wishes of those citizens who will be affected by the policy measure(s) in question. When they take into account these interests and wishes, the chances are that their policy's effectiveness will be

enhanced since it will not fail in its objectives or suffer from poor implementation in practice (Pressman and Wildavsky, 1973).

The consultation of citizens and interest groups does, however, not always have positive consequences for the efficiency of the process. When the different institutions of the European Union have to consult as many citizens as possible and when they are obliged to give all citizens the possibility to participate in the process, this can lead to enormous delays in the process of decision-taking (Mazey and Richardson, 1993, p. 34). It is also possible that different interest groups and citizens make use of different styles of participation and lobbying and it costs a lot of time and money for the institutions of the European Union to work with all these different styles (Wallace and Young, 1997, p. 51). According to Stone, efficient organizations are ones that get things done with a minimum of waste, duplication and expenditure of resources (Stone, 1988, p. 61). For politicians or policy-makers it is efficient to consult only experts and use their knowledge to make policy. It is quite inefficient to let citizens and interest groups participate in the policy-making process because it takes a lot of time to realize this. Too much emphasis on participation can thus lead to sub-optimal and inefficient decisions instead of improved performance. When citizens perceive the EU, as they often seem to, as an inefficient policy-maker the result of increased opportunities for participation may result in a decline of output legitimacy.

Input legitimacy Input legitimacy means that social acceptance of the structure in question derives from a belief that citizens have a fair chance (however understood) to influence decision-making and scrutinize the results. The ability to influence and hold accountable can be realized either through forms of representation which are held to be legitimate, through direct participation and deliberation which is held to be meaningful, or some combination of the two. Input legitimacy is often considered as structurally very limited at the EU level due to the fact that citizens only directly participate during elections for the European Parliament. The problem is that such elections are considered on the whole as "second-rate" elections with consistently low turnout among the citizens in the various Member States. It is further well recognized that even when citizens vote at the EP level they are generally voting on national issues and in relation to the national political arena. When the same citizens vote at national elections in their own countries there is of course only an indirect link between national elections and European policy-making carried out by autonomous actors (see generally, Mair, 2005).

Nonetheless there is a significant body of scholars (largely, but not exclusively from the disciplines of international relations and political science) who analyze the process of European integration (even in a political union) as being largely inter-governmental in its thrust and scope (Moravczik, 1998 and Maignette, 2005). They emphasize the fact that the constituent Member States are *indirectly legitimate* in the sense that it is made up of governments who are selected, scrutinized and can be dismissed by duly elected parliaments (Milward, 1992). It follows on this analysis that there is no need to develop at the European level

itself a parallel system of democracy. In their analysis the Council and the European Council are crucial institutions in steering the direction and content of the Union as a polity and even constitute a type of nascent government of the Union (Eijsbouts, 2005), but the ministers are indirectly accountable in the national system and this is sufficient. In addition, there are those who like Majone argue that the EU is at its core a regulatory polity engaged in policies of economic and social regulation rather than redistributive policies and thus demanding of a certain insulation of expert decision-making from overt political interference. Majone and his followers thus separate regulatory and redistributive policies in a way that the former requires little by way of direct democratic legitimation at the EU level while the latter's democratic legitimation is (indirectly) supplied through national structures. Not only is it less and less clear that the type of separation that Majone has in mind works well in the onward march towards political integration in recent years but it leads inexorably to the (rather whole-scale) depoliticization of European policy-making with various undesirable consequences (Mair, 2005).

Even those scholars who are more supranational in their orientation are in practice much less demanding in terms of the system of public accountability expected from the Council of Ministers (and European Council) as an institution, at least when compared to that of the Commission. The problem here is that it is simply much more difficult to come to grips with how the Council (and European Council) has developed as a matter of practice over the course of the past decade in particular. In order to get a richer view of the nature of the Council as it has evolved in practice one simply has to dig rather deep into various legal and institutional practices of the Council itself, especially in the newer policy areas of justice and home affairs and of foreign and defense policy (Curtin, 2004). Very often the scholars engaged in this kind of rather empirical work are not the same as those engaged in the more normative analyzes of the legitimacy and democratic content of various institutions at the EU level itself.

In recent years, a significant strand of thinking has developed (both in the literature and by policy-makers) that stresses that, if citizens were to participate in some form *directly* in the policy-making processes at the European level, this could form an important additional and direct manner of enhancing the overall input legitimacy of the European Union, alongside more traditional notions of output legitimacy relating to effective decisions. The aim should be that all members play a full role, institutions are open to contributions from outside players, and institutions have greater legitimacy in the eyes of those affected (Working Group 4B, 2001, p. 12; Working Group 5, 2001, pp. 3–4).

One step towards overcoming the legitimacy problem is the concept of "representation." Representation offers a way in which people who are not physically present in a deliberative forum may nonetheless feel that they have sufficient influence (Parkinson, 2003, p. 186). The political and academic debate on the emergence of European public space is less linked to the logic of a traditional understanding of legitimacy by the representation of citizens in parliament than

in a newer conceptualization of *direct* representation of citizens (Sarugger, 2005). In this context, civil society participation is considered under the angle of a (new) form of political representation. A specific sub-form of participatory democracy, associative democracy, assumes that organized civil society can at the same time be an instrument to improve the efficiency of policy-making and assure citizens' participation (Cohen et al., 1995; Schmalz-Bruns, 1995).

In the internal discussions and preparation of the Commission's White Paper on Governance it was emphasized that participation of *civil society* is important for the legitimacy of the policy (process)¹ (Armstrong, 2002; De Schutter, 2002). Considerable emphasis has indeed been put by several EU institutions on enabling the public to actively deliberate on issues before decisions are taken in a definitive form by those "representing" the people (Curtin, 2003). The range of such public "input" stretches from mere "consultation" to providing formal windows of active participation in the decision-taking process itself.

The issue of defining civil society for such purposes is not unproblematic. Habermas's rather fundamental approach to the idea of civil society is as "a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres" (Habermas, 1996, p. 337). In other words, civil society collects, organizes, thematizes and communicates public opinion to the formal structures of will-formation within the political system (Armstrong, 2002; Curtin, 2003). At the same time, civil society reflexively attends to its own needs, ensuring its capacity to continue undistorted processes of communication and opinion-formation (Habermas, 1996, p. 370). Almost at the other extreme is the rather corporatist stance taken by the Commission regarding the involvement of civil society organizations ("non-state and non-profit organizations other than political parties and socio-economic interest groups") (Amiya-Nakada, 2004). The Commission, in rediscovering civil society as a source of legitimation for EU policies, has taken a decidedly "top-down" approach that smacks of attempts to governmentalize and perhaps even "civilize" civil society (Armstrong, 2002; Curtin, 2003).

In terms of the constitutional embedding of more inclusive processes, however nascent, the EU made a start with the Constitutional Treaty. This includes a specific article (Article I-46) which spells out for the first time at the level of constituent texts that the Union institutions shall, *inter alia*, "maintain an open, transparent and regular dialogue with representative associations and civil society." Further, the Union institutions are to "give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action." Both these paragraphs suggest that the Union institutions themselves in a rather top-down fashion are under an obligation

¹ The preparation of the White Paper was organized in the form of six "working areas" and 12 working groups. The papers of the different working groups are published on the Internet at http://europa.eu.int/comm/governance/prepa_lb_en.htm.

(of sorts) to create and maintain “spaces” for “deliberation” by a wide range of interested actors at various stages of the decision-making process.

The relationship between opportunities for participation and the input legitimacy of the European Union is, however, far from straightforward. Although participation can generally be regarded as an important element of democratic policy-making, not many citizens will as a matter of practice participate in EU policy processes. It is in any event very hard for citizens to participate in policy-making and to influence this process (Fischer, 1990, p. 29). Lacking the depth of knowledge, skills and access needed to participate in the decision-making process, the vast majority of the public is cut off from a meaningful role in political activities. Most “normal citizens” live far away from Brussels and will not go there to participate in policy-making processes. Even when electronic venues are created, it does not seem realistic to expect a significant proportion of citizens to participate in policy-making. Participation tends in practice to be limited to a small group of experts from governments, private enterprise and social or civil society groups. If only a small minority of citizens participate in policy-making, is it really possible to speak about input legitimacy?

It has been argued that experts who are really interested in the problems and wishes of the people may participate in the process on their behalf. Joerges has in the context of the EU taken this argument quite far, arguing that (expert) committees constitute arenas for deliberative supranationalism in the sense that the experts deliberate on behalf of the public (Joerges, 2002). This type of democratic elitism means that citizens are not totally ignored in the policy process. Moreover, the assumption is often made that increasing the transparency of expert input will enhance public trust in policy-making. When citizens know *which experts* are consulted and *how* these consultations are used in policy-making processes, their confidence in policy-making may be strengthened. One could argue that, therefore, input legitimacy could be enhanced (and ultimately with beneficial effects for social legitimacy as well) since citizens would have a better chance to scrutinize policy-making thereby enhancing their social acceptance of policy-making structures.

Framing “Deliberation” as Ideal Speech?

Despite the enormous variety in the theoretical starting points and the various levels of governance at which deliberation may be applied in practice, a core set of propositions may be distinguished in order for deliberation to exist. These essentials are, first, the insistence on some form of inter-personal (epistemic) *reasoning* as the guiding political procedure, rather than bargaining between competing interests. Second, the idea that the essential political act – the giving, weighing, acceptance or rejection of reasons – is a *public* act as opposed to the purely private act of voting (Elster, 1998). Democratic deliberation should somehow embody the essential democratic principles of responsiveness to public wishes and the political equality of every member of that public.

In order to secure genuine deliberation such that “no force except that of the better argument is exercised” (Habermas, 1996), participants must meet a set of procedural conditions that minimally include communicative competence, reciprocity and inclusiveness (Cohen, 1989; Gutmann and Thompson, 1996) and a willingness to be persuaded, to have one’s pre-formed preferences transformed in the face of a better argument, and thus to set aside strategic concerns and behavior in the pursuit of these preferences (Dryzek, 2000). These procedural features can collectively be taken to refer to the ideal speech situation for this type of public talk. In the notion of an ideal speech situation all participants are freed of repressive mechanisms, social and pathological, that might distort appreciation of what others might say. In practice, this is a tall order. The risk is that deliberation in its ideal form will break down, with “speech-making replacing conversation and rhetorical appeals replacing reasoned arguments” (Goodin, 2000). There may well be little in mass public communication, including a great deal of media debate, large scale referendum processes or even public meetings which satisfies the procedural conditions of genuine deliberation and hence is deserving of the label “deliberative” (Parkinson, 2003).

Deliberative democracy is generally assumed to be an open system in the sense that those who are potentially affected have both the opportunity to judge what is relevant and what is not (as part of the publicity condition in deliberative theory) as well as the opportunity to affect the inclusion/exclusion rules (Parkinson, 2003, p. 190). Legitimacy depends on the people themselves deciding these issues rather than the bureaucrats. Of course, the problem is all one of scale: true deliberation will only ever be possible in a (very) small-scale forum. Those left outside the forum will tend to regard the decisions taken as illegitimate, while bringing in more than a few people will quickly turn the event into speech-making, not deliberation. This has particular relevance with regard to participation in the rule-making processes of European public administration and the manner in which various EU institutions have in particular developed and expanded their non-legislative (executive) tasks in recent years.

If one takes an overview of the literature on public deliberation in the EU then the institution most focused on is the Commission and its committees and even independent agencies. This is indeed the most prominent and long established strand of public administration we have in the EU. The Commission is traditionally regarded as the core central executive of the EU with a specific remit to initiate policy-making and to implement decisions once taken (in a wide variety of policy areas). As the Commission has grappled in the past years with its new role as an executive power in a changing governance context then it has quite naturally, alongside with public administrations the world over, come to focus on how it can be more reflexive, more inclusive and more deliberative in its approach to the broad remit of policy-making. In an effort to reach out to citizens and their organizations in particular, the Commission has tried to put some flesh on the bones of a new type of accountability as a supplement to more classical notions of political accountability and administrative accountability.

This is accountability towards citizens or society as a whole and it provides the rationale for a new approach towards relationships between public administration and citizens. In the words of the Commission itself:

This new form of direct accountability of public administration can never be aimed at replacing or sidelining the concept of political accountability. In fact, transparent and coherent consultation processes run by the Commission constitute a win-win option in this respect: they not only increase the acceptability of Commission proposals as far as the general public is concerned, they also enhance the possibility of scrutiny of the Commission's activities by the legislator. In other words, more transparent consultation processes will foster the Commission's political accountability rather than diluting it. (Working Group 2A, 2001, pp. 3–8)

The Commission in its White Paper recognized that:

What is needed is a reinforced culture of consultation and dialogue; a culture which is adopted by all European Institutions and which associates particularly the European Parliament in the consultative process, given its role in representing the citizen. The European Parliament should play a prominent role, for instance, by reinforcing its use of public hearings. [...] It should rather be underpinned by a code of conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access. These standards should improve the representativity of civil society organizations and structure their debate with the Institutions. (European Commission, 2001, pp. 14–17)²

The institutional and legal reality is that the Commission has in practice limited the concept of participation by civil society, as loosely defined, to the consultative pre-decision stage with the actual decision-taking limited to the legislature (the Council and the European Parliament). This is in contrast to the social dialogue and co-regulation processes in existence for some time prior to the Commission's White Paper and which can lead to actual decisions being taken by (mainly) the social partners. "Consultation" is conceived of as a two-way relation in which citizens provide feedback to government. It is based on the definition by government of the issue on which citizens' views are being sought and requires the provision of information. In other words, nascent deliberative practice in the EU is defined and controlled by the bureaucrats (mainly the Commission) who, in top-down fashion, decide both what is relevant, who participates and who does not and under what conditions. Under such circumstances it does seem that certain procedural requirements of reciprocity, inclusiveness and a genuine

² The Commission indeed subsequently adopted minimum standards for consultation in the form of a code of conduct (see European Commission, 2002). The Commission has also adopted general principles and minimum standards for consulting non-institutional interested parties on the major policy initiatives it proposes (European Commission, 2003, pp. 14–16).

willingness to be persuaded in the face of a better argument are not being even very thinly respected.

To conclude this section, the Commission in particular has framed its perception of introducing more public deliberation into its policy processes both in terms of output legitimacy and in terms of input legitimacy, with (considerably) more emphasis on the former rather than on the latter. Its take on output legitimacy includes using broader consultation processes largely to obtain information from those general stakeholders not included in the policy-making process as such. Moreover it places considerable emphasis on the need for (scientific) expert decision-making as part of the various governance processes. Input legitimacy in the sense of actual participation and deliberation by (non-expert) "publics" does not seem to be much within the visor of the Commission both in its White paper and its aftermath.

What in any event tends to get overlooked is the fact that the Commission is not the only strand of public administration in the EU. On the contrary, the Council, its committees and "its" independent agencies and organs constitute a parallel executive power at the level of the EU itself, but one that has developed very much in the shadow and more recently (since the early 1990s in a very significant and institutionalized fashion). Alongside the Council, and indeed hierarchically superior to it, is the European Council which too has steadily and incrementally expanded and consolidated its role in policy and decision-making processes, but likewise very much away from the spotlights of transparency and publicity.

Taking an overview of the debate at present it seems that the public part of the equation either gets overlooked or is under-theorized as a total given. Yet this is surely one of the most critical parts of the ideal speech scenario? After all, the sphere we call public is an area of public space. This is well reflected in the manner in which Habermas uses the word "Öffentlichkeit" in the sense of 'openness' or 'publicity' to represent the notion of public space. In this public space matters are *ipso facto* conducted 'in public'. "Publics indeed (only) form themselves around visible and audible focuses of attention (Hannay, 2005, p. 33). Has the fact that it is difficult to see a "public" as having formed around the OMC processes, not everything to do with the fact that the processes in question are more closed than "open" (in spite of the name)?

The public as audience is remarked upon by Habermas in his classic study, *The Structural Transformation of the Public Sphere*. In forming a public there is a distance to account for, namely the distance between the performer(s) or speaker(s) and the audience. This brings an important conceptual clarification, namely that if it is only a question of speakers/performers appreciating each other's performances, then arguably a requisite part of the public is missing, i.e. the audience. Only with publicity can discussions be conducted in front of an audience. As Elster (1998, p. 111) observes, the effect of publicity is "to replace the language of interest by the language of reason." If discussions are conducted in front of an audience, speakers not only have to try and persuade their opponents, they also have to show that they take impartial concerns seriously. Otherwise,

their proposals will easily be rejected as contradicting the collective well being (Neyer, 2003, p. 694).

Eriksen and Fossum (2000) have applied the distinction between general and strong publics in the specific institutional setting of the EU. Strong publics as institutionalized bodies of deliberation and decision-making only exist, and then to some extent, in the European Parliament. General publics refer to a more general sphere of opinion formation and it is difficult to be terribly precise on this in relation to decision-making at the EU level. Weak publics, on the other hand, by implication may well be what the EU currently has in certain sites of executive decision-making in particular because of the dominant behavior of certain categories of actors. Another way of distinguishing more specific "publics" is to look at the various types of actors involved, from parliamentarians, to bureaucrats, to experts, to civil society to citizens and beyond. In the White Paper on Governance, the Commission placed particular emphasis on two of these, experts and civil society organizations, as a means of increasing input legitimacy (European Commission, 2001).

One of the problems in the context of the EU is the fact that the European public space is disjointed and fragmented, leading to the risk that different speakers talk to different audiences (often disconnected national publics) and serve different, and even mutually exclusive normative expectations. As Neyer has put it: "The effect of publicity in European negotiations is ambivalent: on the one hand, it provides incentives for speakers to argue. On the other, it leads to a situation in which each delegate argues according to different normative standards and in which a noisy dialogue of the deaf is the most likely outcome" (Neyer, 2003, pp. 694–95).

2 Transparency and Publicity in the European Union

Transparency as the Dominant Discourse

The adjective "public" and the principle of publicity are often subsumed under the concept of "transparency" in the context of debates in the EU. *Brewers Politics* even defines the term "transparency" as "the catch word for the openness of the operations of the European Community to the public" (Safire, 1998, p. 4). The starting point of the discussion must therefore be "transparency" to see also in that context if any discussion has taken place on notions of the public or publicity. Like the term *legitimacy* in contemporary debates, transparency too is more often invoked than described and it is more often described than defined. It is, in fact, often referred to in such a loose fashion that at times it can seem to resemble a "garbage-can" of different concepts and principles (Bovens, 2004). Understanding the evolution of transparency as norms about (quasi-)voluntary disclosure of information by (political) actors involves issues of power and persuasion in an inherently political context. Although not always up-front, it

seems that transparency in the sense of (voluntary) disclosure of information by public actors is generally closely connected to social legitimacy. As we have seen above, the Commission in particular is prone to argue that transparency (and deliberation) will enhance public acceptance of institutional structures.

In the short time frame of its emergence as a fundamental guiding principle of the political system of the EU, transparency has been presented, as a type of holistic medicine designed to remedy many of the ailments the body of the EU is perceived to have. Thus, we are told, it will increase the legitimacy of the EU, increase the understanding of the citizens on what the EU is about, stimulate deliberation about policy-matters and enable participation by citizens and their representatives. Concepts such as public access to information, e-government, citizen participation, consultation of experts or citizens, the need for reasoned decisions, open decision-making processes, have all in their time been presented as crucial aspects of the concept of transparency. Some authors view transparency as limited to one or two of these issues (e.g., access to information and open meetings), others take a broader approach and view for example the right to be heard before a decision is taken (participation) as an important part of transparency. Most recently in the text of the Constitutional Treaty itself, the Preamble informs us of the symbolic value of transparency since “a reunited Europe intends to [...] deepen the democratic and transparent nature of its public life.”

The *Oxford Dictionary of English* defines “transparent” as an adjective used to connote the process of “allowing light to pass through so that bodies can be distinctly seen.” The result of the light shining through is that the composition of the space in question can be seen and understood. The term “transparency” is quite simply then the condition of being transparent. The origins of the term from Latin *transparere* suggest something appearing as a result of – light presumably – shining through. The result of the light shining through is that the composition of the space in question can be seen and understood. In the context of political systems and organizations, the further leap to subjecting the system or organization to public scrutiny is made already in the *Oxford Dictionary of English*. So there are actually several components suggested. First, light must shine through; second, the space in question will then be more or less fully visible; third, this physical result will facilitate both greater intellectual understanding and greater scrutiny on the part of the observers (the public).

One of the fundamental assumptions underlying a more deliberative and more participatory understanding of democracy (one that has now even been enshrined in the text of the Constitutional Treaty itself) is that the requisite information is easily and publicly accessible, the issue of transparency can be considered an essential part of its operating system. Without transparency and readily available information on “visible” actors and policies, no proper deliberation and participation is feasible. How then has this principle of publicity or transparency developed in the EU over the years? Has it reached the point where we can speak of a very comprehensive and horizontal principle that stretches right across the

public space around which specific or general publics will form? In order to be able to arrive at a proper assessment of the state of the art in this regard, I will first give an overview of the two periods that can be discerned in the evolution of thinking and practice on transparency within the context of the EU.

The Debate on Transparency in the EU

The first period The focus in the first time period (more or less the 1990s) was very much on gradually constructing a right of access by the public to certain categories of documents held by the three main decision-making institutions of the EU, namely the Council of Ministers, the Commission and the European Parliament. This “rights-based” approach built on existing – rather technical – legal case law on the right to be heard, the right to have reasoned decisions and to have access to a file (see Ragnemalm, 1999; Vesterdorf, 1999; Bradley, 1999). This approach was based on the specific responsibilities of the three main decision-making institutions (Commission, Council and European Parliament) and indeed the legal obligations were limited in formal terms to these institutions. The obligations on the institutions to make available “on request” by individuals documents of a certain nature were laid down in increasingly “hard” legal instruments as interpreted by the European courts and applied by the institutions in question. The rights of the “public” were counter-balanced by a system that recognized that the institutions could refuse access to their documents for a number of reasons, including most controversially the right to refuse access where this would be contrary to their institutional interest in the “confidentiality of their own proceedings.”

In this first period the European courts played a crucial role. They effectively built in a short period of time a body of case-law which on the whole kept pressure on the institutions to behave fairly and to devise adequate systems of scrutiny. They tended to interpret rather generously the scope of the legal provisions so that, for example, specific institutional arrangements did not operate to reduce the reach of the access provisions. Thus, in the very first case to reach the European courts, the *Guardian* journalist, John Carvel, successfully challenged the Council’s refusal to grant him the agendas and minutes of various Council meetings including those relating to the new and sensitive area of justice and home affairs policy-making.³ Later the Swedish Union of Journalists challenged the refusal of the Council to reveal documents relating to the establishment of Europol, using the more generous Swedish Freedom of Information Law to highlight the unnecessary degree of secrecy that prevailed at the European level.

The technique of legal interpretation used by the Courts during this foundational period involved a type of teleological reasoning which placed the Code of Conduct adopted by the three decision-making institutions in the

³ TFI Case T-194/94 *Carvel and Guardian Newspapers v. Council* [1995] ECR II-2765.

context of its broader democratic purpose. The Courts tended to emphasize the underlying purpose of access to information, namely to provide the “public,” the “citizens” with a means of controlling abuse of power and corruption as well as on general notions of public control of the activities of public institutions. Thus, the courts developed what can be termed a constitutional perspective on access to information provisions *avant la lettre*. Only later were these “rights” given an explicitly constitutional foundation, first in the Charter of Fundamental rights and later in the Constitutional Treaty.

This tendency was also underpinned by the complementary work of the Ombudsman who too adopted what might be called a rather legal approach in his work, although his emphasis was on more structural aspects of the manner in which certain institutions (mainly the Council and the Commission) made information available or not. Thus, the first Ombudsman tended to focus on putting flesh on what he termed “good administrative behavior” in a manner that was highly complementary to the more formal judicial interpretation of the courts (Magnette, 2003). Indeed, it can be said that the work of the Ombudsman helped to move the understanding of transparency in the EU context away from a more individual and passive focus on the legal right of every citizen to have access to certain documents to a much broader and pro-active duty of the EU administration to ensure that information about its policies and actions is taken in a genuinely accessible fashion. In other words, the work of the Ombudsman in this period facilitated the process of creating visible public spaces around which publics could form.

This legal phase culminated with the adoption of a new and binding legal instrument, Regulation 1049/2001 which entered into force on 3 December 2001.⁴ This Regulation was meant to introduce more transparency into the work of EU institutions. In several respects it clearly did. The extension of the rules to documents authored by third parties constitutes a significant increase in transparency in principle, although there are potentially significant restrictions placed upon it. But in many respects too the new Regulation was considered disappointing by many commentators (see Peers, 2002; De Leeuw, 2003). Quite apart from the provisions in the new Regulation that set a lower standard than the prior rules, the EU institutions arguably spent their greatest political capital defending their existing practices, and therefore missed the opportunity to examine whether those practices should be reconsidered. In particular, the Regulation does not expressly reduce the extent to which the Council can keep a large number of documents secret during the legislative procedure on the grounds that they reveal Member States’ positions, or the Commission’s ability to insist upon the secrecy of all documents relating to infringement proceedings even after the close of those proceedings. While it is possible that the case law interpreting the new Regulation will ultimately chip away at these practices, the Regulation obliges advocates of greater openness and transparency to fight for such an interpretation

⁴ OJ L 2001 145/43 (31 May 2001).

through the Ombudsman and the Courts, rather than entrenching those changes at the outset.

In conclusion, the legal-constitutional approach can, some ten odd years after its commencement, be considered solidly anchored in legal texts, including, at the most fundamental level, the Constitutional Treaty. The provisions on public access to documents clearly have caused changes by giving citizens a tool to obtain the documents they wish to obtain, albeit with a considerable and significant time-lag. It was only the implementation in practice of the obligation to make available and maintain a register of documents on each of the three main (legislative) decision-making institutions that has, however, enabled the "public" to know what sort of documents they might want to have access to. At the same time, the availability of such registers makes absolutely clear the sheer complexity of the institutional configuration of the EU decision-taking arena and the impossibility for the layman or woman to follow it. As a result, those who use the access provisions have indeed tended to be professionals with some of the required expertise (journalists, lawyers, academics) and the legal arena of rights and principles has only to a very limited extent empowered the "public" in any meaningful sense.⁵ For this reason, one commentator has recently dismissed the exercise of the formal legal right of access to information as insignificant and almost anecdotal in the first ten years of its life (Cotino, 2005). But one can, however, argue that those early challengers seeking to go through the EU Looking Glass were given the tools to enable them to peer into previously dark rooms and to force the institutions to justify their behavior and more often than not modify their behavior in a rather structural fashion.

The second period The best way of understanding the legal contribution to the transparency discourse is arguably that it has made (certain of) the institutions more aware of how they themselves can pro-actively make their own information available to a broader public using the medium of information and communication technologies. The second phase in the debate on "transparency" has thus come from the institutions themselves albeit prompted and at times pushed by certain applicants (active members of the general public) seeking to push back the frontiers of openness. The manner in which the Commission in particular has devised new databases, which makes available on the Internet previously confidential information such as, for example, who actually sits on committees, how many there are, when their meetings take place, the agendas of meetings etc. is a measure of how much more "open" the interstices of decision-taking within the EU have become, compared with earlier years. Steps have been taken to make more transparent the workings of the many advisory groups currently contributing

⁵ See, for example, the information contained in the Report from the Commission on the review of the operation of the regulation: COM (2004) 45 from January 2004 and the Council Annual Report on access to documents, 2003, <http://ue.eu.int/uedocs/cmsUpload/RapAnCons.en03.pdf>.

to the Commission's policy-making (for example: both the composition of the groups and the advice they deliver are made publicly available on the Internet).⁶ The Council has, however, been less forthcoming in ordering its information in a user-friendly fashion, perhaps because it has more difficulty in being terribly up-front about the scope of its expanded executive-type tasks in recent years (see further, Curtin, 2004).

It has, however, often been via a process of pushing and pulling by certain more active members/organizations of civil society that the institutions have made available whole categories of information in the public domain thus potentially increasing the visibility of the space in question. Thus, *Statewatch*, a British civil liberties organization during the late 1990s mounted a concerted strategy of challenging practices of the Council, in particular before the Ombudsman on the manner in which they made their information available to the public. The result is that the Council today maintains an extensive and on the whole accessible Register of its documents on the Internet. For those with the expertise, time and courage to wade through the masses of documents placed on the Internet it is possible to engage in a process of some scrutiny and deliberation on the multifarious activities of the Council in its diverse configurations. Another more recent example of the same phenomenon is provided by the skeptic Danish MEP Jens Peter Bonde who over a period of several years kept pressure on the Commission to produce a complete list of all its working groups, which it finally did in 2004. Thus, a revised list of some 1684 working groups active in 2004 has recently been made available to the public via Internet.⁷

In this second and more overtly political phase of the development of transparency in the EU, transparency is perceived not only as a goal in itself but also as a tool for a more democratic way of working and reaching decisions. The Commission has unquestionably taken the lead, in particular in its White Paper on Governance, in presenting the goal of greater openness as a means of achieving more democracy. The Commission's White Paper on Governance also suggests that more transparency will lead to a better involvement in the processes of EU policy-making. The Commission also makes the link with increasing the citizens' sense of belonging in Europe: "Democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and be able to scrutinize the policy process in various stages." The Commission maintains that "providing more information and more effective communication are a pre-condition for generating a sense of belonging to Europe" (European Commission, 2001, p. 11). This is basically an argument that transparency will enhance public acceptance of the institutional structures of the EU. The Commission's White Paper on Governance also suggests

⁶ See for a list of all the consultative bodies: http://europa.eu.int/comm/civil_society/coneecs.

⁷ See further, http://www.europa.eu.int/comm/secretariat_general/docs/expert_groups_final.doc.

that more transparency will lead to a better involvement in the processes of EU policy-making.

The second period bis: consultation and transparency mechanisms As it happens, the Commission has for some time now developed various general and specific (legal) obligations to consult widely before proposing legislation and, wherever appropriate, publish consultation documents (for example in the protocol on the application of the principles of subsidiarity and proportionality and also in the context of the social dialogue). Consultation helps reconcile the views and concerns of different actors throughout the policy-cycle (i.e. in policy-shaping, implementation and evaluation), thereby obtaining wide support and social acceptance for decisions. Consultation is therefore seen as an important means to improve the effectiveness and efficiency of the Commission's activities (Working Group 2A, 2001, p. 7). Indeed, consultation is seen as the Commission's "day-to-day business." For many years whether a consultation procedure was carried out in a meaningful manner or not was almost entirely dependent on the capacity of individual Commission departments. It has only been in recent years that the Commission has attempted to reflect and make operational the guarantees needed for a stable framework in this respect. Policy development related to consultation processes has ideally built upon the experience from the social dialogue and has aimed to create synergies between the European social dialogue and wider civil society consultation mechanisms. The idea is that a more coherent and transparent approach applied by the Commission would encourage the other European institutions to review their own practices relating to consultation processes (Working Group 2A, 2001, pp. 16, 20).

At the same time, some emphasis has been placed in the EU on the need for the input into policy-making itself to be transparent. As the Commission has put it: "It must be clear what issues are being developed, what mechanisms are being used to consult, who is being consulted and why and what has influenced decisions in the formulation of policy. Openness and accountability are important principles for the conduct of organizations when they are seeking to contribute to EU policy development. It must be apparent which interests they represent and how inclusive that representation is. The Commission encourages interest groups to establish their own mechanisms for monitoring the process, so that they can see what they can learn from it and check that they are making an effective contribution to a transparent, open and accountable system" (European Commission, 2002, pp. 3, 17–18).

Why is it important for citizens to see which experts participate in policy-making and how they influence the process? First of all, it is important for citizens to check the independence of experts. According to Peters and Barker (1993, p. 189), it is essential that experts are independent of the governmental process. An ideal situation is when the experts are independent and their advice is entirely based on their expert knowledge and not on their personal interests. Advice as part of the decision-making procedure should only be given by bodies with established

competence and who are independent when forming their opinion (Joerges and Vos, 1999, p. 333). It is interesting that experts often present themselves as independent (Fischer, 1990, p. 160). Through transparency mechanisms it is possible for citizens to check the backgrounds, opinions, interests and way of working of experts and when they do this, they can conclude for themselves if an expert is independent or not. To control their independence, citizens are dependent on the public nature of the information in question (Welch and Wong, 2001, pp. 509–38).

Concluding Remarks

This chapter has sought to focus on the “public” nature of deliberation that takes place in the institutional context of the European Union and in this manner seeks to make a modest and focused contribution in the wider context of a debate on deliberative democracy. In so doing it has examined the relationship between the different types of democratic legitimacy that exist in current debates on the European Union before moving to explore the manner in which the adjective “public” and the principle of publicity have been subsumed under the concept of “transparency” in the context of the debates in the EU. As a term of art, transparency could well win the prize for most increased usage of any word in English in the past decade (Safire, 1998, p. 4). It very often seems to be used as a “catchword,” a convenient piece of political rhetoric, without its many users taking the trouble to define it with any precision. Generally, the term transparency is referred to in such a loose fashion that it can seem to resemble a “garbage-can” of different concepts and principles. The EU is certainly no exception when it comes to the loose fashion in which various actors have bandied about the term over a decade now. In fact the lack of rigor in the use of the term transparency in the EU context is only matched by the vigor with which actors of all shapes, sizes and political leanings rush to support it. Thus, the aim of achieving more transparency in the functioning of public EU institutions is lauded by the European institutions themselves, the politicians and bureaucrats, the members of parliament, the judiciary and (organized) civil society.

In the short time frame of its emergence as a fundamental guiding principle of the political system of the EU, transparency has been presented as a type of holistic medicine designed to remedy many of the ailments the EU polity is perceived to have. Thus, we are told, it will increase the legitimacy of the EU, increase the understanding of the citizens on what the EU is about, stimulate deliberation about policy-matters and enable participation by citizens and their representatives. Concepts such as public access to information, e-government, citizen participation, consultation of experts or citizens, the need to have reasoned decisions, open decision-making processes, have all in their time been presented as crucial aspects of the concept of transparency. Most recently, in the text of the Constitutional Treaty itself, the Preamble informs us of the symbolic value

of transparency since, I quote, “a reunited Europe intends to [...] deepen the democratic and transparent nature of its public life.”

Is transparency as a concept indeed to be understood in fundamental terms, prompting a gradual and incremental change in the levels and expectations of transparency compared even to some years ago? Or must we rather more skeptically ask ourselves if we are not witnessing the canonization of the myth of transparency at the level of the EU in particular? For example, the European Commission (European Commission, 2001, p. 11) argues that increased transparency will facilitate the process of strengthening public confidence in the EU, thereby enhancing in the long run its social legitimacy. The problem, however, with this assumption is that transparency may not deliver the expected results and may even have negative overall effects on social legitimacy. Many citizens show no interest in receiving more information on the EU. If one looks at the figures on who is seeking access to documents in the EU then it has been calculated that if the access request numbers are used in relation to the population of the EU then one in 33,000 citizens has exercised that right to date, which has led one commentator to describe the exercise of formal access to documents as “practically anecdotal” (Cotino, 2005). Increasing transparency of processes and results is therefore not going to necessarily increase the perception of the social legitimacy of the EU of those who never seek information. At the same time, ever greater transparency may in itself result in negative effects on social legitimacy if exploited by the media and those wishing to damage the reputation of the EU. Citizens may not want to belong to a polity when they hear only about all the mistakes and fraud and incompetence that go on in “Brussels.” In certain cases, transparency will not strengthen the effectiveness and legitimacy of the EU but rather weaken it.

What the European Union needs at this stage of its development is a much more sophisticated view of the relationship between transparency and legitimacy. Transparency is not a panacea for legitimacy; rather, the most important consequence of a transparent policy-making process is that citizens have the possibility to access and to control this process. To access and to control the different steps in the policy-making process and the way different actors act, transparency is a necessary condition and a first step. This is not to argue that secrecy (non-transparency) cannot be defended as leading to what has been called at times more “publicizable” outcomes (Chambers, 2004, p. 389). Theorists of deliberative democracy indeed often talk about the “glare” of publicity or “shielding” deliberators and deliberation from the public in the interest of the quality of the discourse.

In the context of the EU, the balance between “public” reason and public “reason” is in any event still skewed in favor of the latter. Not only do we have the context of very fragmented public sphere(s) at the EU level of governance, but we have speaker/audience asymmetries that are quite acute at this level too. Only with publicity can discussions be conducted in front of an audience. One of the problems can be said to be that much of the closed door bargaining that

takes place in the EU (by the Council of Ministers and the European Council and their support civil servants, both national and European) is too rarely exposed to the light of publicity. Moreover, since at the level of the EU we have only a gradually emerging strong public (the European Parliament) and on the whole only weak specialized publics (Eriksen, 2005a and 2005b), it follows that that central feature of modern society – the public sphere – is still largely missing at the EU level. In our further thinking on the evolution of the EU as a political system, it may prove more rewarding to imagine the EU as constituted by a multiplicity of gradually evolving communicative public spaces rather than to lament the non-existence of a single public sphere.

References

- Amiya-Nakada, R. (2004) 'Constructing "Corporatist" State-Society Relations? Current Discourses on the European NGOs and its Democratic Weakness', *Kobe University Law Review*, 38, pp. 1–20.
- Armstrong, K. (2002), 'Rediscovering Civil Society: The European Union and the White Paper on Governance', *European Law Journal*, 8, pp. 102–32.
- Armstrong, K. (2006), 'Inclusive Governance? Civil Society and the Open Method of Coordination', in S. Smismans (ed.), *Civil Society and Legitimate European Governance* (Cheltenham: Edward Elgar), ch. 3.
- Besson, S. (2006), 'Deliberative Democracy in the European Union. Towards the Deterritorialization of Democracy', in this book, ch. 9.
- Bignami, F. (1999), *Accountability and Interest Group Participation in Comitology. Lessons from American Rulemaking* (Florence: Robert Schuman Centre).
- Bohman, J. (2004), 'Constitution-making and Democratic Innovation: The European Union and Transnational Governance', *European Journal of Political Theory*, 3, pp. 315–37.
- Bovens, M. (2004), 'Public Accountability', in L. Lynne and C. Pollitt (eds), *The Oxford Handbook of Public Management* (Oxford: Oxford University Press), pp. 182–208.
- Bradley, K. (1999), 'La transparence de l'Union européenne: une évidence ou un trompe l'oeil?', *Cahiers de Droit Européen*, pp. 283–362.
- Chambers, S. (2004), 'Behind Closed Doors: Publicity, Secrecy and the Quality of Deliberation', *Journal of Political Philosophy*, 12, pp. 389–410.
- Closa, C. and Fossum, J.E. (2004), *Deliberative Constitutional Politics in the EU* (Oslo: ARENA).
- Cohen, J. (1989), 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity* (Oxford: Blackwell), pp. 17–34.
- Cohen, J., Rogers, J. and Wright, E.O. (eds) (1995), *Associations and Democracy* (London: Verso).
- Cotino, L. (2005), 'Theory and Reality of Public Access to EU Information', in D. Curtin, A. Kellermann and S. Blockmans (eds), *The EU Constitution: The Best Way Forward?* (The Hague: TMC Asser Press), part 2.
- Curtin, D. (2003), 'Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance', *Social and Legal Studies*, 12, pp. 55–76.

- Curtin, D. (2004), *Mind the Gap: the Evolving EU Executive and the Constitution*, Third Walter van Gerven Lecture (Leuven, Groningen: Europa Law Publishing), www.law.kuleuven.ac.be/ccle.
- De la Porte, C. and Nanz, P. (2004), 'The OMC – a Deliberative-democratic Mode of Governance? The Cases of Employment and Pensions', *Journal of European Public Policy*, 11, pp. 267–88.
- De Leeuw, M. (2003), 'The Regulation on Public Access to European Parliament, Council and Commission Documents in the EU: Are Citizens Better Off?', *European Law Review*, 28, pp. 324–48.
- De Schutter, O. (2002), 'Europe in Search of its Civil Society', *European Law Journal*, 8, pp. 198–217.
- Dryzek, J. (2000), *Deliberative Democracy and Beyond* (Oxford: Oxford University Press).
- Eijsbouts, T. (2005), 'De macht, de menasen, het model', *Nederlands Juristen Blad*, 20, pp. 1034–34.
- Elster, J. (1998) 'Deliberation and Constitution Making', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 97–122.
- Eriksen, E.O. (1999), 'The Question of Deliberative Supranationalism in the EU', *ARENA Working Paper*, 99/04.
- Eriksen, E.O. (2001), 'Democratic or Technocratic Governance?', *Jean Monnet Working Paper*, No. 6/01.
- Eriksen, E.O. (2004), 'Conceptualizing European Public Spheres. General, Segmented and Strong Publics', *ARENA Working Paper*, 3/04.
- Eriksen, E.O. (2005a), 'An Emerging Public Sphere', *European Journal of Social Theory*, 8, pp. 341–63.
- Eriksen, E.O. (2005b), *Making the European Polity. Reflexive Integration in the EU* (London: Routledge).
- Eriksen, E.O. and Fossum, J.E. (eds) (2000), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge).
- European Commission (1995), *Openness and Transparency in the European Institutions* (Brussels: European Commission).
- European Commission (2001), *European Governance. A White Paper* (Brussels: European Commission).
- European Commission (2002), *Communication from the Commission towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission* (Brussels: European Commission).
- European Commission (2003), *Report from the Commission on the Application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament and the Council Regarding Public Access to European Parliament, Council and Commission documents* (Brussels: European Commission).
- Fischer, F. (1990), *Technocracy and the Politics of Expertise* (Newbury Park: Sage Publications).
- Fossum, J.E. and Menendez, A.J. (2005), 'The Constitution's Gift? A Deliberative Democratic Analysis of Constitution-making in the European Union', *European Law Journal*, 11, pp. 380–410.
- Gerstenberg, O. (1997), 'Law's Polyarchy. A Comment on Cohen and Sabel', *European Law Journal*, 3, pp. 343–58.

- Goodin, R.E. (2000), 'Democratic Deliberation Within', *Philosophy and Public Affairs*, 29, pp. 81–109.
- Gutmann, A. and Thompson, D. (1996), *Democracy and Disagreement* (Cambridge, MA: Belknap).
- Habermas, J. [1992] (1996), *Between Facts and Norms* (Cambridge, MA: MIT Press).
- Hannay, A. (2005), *On the Public* (London: Routledge).
- Joerges, C. (2002), "'Deliberative Supranationalism" – Two Defences', *European Law Journal*, 8, pp. 133–51.
- Joerges, C. and Vos, E. (1999), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart Publishing).
- Kok, F., Kramer, P. and van der Maas, T. (2004), *Het Brussels labyrint. Hoe Nederlanders lobbyen in Brussel* (Amsterdam: Uitgeverij Bert Bakker).
- Lodge, J. (1994), 'Transparency and Democratic Legitimacy', *Journal of Common Market Studies*, 32(3), pp. 343–68.
- Magnette, P. (2003), 'Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union', *Journal of European Public Policy*, 10, pp. 677–94.
- Magnette, P. (2005), *The Nature of the European Union* (London: Palgrave).
- Mair, P. (2005), 'Popular Democracy and the EU Polity: An Assessment', *European Governance Papers*, C-05-03, <http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-03.pdf>.
- Majone, G. (1993), 'When does Policy Deliberation Matter?', *EUI Working Paper*, SPS No. 93/12 (Florence: European University Institute).
- Majone, G. (1996), *Regulating Europe* (London: Routledge).
- Manin, B. (1987), 'On Legitimacy and Public Deliberation', *Political Theory*, 15(3), pp. 338–68.
- Mazey, S. and Richardson, J. (eds) (1993), *Lobbying in the European Community* (New York: Oxford University Press).
- Milward, A. (1992), *The European Rescue of the Nation State* (London: Routledge).
- Moravcsik, A. (1998), *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht* (Ithaca, NY: Cornell University Press).
- Neyer, J. (2003), 'Discourse and Order in the EU: A Deliberative Approach to Multi-level Governance', *Journal of Common Market Studies*, 41(4), pp. 687–706.
- Parkinson, J. (2003), 'Legitimacy Problems in Deliberative Democracy', *Political Studies*, 51, pp. 180–96.
- Peers, S. (2002), 'The New Regulation on Access to Documents: A Critical Analysis', *Yearbook of European Law*, 21, pp. 385–442.
- Peters, G. and Barker, A. (1993), *Advising West European Government: Inquiries, Expertise and Public Policy* (Pittsburgh: University of Pittsburgh Press).
- Pressman, J.L. and Wildavsky, A. (1973), *Implementation* (London: University of California Press).
- Ragnemalm, H. (1999), 'The Community Courts and Openness within the European Union', *The Cambridge Yearbook of European Legal Studies*, 2, pp. 19–30.
- Rawls, J. (1993), *A Theory of Justice* (Cambridge, MA: Harvard University Press).
- Safire, W. (1998), 'On Language: Transparency Totally', *The New York Times*, January 4, p. 4.
- Sarugger, S. (2005), 'Associative Democracy and the Democratic Legitimacy of the European Union', unpublished manuscript.

- Scharpf, F. (1999), *Governing Europe: Effective and Democratic?* (Oxford: Oxford University Press).
- Schmalz-Bruns, R. (1995), *Reflexive Demokratie: Die demokratische Transformation moderner Politik* (Baden-Baden: Nomos).
- Stone, D. (1988), *Policy Paradox: The Art of Political Decision Making* (New York: W.W. Norton and Company).
- Suchman, M. (1995), 'Managing Legitimacy: Strategic and Institutional Approaches', *Academy of Management Review*, 20, pp. 571–610.
- Vesterdorf, B. (1999), 'Transparency – Not Just a Vogue Word', *Fordham International Law Journal*, 22(3), pp. 902–29.
- Wallace, H. and Young, A.R. (1997), *Participation and Policy-Making in the European Union* (Oxford: Clarendon Press).
- Weiler, J. (1991), 'The Transformation of Europe', *Yale Law Journal*, 100, pp. 2403–83.
- Welch, E.W. and Wong, W. (2001), 'Global Information Technology Pressure and Government Accountability: The Mediating Effect of Domestic Context on Web Site Openness', *Journal of Public Administration*, pp. 509–38.
- Working Group 2A (2001), Report of Working Group 'Consultation and participation of civil society', http://europa.eu.int/comm/governance/prepa_lb_en.htm.
- Working Group 4B (2001), Report of Working Group 'Networking people for a good governance in Europe', http://europa.eu.int/comm/governance/prepa_lb_en.htm.
- Working Group 5 (2001), Report of Working Group 'Strengthening Europe's contribution to world governance', http://europa.eu.int/comm/governance/prepa_lb_en.htm.

PART III

Where to Deliberate

Chapter 8

The People in Deliberative Democracy

Francis Cheneval¹

Introduction

This paper argues in favor of a dual form of the *demos* in the liberal polity.² One *demos* is defined by formalized membership and decision-making procedures, the other by open public deliberation. Liberal nationalism seems to emphasize the formal and finite (national) aspects of the *demos* as it considers the basic structure a closed social system (Rawls, 1993; see Yack, 2001). Deliberative democratic theory emphasizes the epistemic virtues of deliberative procedures and considers public deliberation a necessary element of the procedural notion of the *demos* and of popular sovereignty (e.g., Cohen, 1996 and 1997; Elster, 1998; Habermas, 1996a and 1998; Bohman, 1998). As I will try to show, the two conceptions of the *demos* are linked and they both imply that the authoritative *demos* of liberal democratic states are not totally separate and not mutually exclusive. The national *demos* are bounded and open at the same time, and the transnational public spheres are enacted by the *demos*. This in turn strengthens the argument that interstate communicative action and integration can be embedded in legitimation processes even under conditions of formally separate *demos* (Risse, 2000; Mitzen, 2005). This embeddedness, however, is not just due to reason-giving of governments, but essentially the reason-giving of an intra- and transnational community of common sense.

In the first part of the paper, I argue that the decision-making *demos* and the publicly deliberating *demos* are essentially non-coextensive. The deliberating *demos* extends to all beings capable of reflexive judgments, and it is based on rights that are not acquired through citizenship. The political decision-making

¹ I thank Samantha Besson and José Luis Martí as well as all the participants in the 2005 IVR-workshop “Deliberative Democracy and its Discontents” in Granada for valuable comments on an earlier draft of this paper.

² I do not mean “the people’s two bodies” (Morgan, 1988, p. 83) which refers to the duality of the people as a formal decision-making community and the people as a pre-political community imagined as bounded and sovereign. In modern liberal democracy the gap between those two “bodies” of the people is bridged by procedures. The so-called imagined community has no other form of legitimate expression of its sovereignty than through formal decision-making procedures. I therefore consider the imagined community an enabling and explanatory part of the bounded, formal decision-making community.

and voting *demos* is embedded in the deliberative *demos* and only both taken together form the liberal democratic *demos*. The second part of the paper deals with the hypothetical and counterfactual foundations of liberal and deliberative democratic theory. It is shown that both theories rely on hypothetical justifications of basic principles of the polity and both rely on a certain *demos*-hypothesis. Important differences notwithstanding, both understandings thus transcend the finite *demos* of concretely formalized membership by referring to an imagined *demos* of reason givers. The third part of this paper addresses the tension between the presupposition of the basic structure as a closed social system and the universal validity of its legitimacy claims (Rawls, 1993). Liberal political theory as conceived by Rawls includes a transcending element in its conception of the *demos*. The citizen representatives in the non-historical original position draw their conclusions independently of their citizenship. Furthermore, the epistemic virtues of the hypothetical contract do not determine or depend on specific membership or territory. With regard to their normative foundations, political liberalism and deliberative democratic theory therefore both conceive open and overlapping *demoi*. In part four of the paper this communicative openness of the liberal deliberating *demoi* is brought into relation with the finite formal decision-making *demos*. By tying deliberation to legitimate self-government, non-domination and popular sovereignty, deliberative political theory fills the "introverted," self-contained and exclusive notion of democratic peoplehood with new meaning. It gives a more adequate account of the open and decentered nature of a liberal democratic *demos*. Still, it cannot disregard the essential finitude of political decision-making and policy implementation. Therefore, the *demos* has to be conceived as a twofold community: a finite political decision-making community *and* a wider epistemic deliberating community appealing to common sense. The linkage of the two *demoi* is realized if formal democratic decision-making is embedded in open public deliberation. Part five addresses two institutional consequences of these reflections. First, the open and overlapping character of the liberal *demoi* makes post-national democracy and transnational governance among democracies feasible and legitimate in principle. The no-*demos* thesis, usually directed against European democracy (see Kraus, 2003), has to be modified in the sense that any formal decision-making *demos* is incomplete and it is completed by a *demos*-reality that is not strictly bounded. This does not in itself imply a shared commitment and mutual responsiveness of the *demoi* of different states, but it represents a strong enabling feature of a process of coordinated rule-making and implementation on common issues by the *demoi* (see Müller, 2001). Second, the deliberative ideal prescribes real deliberation as the only way to a correct decision. Therefore, the universalistic liberal features of democracy do not *eo ipso* imply a justification of gradualist or statist cosmopolitanism. They prescribe a process of actual deliberation about post-national institution-building among real peoples and citizens in concrete life worlds. Philosophy cannot counterfactually anticipate the concrete institutional result of this transformational process.

1 Who is “We”? – the Liberal *Demos* and its Deliberators

Ivor Jennings has pointed to one of the most pertinent problems of democratic theory when he writes “The people cannot decide until someone decides who are the people” (Jennings, 1956, p. 56). Does it make sense to say that the people cannot deliberate until someone decides who are the people? Or does deliberative political theory operate within a framework that dissolves the finite group of citizens forming “the people,” in the name of an epistemic or moral community which is not identical with the particular people of a state or the legal community in general? Habermas’s (1998, p. 251) position according to which deliberative politics is “subjectless” seems to point in that direction. The absence of a concrete subject called *demos* in deliberation might be the reason why Habermas himself uses the term deliberative *politics* and not deliberative *democracy*. In general, deliberative politics is a form of communication within and among democratic peoples, polities, legal communities and society at large. The normative conception of deliberative politics transforms the concept of legal and political community by demanding discursive modes of socialization in general and in humanity at large. According to Habermas, the deliberative community is much wider than the legal and political community; the legal and political community is to be embedded in the discursive community, not vice versa (Habermas, 1998). Deliberative politics give primacy to reasons over particular interests, to arguing over bargaining, to cognitive processes over defense of fixed preferences, to mutual justification over authoritative allocation, etc. (Cohen, 1997; Estlund, 1997). The deliberative community transcends the particularity of the legal and the political community. When people deliberate, when they argue, when they give reasons they ultimately appeal to the common sense of every human person able to put himself or herself into the position of others, able to relate to a specific problem and to take all the given information and claims into consideration.

A large part of the literature on deliberative democracy connects the ideal of deliberation directly to citizens and their decision-making within the democratic polity. The ideal is that political decisions should be made on the basis of a process of public deliberation *among citizens*. Citizens who collectively make mutually binding laws owe to each other the public giving of justifying reasons (see Gutmann and Thompson, 2004, pp. 35–36). This identification of deliberation and reciprocal justification is problematic if it is meant to imply a restriction of deliberative democracy to a formally closed circle of deliberation within the polity, to a formalized group of people coextensive with the group of citizens. The liberal democratic *demos* is a formal decision-making community of individuals holding citizenship and sharing a common commitment to the polity, on the one hand, and a deliberating community open to anybody with common sense, on the other.

The former is not further argued in this paper. The reasons for the latter are (a) the conditions of public deliberation, and (b) the reflective, synthetic and heterogeneous character of political arguing. Public deliberation in an open

society cannot be bound by formally closed membership. Anybody capable of counterfactual mental and communicative operations,³ anybody capable of imagination (Goodin, 2003, pp. 62–70), anybody capable of well-informed and reasonable judgment of any kind may participate in a public political deliberation. In such a deliberation an undefined multitude of scientific, moral, aesthetic and ethical judgments flow together. There are experts for specific aspects of these judgments, there are people authorized by voters to select experts from a pool of experts for formalized hearings and committee meetings, but there are no experts for the deliberative synthesis of judgments in the public sphere itself. Even the findings of political science are only a part of wider public deliberation. Public deliberation does not know formal membership. This seems obvious for issues that are deliberated without being geared to a formal political decision. But it is also the case for issues that are deliberated in view of an authoritative political decision.

Take the following example: the deliberation about the construction of a town library in a specific location brings together judgments on the cultural and educational meaning of a public library for a community, the aesthetics and proportionality of the size of the building project, the civil engineering of the building project, the correct calculation of the budget, the choice of the location with all its implications, the priority of the library in relation to other needs of the community, the choice of the architects, etc. It is true that as a non-member of a political community one might respectfully reserve judgment on some aspects of this deliberation. In most cases time is scarce enough to participate in the deliberations of one's own community anyway. But in principle, non-formal members of a community can give reasons with regard to all aspects of the above-mentioned example. As a matter of fact, newspapers, television and radio discussions, internet chats, etc. are full of reasoned judgments on political issues of different parts of the world. Those judgments are rarely given only by members of the respective political communities. This is perfectly legitimate and characteristic of open public deliberation in an increasingly cosmopolitan society (Bohman, 1999).

A first possible counter argument might be that while everybody in an open society is allowed to deliberate (within the general rules of the constitution), citizens owe justification of mutually binding rules to each other; they are therefore obliged to deliberate. The decision-making community and the morally mandatory deliberative community would thus be coextensive. But morally mandatory participation in deliberation is completely strange to the ideal of free and open deliberation. Deliberation happens and people get drawn into it if they are given the opportunity. The obligation of justification of authoritative decisions should be tied to certain official government functions, but it is hard to conceive of a system of morally obligatory public deliberation. It is not the individual vote of

³ Of the sort: "z is a desirable outcome because X and Y, if reasonable and equal, would agree on z."

the citizen that is legally binding; no duty of public justification can therefore be deduced from the right to vote. And, what would be the moral standard of sufficient deliberation? The citizens could hardly know whether they have fulfilled their deliberation duty. Is listening to others and deliberating within enough, or does the citizen have to actively engage in discussions? In general, it does not make sense to make deliberation a moral obligation, because it is difficult to set a deliberation standard for individuals.

One might argue that time and space in deliberation is always scarce and that therefore the deliberation community has to be restricted to those potentially affected by a decision. This second counter-argument raises an interesting issue. It is often said that deliberation breaks across the boundaries of the decision-making communities, because the extension of the deliberating community is defined by the criterion of being affected by a decision (Thompson, 1999; Dryzek, 2001, pp. 651, 662; Gutmann and Thompson, 2004, pp. 36–37). Termed in such a way, this position would prove the point, namely that the decision-making community and the deliberating community are non-coextensive: the decision-making community being defined by formal membership and the deliberating community by the criterion of being potentially affected by a decision or an issue. However, the “*quod omnes tangit* principle” (or “all affected principle”) is traditionally used to define the extension of the decision-making community.⁴ Without disregarding the importance of the all affected principle, I do not think that it is adequate to define formal membership in modern liberal democracy. It is virtually impossible to objectively and authoritatively define who is potentially affected by a law or a public project. First, the consequences of laws and public projects are infinitely complex; many of them are unintended. Second, people constantly move geographically as well as socially and thereby change their mode of being affected by laws and public projects. Third, “being affected” has a strongly subjective component, which cannot be formalized by an objective authoritative decision of who is potentially affected and in what way. Fourth, the intensity and quality of being affected differs among those who would be considered affected. The “more affected” could claim a primacy over the “less affected.” Fifth, every decision affects a different group of people; the decision-making *demos* would therefore have to be constituted differently for every law and public project. The impossibility to objectively denote the affected also speaks against the objective definition of the deliberative community by the “all affected principle.” Let us concede for a moment that the people who pay for a project through their taxes should be part of the decision-making community and non-taxpayers should be excluded.⁵ Still, the “all affected principle” is not valid for the determination of the

⁴ “*Quod omnes similiter tangit ab omnibus comprobetur.*” (Corpus Iuris Civilis, Codex Justinianus, 5, 59, 5, 2). See Congar (1958).

⁵ While this principle demands voting rights for all tax paying foreign residents, it potentially excludes low income citizens who do not pay taxes. The “affected principle” might imply a relapse into a census-system of democracy.

public deliberating community. On the deliberative level, the goal is to weigh and confront all the reasons for or against a project, for example the construction of a town library. Priority has to be given to openness, due to the interest in getting all the potentially good reasons expressed and due to the impossibility of an objective determination of who is affected. Furthermore, a human person does not have to be potentially affected by a specific measure to form a reasonable judgment. It suffices to be able to relate to the reasons given for or against it and to conceive what it means for those who are potentially affected by it. The criterion for inclusion in the public deliberating community is the capability of putting oneself into the position of the concrete and generalized other (Mead, 1967, pp. 152–64), of those who pursue a common project and who have to bear the consequences. This implies the ability to counterfactually anticipate consequences and the ability to relate to the fact that there will be unintended consequences. This condition fulfilled, paying for a project does not make reasoning any more reasonable. It may answer the question “who is to decide?” (I think it should not), but not the question “who is to deliberate?”. An additional argument against the “all affected principle” as criterion for membership in deliberation lies in the unduly restrictive consequences. There are laws, for example about sailboats, which probably do not affect people who never get close to a lake but who are part of the respective political community. Should they be objectively excluded from deliberation on the law just because it does not affect them? They might individually decide not to participate, but no objective rule can force them to refrain from offering judgments. The “all affected principle” is a highly ambiguous tool to define membership, be it in decision-making or in deliberation. I suggest that this noble principle be used only to critically transgress any formal restriction of membership.

Is the public deliberating community part of the *demos* at all, since it is not coextensive with the formal decision-making *demos* of citizen-voters? There might be tensions between the “deliberative” and the “democratic” aspect of deliberative democracy (Pettit, 2003), but answering this question negatively would defeat deliberative democracy altogether. Answering it positively shows why deliberative political theory makes an essential contribution to answering the question “who are the people?”. The major contribution of deliberative democracy to democratic theory is the insight that formal decision-making procedures are insufficient and purely cosmetic without widespread public deliberation. Formal decision-making, formal deliberation and open public deliberation have to be connected and mutually responsive. The public deliberative component has to be understood as an integral part of the modern *demos*. Without the deliberative aspect, democracy does not effectively correspond to the criterion of contestability and no link is made between decision and justification.⁶

The potentially open group of public reason-givers is not to be confused with the addressees of reasoning or the participants in formal deliberation. While the

⁶ See Habermas’s conclusive remarks on Dewey and Cohen in Habermas (1996a, pp. 302–308) and Pettit (2003, pp. 151–53).

first group is unrestricted in public political deliberation, the latter two might very well be formally closed for good reasons.⁷ Reasons might be given to a restricted circle of decision-makers (governments, voters, etc.) by a group of people who might be competent on a subject and not part of the formal decision-making community (e.g., scientists of any kind, experts of international organizations, experts and activists of transnational NGOs, foreign populations working in a country, experts in a parliamentary hearing giving reasons to committee members, etc.). In this case, the restriction of the addressees and actors of deliberation is justified by the formal restriction of a closed decision-making community exposing itself to reason-giving from non-members. Democracy knows formally restricted deliberation communities, such as judicial bodies, formalized expert groups, parliaments and their committees, European Union (EU) "comitology" (Joerges and Neyer, 1997; Joerges, 2002), etc. However, they are only segments of a wider public deliberation community in which they are to be embedded and to which they owe justification (Schmalz-Bruns, 1999). Furthermore, in formalized deliberation the members refer to reasons and give judgments that are comprehensible to anybody capable of reasoning. If scientists of special committees give competent judgments, the latter have to be publicized and up for discussion in the universal scientific community at large. There is no reason intrinsic to the form of deliberative political communication which justifies the exclusion of persons capable of discourse and reasonable judgment. In principle, the public deliberating community is essentially open to anybody able and willing to give reasons to others.

In the practical version of deliberative democracy (mutual justifiability of laws among citizens), deliberation seems to be restricted to law givers, i.e. citizens. But justification is supposed to be a giving of reasons which are comprehensible and valid due to their acceptability to a human community of common sense, not a specific group with specific interests or a specific ethical tradition. In a liberal democracy it must be possible to dissociate oneself from an ethical or religious tradition. At the same time, citizens have to be capable of relating to ethical traditions other than their own. Justification of laws for all citizens must therefore have a wider appeal to common sense. This has the consequence that you do not have to be part of the decision-making community to be able to give and relate to such justifications. You do not have to be a New Yorker to relate to and reasonably discuss the justification of the prohibition of smoking in public buildings in New York. You do not have to be a Catalan to relate to the idea that the Catalans have a justified right to protect and cultivate their language. You have to be able to relate to historical narratives, to what it means to have a mother tongue, and you have to be willing to grant to others what you claim for yourself in terms of speaking your own language.⁸ One can presuppose that people not knowing if they are Catalan would agree that the negative and positive form

⁷ See Steiner et al. (2004).

⁸ I thank Cristina Lafont for proposing this example to me in private discussion.

of protection of the language should be more comprehensive within Catalan territory and more restricted outside. The point here is that also in ethical matters (as opposed to strictly moral in a universalistic Kantian sense) the deliberating community is never coextensive with the law-giving political community, and the law-giving community is embedded in the community of common sense and decentered reasoning.

In all the arguments delivered it is presupposed that publicity and freedom of deliberation is a necessary condition of democracy. Unlike formal decision-making or formal deliberating in closed committees of any kind, public democratic deliberation cannot be restricted to formalized membership without violating essential principles of liberal democracy, such as publicity, transparency, and freedoms of speech, association, and press. Furthermore, public political deliberation implies a constant movement of mental and discursive transcendence of the finite political community in the name of an epistemic community. The *episteme* of the public deliberating community in a modern pluralistic society does not consist in any specific scientific discipline or knowledge, not in a singular rationale, not in a monistic communitarian *ethos*, and not necessarily in a universal morality either. In a public political deliberation all these aspects might be brought into play by the participants and it is in principle never determined who those participants exactly will be.

The ultimate instance appealed to in public deliberation is common sense. The latter is traditionally understood as a reflexive faculty of judgment. It leads to insights not directly attainable by any specific technical-instrumental, scientific or moral reasoning. Political judgments cannot be reduced to pure truth-finding or pure norm-giving, because they almost always imply a combination and weighing of both, and they include aesthetic and teleological judgments (Arendt, 1982, pp. 75–77). Common sense is of course not to be reified. It denotes the ability to exchange and mutually understand reflexive judgments, as well as the ability to put oneself in the place of the “generalized other.” As G.H. Mead has shown, this potential communicative ability is gradually constituted by the social process and it constantly reshapes an open-ended, potentially universal process of discursive and institutional integration (Mead, 1967, pp. 260–73, 281–89).

2 The Real and the Hypothetical *Demos* in Liberal and Deliberative Democracy

Deliberative theory makes the transcending tendency of liberal democracy more explicit. It shows that the people as a formalized group of citizens and the people giving reasons, conceiving and realizing ideals such as individual rights, fair cooperation, impartiality, free and open communication through real public deliberation, cannot be coextensive. This argument also leads to an important clarification. Deliberative political theory is actually as dependent on counterfactual and hypothetical idealization as liberal political theory relying

on the idea of a hypothetical contract. While liberal democratic theory in the Kantian–Rawlsian tradition refers to the idea of a hypothetical consensus regarding democratic procedures and principles of justice, deliberative theory works under the assumption of a hypothetical consensus on outcomes under ideal procedural conditions: “outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals” (Cohen, 1997, p. 146). It is also Habermas’s idea that democratic legitimacy is explained if it produces laws that would have met with unanimous agreement in an ideal deliberative situation (Habermas, 1996a, pp. 103–104, and 1998, pp. 31, 34, 259). This hypothetical element is not often seen by the proponents of deliberative democracy when criticizing Rawls for the purely hypothetical status of the contract versus the real deliberation of real people in the deliberative model (Gutmann and Thompson, 2004, p. 35). The ideal of real deliberation is justified with a counterfactual argument. Liberal politics in the Rawlsian version presupposes a hypothetical contract among a finite group of people with specific preferences and positions in the life world. The veil of ignorance is “the cunning of reason” by which these particular preferences are detached from their subjects and taken into consideration by all participant subjects. The Rawlsian mode of communication in the ideal situation is not totally subjectless; it is subject-neutral with regard to a limited group of subjects. It is not purely reasonable but rational under reasonable conditions, due to the veil of ignorance. In real world deliberation, by no means excluded but partially enabled by the liberal model, people deliberate and decide invoking principles and using procedures that could be agreed on in a subject-neutral discourse. In this sense, the liberal and the deliberative counterfactuals are complementary. Rawls’s original position determines principles of justice which people in real deliberation can invoke and try to realize. The deliberative counterfactual model, as proposed by Cohen and Habermas, justifies the imperative to complement the representational device of the hypothetical contract with real deliberation in a society which should increasingly design the conditions of deliberation according to the principles of ideal procedure.

The liberal position is based on the assumption that subjectivity and finitude are irreducible; particular subjectivity and the particular interests implied cannot be “reasoned” away, either in hypothetical or in real deliberation. Because this is so, Rawlsian deliberation is at best subject-neutral under idealized conditions. The results of this hypothetical deliberation are constantly confronted with real deliberation; a reflective equilibrium is sought by the individual and a deliberative equilibrium is sought by the group, but never definitively found. But since the political community is finite and the people are presupposed to be rational (as opposed to purely reasonable) and pursue particular interests (be they changing, socially construed, etc.), liberal democratic theory is based on a form of communication that involves particular subjects, ultimately within the framework of a collective subject authorized to determine the constitutional and legal framework: the people. Liberalism seeks justice not under the presumption

that particular preferences, or the state for that matter, will wither away through reasonable deliberation. It seeks principles of justice in a hypothetical contract which finite subjects can invoke when justifying political decision-making structures and constitutional norms in real deliberation. Liberal democratic contract theory operates under a constitutional presupposition in the very large sense of the term. We will address the tension between this constitutional presupposition and the universalistic underpinnings of the principles of justice of liberalism in Section 3.

Deliberative democratic theory's problem is rather the opposite. It seems to operate under an ideal where particular subjectivity is supposed to wither away in subjectless, purely reasonable communication and ideal procedure. The presumption is that subjectivity and particularity can be dissolved by reason in the name of epistemic unity and reasoned agreement (Habermas, 1998, pp. 246–47; see Cohen, 1997). Many theorists of deliberative democracy might not readily accept the foundation of their theory in normative hypothesis. They think that their advantage over liberalism and Rawls in particular is based on the fact that Rawls's contract is hypothetical and their concept of deliberation is real. This also makes them misconceive the group of deliberators as a finite group of real deliberators. In reality, it is of course a finite group, but the boundaries of the finite group are simply pragmatic and accidental. In principle, the group of public deliberators is restricted only by cognitive and communicative abilities common to mankind. It is hard to see how one can defend the deliberative ideal of the realization of true deliberation without presupposing the hypotheses of an epistemic community and idealized procedure leading to reasonable and acceptable results.

Also in the practical model of deliberative democracy, i.e. a model geared towards the mutual justification of norms collectively imposed (as opposed to consent to facts or to pure truth finding), the justification of deliberative democracy relies on hypothetical counterfactuals. The imperative of mutual justification of laws in real deliberation implies that citizens have to give reasons for the laws they collectively impose on each other. This reason-giving has to survive the test of actual deliberation. Reasons have to be given not only about procedures and principles, but also about the concrete application of principles to particular cases. The defenders of this position hold that concrete applications to particular cases cannot be anticipated in hypothetical reasoning; they can only be actualized by real deliberation (Gutmann and Thompson, 2004, p. 35). This is convincing and indeed an essential contribution of deliberative democratic theory. But as the Cohen quotation above shows, the normative argument in favor of real deliberation relies on the hypothetical anticipation of the convergence of actual agreement under idealized conditions with best epistemic results. The presupposition of hypothetical consent to common reasons, to the reasonableness of mutual justifiability and of the possibility of ongoing contestation with regard to concrete outcomes justifies an imperative for real deliberation.

Defenders of deliberative democracy have to concede that real total agreement on concrete outcomes is factually almost never the case. The case for deliberative democracy is defended by a hypothetical, normative figure of reasoning. This means that also in a non-purely epistemic model of deliberative democracy, reasonable consent to procedures and outcomes remains hypothetical and so does the community of reasonable consenters. Even in a non-epistemic model of deliberative democracy, deliberation is justified with the argument that reasonable people under ideal conditions of deliberation would agree on real deliberations, punctual majoritarian decisions and certain laws. Deliberative democracy is ultimately justified by counterfactual hypotheses; if not, its justification would be circular. We can thus assume that the specific difference between the justification of liberal and deliberative politics is not that deliberative democracy relies exclusively on real deliberation while liberal theory remains hypothetical and abstract. The deliberative and the liberal democratic theories are both based on hypothetical reasoning. Both are based on the idea of reflected subjectivity by a hypothetical device, but they tie this reflected subjectivity to different imagined or hypothetical communities. Rawls's hypothetical community consists of citizen representatives under the veil of ignorance. Deliberative democracy refers to an imagined community of common sense which is not coextensive with the members of a basic structure or with the imagined representatives of a basic structure.

3 Who is "We" in Contractualist Liberalism?

The transcendental aspect of any liberal deliberative *demos* sheds light on a problem that remains unresolved in the hypothetical-contractualist version of political liberalism. The latter considers the members of the hypothetical original position as imagined representatives of the citizens of the polity. The basic structure and its original position is thus a "complete and closed social system" (Rawls, 1993, p. 40). The problem, however, is that the idealizations of the hypothetical contract founding the setting of the original position are not tied to the individual and collective rationale of a finite polity. Fairness and reciprocity do not determine borders; they demand the relation with and the inclusion of the other. Who the other concretely is in the first place, is not implied in the epistemic virtues of the hypothetical contract, i.e. in the ideas of impartiality, reciprocity or equality. The original position is non-historical, yet the extension of and the membership in the basic structure and its original position are predetermined by historical facts. Rawls presupposes a basic structure which is transcended by the epistemic virtues of the hypothetical contract, but he locks these epistemic virtues into a finite political structure with restricted membership. The same is true for the contractualism of T. Scanlon who suggests that morally right principles are ones "no one can reasonably reject" (Scanlon, 1982). The community of reference of a hypothetical contract is not a finite group of citizens. There is no easy way out of this basic tension, because Rawls's theory is political as opposed

to purely epistemic or moral. This distinction is unquestionably meaningful and I acknowledge the irreducibility of the historical and cultural dimension of the genesis of political communities. But we should admit that there is a basic tension between the historical and pragmatic reasons to formalize and close social systems, on the one hand, and the liberal universal validity claims founding their political legitimacy, on the other. One of the problems remaining unresolved in liberal political philosophy based on a hypothetical contract is that there are no reasonable criteria offered by the hypothetical contract itself to determine who its members and where its borders are (Somek, 1998, pp. 104–105, 113–14; Yack, 2001, p. 529). In the framework of liberal democratic theory, the people and the members who actually form the political body, who are part of the “contract,” who decide in voting and election procedures, in whose name the constitution and the laws are applied and enforced, are historically given. The hypothetical assumption of the contract itself does not offer criteria as to who should be in and who should be out. The hypothetical and the factual group of people forming the basic structure are numerically identical, or the latter only represent the former. In the justification of the principles by which the people should be governed or govern themselves, the people are always already considered a historical reality.

This constellation can be highlighted by Rawls’s conception of the basic structure. In the latter, it is presupposed and not justified who is part of it. Moreover, for Rawls this presupposition is based on the criterion of *jus soli* which ascertains membership given the fact that someone is born on the territory of a politically constituted people. In Rawls’s basic structure and hypothesis of the original position the members recognizing each other as free and equal are born on a territory and they never leave it until they die. How do we know what that territory is and who these people are in reality? We can only know these facts if the people and their territory are already constituted and membership defined and identified. The hypothesis of the contract does not tell us anything new about the constitution of the people, it presupposes it as a given. Liberal normative political theory seems to start only after the historical creation of the polity. Its universal principles are applied to a finite group of people within a given basic structure:

Moreover, I assume that the basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies. Its members enter it only by birth and leave it only by death. This allows us to speak of them as born into a society where they will lead a complete life. That a society is closed is a considerable abstraction, justified only because it enables us to focus on certain main questions free from distracting details. (Rawls, 1993, p. 12)

This setting excludes migration and has consequences for the further normative argument of liberal democratic theory. Only those who are “in,” actually consider themselves as free and equal. By considering themselves as free and equal, they exclude others from being so. This is not necessarily nasty or hostile; it might just be a fact. Constitutional equality regarding rights that are tied to citizenship

necessarily implies inequality with regard to the rest of human kind, also that part of human kind who actually lives within the borders of the basic structure and under its laws. To assume that people do not migrate and that everybody within the borders is a formal member with equal rights and freedoms is, as Rawls himself concedes, a "considerable abstraction." However, the creation of factual civil inequality by restricted civil equality seems to be an unavoidable consequence of the creation of finite polities. The creation of finite polities seems unavoidable given the material constraints in the communicative processes of establishing laws and in the coercive processes of enforcing them. The universal community of mankind is, at best, a purely moral kingdom of ends (Cheneval, 2005, pp. 24–30, 172–91), a counterfactual moral discourse community (Apel, 2000), and an epistemic community in an ideal speech situation or subjectless ideal procedure (Habermas, 1998). Kant considered it the regulative idea of a slow process of integration among finite polities (Cheneval, 2005, pp. 165–66).

Liberals are of course divided into (inter-)nationalists and cosmopolitans in the assessment of the political consequences of certain moral assumptions and epistemic virtues. Some defend the necessity of post-national institution-building in view of the foundation of a legal community of mankind (Scheffler, 1999; Bohman, 2001). The liberal nationalists, on the other hand, argue in favor of the containment of politics within the finite political community, the only one that can actually realize the principles of liberal democracy. The reasons they give are usually realistic and constructivist. They have to do with the linguistic, psychological, historical, social, and generally cultural conditions of the realization of liberal democracy.

On the normative level, liberal democratic theory is split between those who argue in favor of a direct correspondence between the members of the hypothetical contract and the imagined members of the factual political community (Rawls), and those who defend the position that the normative basis invoked by the factual democratic community transcends this community in the name of a much larger, ultimately cosmopolitan epistemic and moral community of mankind inside and outside the borders of a finite polity (Pogge, 1989; Held, 1995; Beitz, 1999; Jones, 1999; Singer, 2002). According to the globalists, reasons and arguments are independent of the political and social status of the person who gives reasons. According to the nationalist liberals, reasoning in the political realm is always carried out by politically finite subjects and addressed to finite subjects. It seems clear that the cosmopolitans make a stronger argument from an epistemic and moral point of view while the nationalist argument seems more plausible from a political and ethical point of view. As I will argue in the last part of the paper, both are wrong because the national-cosmopolitan dichotomy is a false one. The post-national political process is transformational; it does not reproduce the national structures gradually on the continental and global level.

The weakness of a strictly nationalist liberalism, though, consists in the fact that, in the figure of the hypothetical contract, the Pandora's Box of a normative transcending of factual political reality is opened. The veil of ignorance and

its normative ideal of subject-neutral reasoning, the ideal of a fair bargaining procedure according to epistemic virtues, and the ideas of impartiality and reciprocity transcend the strict identity of the members of the hypothetical and the real contract or polity. The normative device of the hypothetical contract brings the Trojan horse of universality into the particular polity and particular political subjectivity. The reasonable setting of the veil of ignorance breaks across clearly defined formalities of political membership and political subjectivity. It appeals to a general episteme which is not constituted by and not limited to the concrete political convention. The justification of the legitimacy of the constitutional and democratic form of government is deduced from the terms of the social contract in its hypothetical normative form. Who are to be the parties of this hypothetical contract is not and cannot be decided in terms of the hypothetical contract, it has to be presupposed. The counterfactual community of the free and equal citizen representatives of the Rawlsian hypothetical contract is therefore not a representation of specific formal members of a concrete *demos*. The citizen representatives in the "hypothetical and non-historical" (Rawls, 1993, p. 24) original position do not represent the citizens of a specific country, and the principles they are imagined to agree on are general principles of political liberalism at large.

4 The Twofold Status of the *Demos*

"Deliberative democracy" stands for a movement of constant mental and ultimately real institutional transcendence of the factual law-giving community in the name of an open community of common sense. Deliberative theory highlights a very important, transcendental foundation of democratic theory. The latter consists of the imperative of a constant communicative transcending of finite subjectivity, including finite peoplehood, in the name of reasonable communication within and without the bounds of the basic structure. Every concrete liberal political *demos* transcends itself internally by its referral to epistemic virtues of acceptability (not just acceptance) and externally by the open character of its deliberative *demos*. It thereby sustains a tension between its concrete finitude and its universalistic claims to reasonableness and legitimacy. The point is not to reduce this tension by a complete dissolution of finite political communities in the name of cosmopolitan deliberation. The tension mentioned is basically irreducible due to the finite nature of politics and law-enforcement. The point here is to negate the possibility of a total institutional closing of the liberal political community by absolute claims to popular sovereignty of a self-centered *demos*. Deliberative democratic theory makes the twofold status of the liberal democratic *demos* explicit: the latter is a formal decision-making community of common action and purpose, on the one hand, and a publicly deliberating *demos* of non-formalized membership, on the other. Deliberative democracy shows that

the public deliberative component is an intrinsic, albeit decentered part of the liberal *demos*.

It might be asked how these two forms of expression of the liberal *demos* are related to the legal hypothesis of popular sovereignty, which creates the *demos* as the particular legitimate norm-giving authority and establishes the status of membership in the polity. One might also argue that deliberative democracy depends on a constitutional presupposition, since there is no deliberative *demos* without the foundation of a formal decision-making *demos* by a constitutional act. The constitutional setting also constitutes the deliberative *demos* through the guarantee of basic individual rights of freedom of speech, association and press. Consequently, the group referred to by a speaker of any sentence implying "we the people" is coextensive with the persons holding citizenship.

But as we have seen, tying the deliberation community numerically to the decision-making community would put into question the very idea of deliberation along with basic individual rights such as freedom of speech, association and press. Deliberative theory might argue that the liberal system offers an insufficient guarantee of these freedoms, but it does certainly not abandon them. These rights are not citizens' rights in the strict sense of the term. The liberal democratic state grants freedom of speech and press to everybody on the territory. There is thus a constitutional presupposition implied in deliberative democracy, but this constitutional presupposition is finite as much as it is transcendental. Habermas's convincing point is that deliberation is not embedded within a legal and political community but rather the other way round: the legal and political communities are embedded in a deliberating community. This basic liberal democratic idea of free communication is lost if we say that the people of deliberative democracy are only the citizens joined in the shared intention to rule themselves, and that the people of deliberative democracy are coextensive with the *demos* of formal decision-making procedures and elections.

Insofar as factual democratic nations refer to universal principles in their legitimation (e.g., freedom, impartiality, reciprocity, equality, epistemic quality of procedures), their normative boundaries do not coincide with the conventional determination of a given political entity. Moral reasons and epistemic principles of justification have a validity that is not determined by actual consent or the material constraints of the communicative constitution and coercive enforcement of laws. The hypothetical contractual foundation of liberal democratic nationalism – i.e. the hypothetical contract whose normative claim does not originate from an actual promise or actual signature of a contract, but from the conditions of reciprocity and impartiality entailed in the idea of the contract – implies an epistemic foundation of the political community. Every liberal democratic particularity based on the normative hypothesis of a contract between free and equal human beings sets and *eo ipso* transcends the factual political community. This transcendence does not just point to non-members and the realm outside the borders of the polity. It also implies a movement of internal transcending of political bargaining and interest aggregation in view of epistemic reasons.

The latter do not gain their normative validity from the political and legal determinations of the polity itself. Seneca's political dualism of patriotism and cosmopolitanism⁹ does not just apply to the difference between things national and things universal, it points to an internal normative difference in the polity and in the citizens: the difference between bargaining and arguing, between instrumental rationality and justice, between concrete procedures and desirable outcomes etc.

We therefore may definitely consider a twofold status of the *demos* in modern liberal democracy: (a) the people composed of individuals holding citizenship and expressed as a totality in concrete democratic procedures and common commitment; and (b) the people as epistemic discourse community in the public sphere. The former (a), the people as the ultimate norm-giving authority, finds its only expression in democratic procedures provided for by the constitution or similar treaty or ensemble of treaties. Only actual members of the polity can participate. Only procedures provided for in the constitution or a similar set of treaties have the authoritative force of realizing and enacting "the people." There is no possible legitimate authoritative expression of the people outside democratic procedures provided for in the liberal democratic constitution or a functionally similar system of treaties. The idea of the people as a pre-political super-agent, macro-subject, and fusion of bodies and minds, which invests the highest authority upon itself in a constitutional act amounts to a problematic reification of shared intentionality (Bratman, 1999, p. 111). There are of course functional, historical and cultural explanations of the creation of specific groups and the successful foundation of specific polities. But these explanations do not amount to a sufficient justification of the political authority of the people. Some explanatory theories are based on certain objective cultural criteria that allow identifying a people (Huntington, 2004). Others follow a subjective understanding and invest final political authority in an "imagined community" sharing narratives of history, belonging and heritage (Morgan, 1988; Anderson, 1991). The descriptive theories mentioned are needed to explain the causal and communicative relations making a constitutional act possible and the working of the constitutional arrangement feasible. But the people referred to as the ultimate source of all legitimate political authority is a practical hypothesis expressed in authorized procedures and embedded in open deliberation. Therefore, the only legitimate "reification" of the first person plural hypothesis "We, the people" is to be found in the democratic and judicial procedures that have to be embedded in open public deliberation. Nobody can act politically and legally in the name of the people without being legitimized to do so by the corresponding procedures (Habermas, 1996b).

Denying the importance of everybody deliberating and identifying the reasons that could be invoked "in the name of the people" while referring to a wider epistemic community would be detrimental for democracy. Democratic

⁹ Seneca (1995, pp. 86–88).

and judicial decision-making procedures without the frame of wider public deliberation lack transparency, publicity and epistemic quality. Furthermore, empirical evidence shows that deliberation actually creates a higher level of awareness and information. What people consider best before and after deliberation is very different, and they like the "after" better than the "before" (Fishkin, 1997). Deliberation means that attention is given to the epistemic mode of expression of the people, to the people as a community of common sense. This community is referred to every time a member of the polity or a stranger actually argues with respect to a specific problem appealing to common sense. This sphere of common sense and common reasonableness is accessible to all persons capable of reasoning. The *demos* thus has a transcending dimension within. It comes as no surprise that, historically, the invention of publicity largely coincided with the formulation of modern liberal cosmopolitanism (Laursen, 1993).

Democratic legitimacy implies this dualism of finite political subjectivity and subject-neutral common reasonableness. Subject-neutral means that any subject claiming reasons can join in the process of deliberation, independently of the person's affiliation with a specific political community. This role is not restricted to representatives of the basic structure in a hypothetical original position. Taken to its conclusion, the necessarily open character of the people as a public deliberating community means that the formally and territorially distinct peoples of democratic communities connect to the extent that they understand and realize themselves as reason-giving communities.

5 *Demoi* and Multilateral Institution-building

This final point cannot be treated extensively in this article. I would only like to add two brief points regarding the relation between the twofold status of the *demos* and political institution-building among *demoi*. Beforehand, I would like to draw attention to the plurality of *demoi* referred to in *demoi*-cracy. This plurality is a consequence of the argument in favor of a twofold status of the singular liberal *demos* as a closed decision-making *demos* ($demos_1$) and an open deliberative *demos* ($demos_2$). We can thus refer to the *demoi* as a plurality of closed decision-making *demoi* and to the plurality resulting from the difference between the formal decision-making *demoi* and the open deliberating *demoi*.

- 1 The public deliberating community transcends the formal political decision-making and voting community by non-formalized membership and communicative appeal to common sense. Public deliberation is thus at the same time an indispensable asset of the legitimate formal *demos* within the boundaries of the polity and a lieu of transcendence of the formal political community. For this reason, the national *demoi* of modern liberal democracies cannot be understood as totally separate entities. They are separate only with regard to formal membership. But even in this respect, dual citizenship,

extraterritorial voting in embassies permitted by many progressive liberal democratic states, ratification procedures of treaties in the EU, and the election process of the European parliament lead to the overlapping of the formalized decision-making *demos*. Liberal democratic *demos* are communicating vessels through the public sphere of free communication and deliberation and, to some extent already, also through formalized decision-making. The latter therefore has to be considered as the logical consequence of the former, not as a disfiguration of democracy. Horizontally differentiated and transnationally coordinated direct democracy, however, is necessary to transform multilateral relations among democratic states from executive intergovernmentalism into real *demos*-cracy (Hug, 2002; Kaufmann et al., 2005, pp. 104–105, 176).

In itself, the deliberative openness within and among *demos* does not materially contain a shared intention of mutual responsiveness. Nor does it necessarily transport a commitment to joint activity and to mutual support. The latter, however, are necessary conditions of the actual formation of a formally institutionalized decision-making community of common activity. The epistemic link between the deliberating *demos* and the common participation in deliberation by many individuals does not automatically bring about a strong sense of common belonging and mutual responsiveness among *demos*. However, these elements of first person plural intentionality can be actualized by the deliberative *demos* if the conditions which make common activity meaningful in the first place are given. In a context of factual interdependence, of strong need for the solution of common problems through common multilateral rule-making, in an environment where public spheres actually connect through migration, enhanced transportation and telecommunication, the connectedness of the deliberative *demos* can be concretized in political institution-building. But it is still a question of formal democratic decision-making on the national levels to gear this public communication into formalized problem-solving. The liberal deliberative *demos* thus create the potential of legitimate post-national institution-building which can respond to and structure the functional necessities of transnational governance. Deliberation without authoritative democratic decision-making procedures lacks legal force, efficiency and clarity. No binding rule or political authority can be based on what is vaguely perceived as an outcome of public or ideal deliberation. This is true for deliberation within the boundaries of the state as well as for deliberation about problems of transnational governance. Without a legal framework, authoritative voting and electing, public deliberation and the preferences it forms remain distantly objective and non-authoritative, i.e. detached from appropriation by the subjects entitled to create binding norms in a polity. Justification and deliberation have to be appropriated by the peoples in binding decisions. This act is necessary because it is only through subjective procedural authorization that political authority can be exercised in a legitimate way. Since deliberation remains vague and of uncertain consequence without subjective appropriation in democratic decision-making procedures, the benefits of deliberation will remain very

limited without a formal institutional framework linking the *demoi* as distinct *demoi*.

- 2 Although the deliberative ideal relies on a human *episteme* and therefore potentially cosmopolitan common sense, it still represents one of the main reasons why the universalistic claims of liberal theory do not directly lead to statist cosmopolitanism (world state theory). The deliberative ideal holds that any political decision-making, post- and supra-national institution-building included, has to pass the test of real deliberation in concrete life worlds and communities. While common sense might pre-exist as a human faculty, its content is always the result of communicative processes. The abstract cosmopolitanism implied in universal liberal principles and non-historical hypotheses may lead to an extension or integration of existing political communities only to the extent that the concrete post-national institution-building passes the test of real deliberation within and among existing political communities. Philosophical reflection cannot anticipate the concrete outcomes of this real deliberation about post-national institution-building. Cosmopolitanism can therefore not be anticipated counterfactually in a concrete statist form. The institutional setting created by deliberating *demoi* cannot be anticipated in normative theory.

References

- Anderson, B. (1991), *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso).
- Apel, K.-O. (2000), 'Globalization and the Need for Universal Ethics', *European Journal of Social Theory*, 3(2), pp. 137–55.
- Arendt, H. (1982), *Lectures on Kant's Political Philosophy* (Chicago: University of Chicago Press).
- Beitz, C. (1999), *Political Theory and International Relations*, With a New Afterword by the Author (Princeton, NJ: Princeton University Press).
- Bohman, J. (1998), 'Survey Article: The Coming of Age of Deliberative Democracy', *Journal of Political Philosophy*, 6(4), pp. 400–25.
- Bohman, J. (1999), 'Citizenship and Norms of Publicity, Wide Public Reason in Cosmopolitan Societies', *Political Theory*, 27(2), pp. 176–202.
- Bohman, J. (2001), 'Cosmopolitan Republicanism: Citizenship, Freedom and Global Political Authority', *Monist*, 84(1), pp. 3–21.
- Bratman, M.E. (1999), *Faces of Intention. Selected Essays on Intention and Agency* (Cambridge: Cambridge University Press).
- Cheneval, F. (2005), *La Cité des Peuples* (Paris: Cerf).
- Cohen, J. (1996), 'Procedure and Substance in Deliberative Democracy', in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press), pp. 95–119.
- Cohen, J. (1997), 'Deliberation and Democratic Legitimacy', in R. Goodin and P. Pettit (eds), *Contemporary Political Philosophy* (Oxford: Blackwell), pp. 143–55.

- Congar, Y. (1958), 'Quod omnes tangit ab omnibus tractari et approbari debet', *Revue historique de droit français et étranger*, 36, pp. 210–59.
- Dryzek, J.S. (2001), 'Legitimacy and Economy in Deliberative Democracy', *Political Theory*, 29(5), pp. 651–69.
- Elster, J. (ed.) (1998), *Deliberative Democracy* (Cambridge: Cambridge University Press).
- Estlund, D. (1997), 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority', in J. Bohman and W. Rehg (eds), *Deliberative Democracy* (Cambridge, MA: MIT Press), pp. 173–204.
- Fishkin, J. (1997), *The Voice of the People: Public Opinion and Democracy* (New Haven, CT: Yale University Press).
- Goodin, R.E. (2003), 'Democratic Deliberation Within', in J.S. Fishkin and P. Laslett (eds), *Debating Deliberative Democracy* (Oxford: Blackwell Publishing), pp. 54–79.
- Gutmann, A. and Thompson, D. (2004), 'What Deliberative Democracy Means', in A. Gutmann and D. Thompson, *Why Deliberative Democracy* (Princeton, NJ: Princeton University Press), ch. 1.
- Habermas, J. [1992] (1996a), *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press).
- Habermas, J. [1992] (1996b), 'Popular Sovereignty as Procedure', in J. Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press), pp. 463–90.
- Habermas, J. [1996] (1998), *The Inclusion of the Other* (Cambridge, MA: MIT Press).
- Held, D. (1995), *Democracy and Global Order* (Cambridge: Polity).
- Hug, S. (2002), *Voices of Europe. Citizens, Referendums, and European Integration* (Lanham, MD: Rowman and Littlefield).
- Huntington, S. (2004), *Who are We? The Challenges to America's National Identity* (New York: Simon and Schuster).
- Jennings, I. (1956), *The Approach to Self-Government* (Cambridge: Cambridge University Press).
- Joerges, C. (2002), 'Deliberative Supranationalism – Two Defenses', *European Law Journal*, 8(1), pp. 133–51.
- Joerges, C. and Neyer, J. (1997), 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology', *European Law Journal*, 3(3), pp. 273–99.
- Jones, C. (1999), *Global Justice. Defending Cosmopolitanism* (Oxford: Oxford University Press).
- Kaufmann, B., Goldmann, M. and Carline, P. (2005), *Guidebook to Direct Democracy in Switzerland and Beyond* (Bern: Initiative and Referendum Institute Europe).
- Kraus, P.A. (2003), 'Cultural Pluralism and European Polity-Building: Neither Westphalia nor Cosmopolis', *Journal of Common Market Studies*, 41(4), pp. 665–86.
- Laursen, J.C. (1993), 'Publicity and Cosmopolitanism in late Eighteenth-Century Germany', *History of European Ideas*, 16, pp. 117–22.
- Mead, G.H. (1967), *Mind, Self, and Society from the Standpoint of a Social Behaviorist* (Chicago: University of Chicago Press).
- Mitzen, J. (2005), 'Reading Habermas in Anarchy: Multilateral Diplomacy and Global Public Spheres', *American Political Science Review*, 99(3), pp. 401–17.
- Morgan, E. (1988), *Inventing the People* (New York: Norton).

- Müller, H. (2001), 'International Relations as Communicative Action', in K. Fierke and K.E. Jorgensen, *Constructing International Relations* (New York: M.E. Sharpe), pp. 160–78.
- Pettit, P. (2003), 'The Discursive Dilemma and Republican Theory', in J.S. Fishkin and P. Laslett (eds), *Debating Deliberative Democracy* (Oxford: Blackwell), pp. 138–62.
- Pogge, T. (1989), *Realizing Rawls* (Ithaca, NY: Cornell University Press).
- Rawls, J. (1993), *Political Liberalism* (New York: Columbia University Press).
- Risse, T. (2000), 'Let's Argue! Persuasion and Deliberation in International Relations', *International Organization*, 54(1), pp. 1–39.
- Scanlon, T.M. (1982), 'Contractualism and Utilitarianism', in A. Sen and B. Williams (eds), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press), pp. 103–28.
- Scheffler, S. (1999), 'Conceptions of Cosmopolitanism', *Utilitas*, 11(3), pp. 255–76.
- Schmalz-Bruns, R. (1999), 'Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaates', *Zeitschrift für Internationale Beziehungen*, 6(2), pp. 185–244.
- Seneca, L.A. (1995) 'De otio', in L.A. Seneca, *Werke* (Darmstadt: Wissenschaftliche Buchgesellschaft), pp. 80–99.
- Singer, P. (2002), *One World. The Ethics of Globalization* (New Haven, CT: Yale University Press).
- Somek, A. (1998), 'National Solidarity, Global Impartiality, and the Performance of Philosophical Theory. The Example of Migration Policy', *Ratio Juris*, 11(2), pp. 103–25.
- Steiner, J., Bächtiger, A., Spörndli, M. and Steenbergen, M. (2004), *Deliberative Politics in Action* (Cambridge: Cambridge University Press).
- Thompson, D. (1999), 'Democratic Theory and Global Society', *The Journal of Political Philosophy*, 7(2), pp. 111–25.
- Yack, B. (2001), 'Popular Sovereignty and Nationalism', *Political Theory*, 29(4), pp. 517–36.

Chapter 9

Deliberative *Demoi*-cracy in the European Union *Towards the Deterritorialization of Democracy*

Samantha Besson¹

Our European *demoi*-cracy is neither simply a *Union of democracies* nor a *Union as democracy*. Our European *demoi*-cracy is instead one of the most innovative political machines ever invented to create and manage not only economic but also democratic interdependence. [...] Our European *demoi*-cracy is predicated on the mutual recognition, confrontation and ever more demanding sharing of our respective and separate identities – not on their merger. The EU is a community of others. In political terms, a *demoi*-cracy is not predicated on a common identity, European public space and political life. Instead, it requires informed curiosity about the political lives of our neighbours and mechanisms for our voices to be heard in each other's forums. In time, a multinational politics should emerge from the confrontation, mutual accommodation and mutual inclusion of our respective political cultures. (Nicolaidis, 2003, p. 5)²

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² The paper from which this quote was excerpted has since been revised and published as Nicolaidis (2004).

Introduction

Whether cosmopolitan³ or national, many democratic theories suffer nowadays from a territorial bias that prevents them from accounting properly for the new democratic reality in Europe. Even though most theories have realized the necessity of post-national⁴ democracy, although they have acknowledged the tyranny of national paradigms of democracy and hence developed new models of post-national democracy and although the “*demos without ethnos*” thesis has now gained extensive support, the relevant democratic polity and hence the relevant democratic subject in most cosmopolitan democratic theories remains a territorial one. It has indeed long been recognized as the *paradox of the democratic polity* that the modern democratic polity is both constituted and constrained by pre-political territorial boundaries (Benhabib, 2004, ch. 4; Whelan, 1983; Offe, 1998). The problem, however, is that territorial boundaries of democracy exclude many non-citizens’ interests, which are affected by domestic decisions, and therefore conflict more and more with political equality and with the inclusive nature of democracy. Despite increasing evidence of the so-called “deterritorialization of politics” at the global level (Held et al., 1999, p. 32; Held, 1995a, p. 237) and of the porosity of national boundaries, the territorial boundaries of democracy are still held to apply to regional and cosmopolitan democracy.⁵ Supranational polities, whether regional or global, are thought of as overlapping territorially delineated national entities and as sharing in part at least the same constituencies, thus simply adding another layer of territorialized democracy rather than opening national democracies or other non-state, albeit territorially distinct, polities to one another along functional instead of territorial lines only.⁶

This is the case in most accounts of democracy in the European Union (EU) which focus on the co-operation of territorially delineated national *demos* (Weiler, 1999) or on the constitution of a pan-European *demos*, which encompasses all the national *demos* within their territorial boundaries (Habermas, 2001a). Even though the national states with the territorially delineated democratic

³ “Cosmopolitan democracy” need not imply a world democracy institutionalized along the lines of state-like democracy; it refers merely to “post-national” democracy, i.e., democracy beyond the state whether it is international, supranational or purely transnational, without assuming the disappearance of national democracies. On the term, see Archibugi (2004); Dryzek (1999).

⁴ I refer to the term “post-national” as a generic term to mean non-strictly national, whether supranational or merely international. It should not be taken to mean that post-national law supplants and replaces national law; it can well coexist with it.

⁵ See for example Pogge (1997). See for a critique, Archibugi (2004, p. 445 ff.); Dryzek (1999, p. 44).

⁶ See for example Habermas (2001a). See also, albeit to a minor extent, Held (1995b, pp. 154, 236) as shown in the critique by Dryzek (1999, p. 32) and Bohman (2005).

politics they promote remain crucial to European democracy,⁷ there is legal and political evidence pointing in the direction of a progressive deterritorialization of democracy in the European Union (Benhabib, 2004, ch. 4). The main features of European democracy have already been discussed at length elsewhere: in a nutshell, it is an unprecedented and fully institutionalized form of post-national democracy, whose primary agents remain the many national *demos* and not (only) a single and distinct European *demos* and in which the relevant national and European *demos* are gradually decoupled from underlying *ethnoi*. Hence, the now famous idiosyncratic concept of European *demos*-cracy (Van Parijs, 1998; Weiler, 1999; Poiras Maduro, 2002; Nicolaïdis, 2003 and 2004; Bohman, 2004 and 2005). There is more to the unique organization of European *demos*-cracy, however, and this novelty lies, I will argue, in the progressive deterritorialization of the relevant *demos* in the EU.⁸

It is crucial to pay heed to this transformation, since, without democratic deterritorialization, truly transnational deliberation could not really take place and European *demos*-cracy would amount to no more than wishful thinking. Deliberative democracy should be seen as part of this transformation. Besides its other advantages, it re-centers attention, I will argue, on the European citizen and the moral-political constituents of each national *demos* and hence the functional European *demos* of *demos* in which they may participate depending on the issue, rather than only focusing on each single national or European territorially-bound *demos* with their electoral constituents.⁹ A lot of progress needs to be achieved to

⁷ It is important not to conflate nationality with territoriality as non-nationals usually see their civic credentials assessed on territorial grounds in contemporary polities. It suffices to think of the residence-based approach to European citizenship that aims at freeing EU citizenship from national nationalities, but that remains founded on a territorial criterion of citizenship and democracy. See Schachar (2003); Benhabib (2004). This explains reversely how the deterritorialization of democracy need not imply the end of national states, as we will see.

⁸ From a methodological perspective, the chapter purports, starting from the evidence of deterritorialization of democracy in Europe, to discuss its theoretical underpinnings, then suggesting in return ways in which the institutionalization of European democracy may develop this deliberative potential. A combination between a "top-down" and a "bottom-up" approach is required that allows for a certain influence of the post-national political and legal reality on normative considerations (Gutmann and Thompson, 2004, p. 37), while also in turn constraining that institutional reality with those very normative considerations. All this explains how the EU can be used as an example against which one should test institutional considerations of cosmopolitan democratic theory, without, however, necessarily being taken as an absolute model and an optimal outcome, given the constant need for institutional reform (Nicolaïdis and Lacroix, 2003, p. 137).

⁹ On the opposition between moral and electoral constituents, see Gutmann and Thompson (2004); Thompson (1999, p. 120 ff.). I am referring here to moral-political constituents to emphasize the political role of these constituents as opposed to a purely moral presence (on the latter, see Cheneval, 2006, in this book).

enhance the deliberative dimension of European *demoi*-cracy, however. Based on the deliberative model of democracy, the chapter will venture different institutional proposals aimed at making the best of Europe's deterritorialized *demoi*-cracy. I will start by presenting the specificity of the democratic legitimacy of the European polity and of European deliberative democracy (Section 1). The second section will identify the relevant democratic subjects in the EU and conclude to the plurality of European *demoi*. In the third section, I will address the paradox of the democratic polity and argue for the deterritorialization of *demoi*-cracy in the EU. This will lead, in the fourth section, to the development of a model of deterritorialized deliberation in the EU and beyond.

1 The Democratic Legitimacy of the European Polity

Ever since the European Union entered its so-called "legitimacy crisis" in the early 1990s (Bellamy and Castiglione, 2000; Poiares Maduro, 2002), the issue of the democratic legitimacy of the EU has become an object of fascination for both Europeanists and democratic theorists alike (Weiler, 1995; Craig, 1999; Mény, 2003). Very rapidly it has indeed become clear that, if there were a need for legitimacy on the part of a polity which has a huge impact on the life of its legal subjects, the *sui generis* nature of that polity (Poiares Maduro, 2002; Bohman, 2004, p. 330; Schilling, 1996; Weiler and Haltern, 1996) had to have an influence on the kind of regime legitimacy it called for (Eriksen and Fossum, 2000a, p. 13).¹⁰ National paradigms of democracy are useless in alleviating the growing democratic deficit, whether at European or, even worse, at national levels (Bellamy and Castiglione, 2000; Poiares Maduro, 2002). The mixed nature of the polity, situated between a State and an international organization (Mancini, 1998; Weiler, 1998; von Bogdandy, 2000), and its multi-level¹¹ type of governance¹² call for a new model of post-national democracy. In fact, each layer of supranational, international and infranational governance in the European polity should be matched by a specific regime whose legitimacy will depend on the political characteristics of governance required. Moreover, what need to be adapted are not only European democratic requirements, but primarily national models of democracy, which are themselves in deficit due to globalization (Mény, 2003; Moravcsik, 2003; Magnette, 2003a; Thompson, 1999, p. 121 ff.; Beetham and Lord, 1998; Closa and Fossum, 2004). In what follows, I will first discuss models of post-national democracy and then post-national deliberative democracy in general, before addressing the question of deliberative democracy in the EU.

¹⁰ On the notion of post-national legitimacy, see Follesdal (2004); Bellamy and Castiglione (2004).

¹¹ See Jachtenfuchs (2001); Weiler (1999).

¹² On this long-lasting debate on democratic governance as opposed to government, see e.g., Held (1995a); Dryzek (1999, p. 31 ff.); Archibugi (2004).

Post-national Democracy in General

Cosmopolitan or post-national democracy draws the consequences of *globalization* for democracy. National states are no longer the only sources of decisions (Habermas, 2001a); many decisions are taken outside the reach of national political processes and national political processes produce decisions that affect people outside their electoral constituents. Globalization thus generates a legitimacy gap that needs to be filled by globalizing democracy and extending it beyond the national state (Archibugi, 2004, p. 438).

Post-national democracy groups all democratic processes that occur beyond the national state or within the national state, but in ways that link national democracy to other transnational, international or supranational democratic processes. It is not simply about improving national processes, nor about legitimizing international processes indirectly through those national processes (Archibugi, 2004, p. 442). Nor should it, however, be confused with the idea of a cosmopolitan state, as it does not prejudge the nature of the post-national polities whose regime should be democratized (Beitz, 1994; Gosepath, 2002; Besson, 2006). The multiplication of levels of governance and accountability need not indeed necessarily benefit democracy (Gutmann and Thompson, 2004, p. 62). In revealing the beneficial connections between national democracy and transnational or post-national democracy, cosmopolitan democracy proposes the implementation of a multi-layered and multi-centered democratic society *within, among and beyond* states.

Of course, if one transposes democracy beyond the state, it is important to adapt it to the new post-national constellation and its many layers of governance. Post-national polities cannot be governed in the same way as national ones and this undermines the argument according to which international organizations are far less democratic than national states.¹³ These models need, however, to be revised at the national level too, since, on the one hand, national democracies can be deemed deficient in many ways (Mény, 2003; Archibugi, 2004, p. 465; Schmidt, 2004, p. 976) and, on the other, cosmopolitan democracy is a global process that integrates all different layers in such a way that their democratic quality can no longer be judged in an isolated fashion (Dryzek, 1999; Archibugi, 2004).

Deliberative Post-national Democracy in General

Among the different models of democracy that can account for the new post-national democratic processes, one should mention deliberative democracy. By definition, deliberative democracy fits globalized polities better than other democratic theories: deliberation accommodates fluid boundaries, since what matters is the participation of those affected by a decision, wherever they are (Thompson, 1999; Gutmann and Thompson, 2004, p. 36 ff.). In a global world,

¹³ See, for example, Dahl (2001, p. 38).

many national decisions affect people other than those people deciding. It seems therefore that deliberative democracy theories, which emphasize the need to justify decisions to people who have to live with the consequences of collective decisions and to deliberate with them, can easily extend their requirements to the post-national arena.

The idea that democracy revolves around the transformation of preferences through *deliberation* rather than the mere aggregation of preferences through voting has now become one of the major creeds in democratic theory. Deliberative democracy remains, however, a complex ideal with a variety of forms and its legitimacy is still heavily debated (Gutmann and Thompson, 2004; Dryzek, 2005; Besson, 2003 and 2005a, ch. 7). Deliberative democracy, broadly defined, is any one of a family of views according to which public deliberation among free and equal citizens lies at the heart of legitimate political decision-making and self-government. One may summarize the core phenomena that count as deliberative democracy as (i) a process of collective decision-making with the participation of all those affected by the decision (Dryzek, 2001, pp. 651, 662) or at least of their representatives (Benhabib, 1996, p. 68; Besson, 2005a, ch. 10) (democracy) and (ii) a means of reasoned argument offered by and to participants who are committed to values of rationality and impartiality (Elster, 1998, p. 8; Cohen, 1989, p. 22) (deliberation).¹⁴ Whatever form it takes, a conception of deliberative democracy “is organized around an ideal of political justification” (Cohen, 1996) (public justification) requiring free public reasoning of equal citizens (reasoned argument). Claims on behalf of or against such decisions have to be justified to these people in terms that, on reflection and using their common reasons, they are capable of accepting (Dryzek, 2000, p. v).

Deliberative Democracy in the EU

Different democratic models have been put forward to legitimize the EU (Martí, 2003, p. 147 ff.). It is deliberative democracy, however, that is usually regarded as the most promising model for the development of regime and polity legitimacy in the European Union (Curtin, 1997; Weiler, 1999; Eriksen and Fossum, 2000a; Bellamy and Castiglione, 2000; Poiares Maduro, 2002; Gerstenberg and Sabel, 2002; Martí, 2003; Chalmers, 2003; Lord, 2004; Lord and Magnette, 2004).

There are many reasons for this and I will only mention a few here (Martí, 2003). First of all, the *nature* of the European polity. Because deliberation accommodates fluid boundaries particularly well, it fits the mixed and polycentric nature of the European polity. This is even more the case as power is not divided according to the functions of government in the EU, but among stakeholders and these are scattered across the EU (Lord, 2004, pp. 188–89; Thompson, 1999). A second reason to base the democratic legitimacy of the EU on the deliberative

¹⁴ On the relationship between the democratic and deliberative components of deliberative democracy, see Martí (2006) and Lafont (2006), in this book.

model lies in the specificity of the EU's political regime. The latter is indeed neither truly majoritarian nor consociational; it accommodates national diversity and protects against majoritarianism, but without losing in decisiveness (Magnette, 2003b; Dryzek, 2005). A third justification to support the deliberative model of democracy in the EU lies in its reflexivity. Deliberative democracy allows indeed for widespread disagreement and deliberation over the legitimacy of the polity and its regime (Gutmann and Thompson, 2004). This is particularly important in a complex polity like the EU in which decisions affect the lives of many and should hence be regarded as open to potential critiques and revision (Eriksen and Fossum, 2000b, p. 258; Lord and Magnette, 2004). A final and connected reason lies in the dynamic nature of deliberation (Gutmann and Thompson, 2004, p. 6). It is a long-term process in which decisions may constantly be re-opened. This applies particularly well to the EU in which the same decisions are taken in iterated fashions by different authorities.

Numerous questions remain unanswered regarding the application of deliberative democracy to the EU, however. As a post-national polity, deliberation in the latter cannot entirely equate deliberation in a national democracy.¹⁵ One may mention three of these difficulties here: first of all, what motivates us to deliberate (Neyer, 2003, p. 693)? Differences among European citizens might trigger deliberation, but they may also prevent it depending on the circumstances. Second, what kind of deliberation should we privilege? And, finally, what kind of empirical and institutional arrangements could best encourage deliberation in the EU? In what follows, I would like to concentrate on the second and third questions. It is important indeed to suggest an adequate institutional framework of deliberation in the EU, that corresponds to its polycentered and heterarchical nature. To be able to do so, we need to turn, first, to the identification of the democratic subjects in the EU.

2 The Plurality of Democratic Subjects in the EU

Democracy cannot exist without a subject: its *demos* or its people. The same applies therefore in principle to post-national or global democracy. In fact, the absence of a global *demos* is one of the main objections to global democracy. This objection is also referred to as the *no-demos thesis* in the European Union; there allegedly cannot be a European democracy because there is no European *demos*. To develop European deliberative democracy along the lines I have just described, it is crucial to address this objection and identify the relevant democratic subjects in the EU. To do so, I will first discuss the notion of post-national democratic subject in general, before addressing the issue in the European context.

¹⁵ See, for example, the essays in Eriksen and Fossum (2000a).

The Post-national Democratic Subjects

The absence of a global *demos* is one of the main objections to global democracy. According to this objection, minorities and elites are still the primary participants in discussions relative to global politics, rather than the whole community of global stakeholders (Urbinati, 2003).

The problem is that there is no agreed set of criteria as to how to judge what makes a multitude of people a *demos* or a political community. Self-rule or self-legislation, which lie at the core of democracy, also imply self-constitution; the community which binds itself by the laws it generates also defines itself as a democratic subject by drawing its own boundaries (Benhabib, 2004, ch. 4). All it takes therefore is some kind of “we-feeling,” a form of solidarity among different “stakeholders” (Archibugi, 2004; Lord, 2004). This requirement of a solidarity feeling should also apply to the post-national level, therefore. According to Calhoun, indeed, solidarity does not necessarily respect state boundaries (Calhoun, 2003). In fact, solidarity need not necessarily be pre-political at all; it can be generated by the political exercise of constitution of global institutions. Moreover, this solidarity need not even be territorial. Peoples can be interpreted as the inhabitants of a village, of a city, or of a country, but also as ethnic groups, members of religious movements, and even fans of a football team. In many functional areas of governance, there are different *demoi* which are not always clearly associated to states’ borders. If communities of fate overlap *de facto*, it is regressive to anchor in a static manner a political community to a geographically delimited and in some cases pre-political “population” (Archibugi, 2004).

In fact, it is not only the pre-political and often territorial boundaries of the *demos* which are put into question at the post-national level, but also the single nature of the post-national *demos*. Post-national democracy is indeed the result of the imbrication of many national, transnational, international and supranational democratic processes in which the democratic subjects are many and do not necessarily constitute a single *demos* (Archibugi, 2004; Bohman, 2005). All this is particularly relevant to the identification of the democratic subjects in the European Union. The questions we need to ask are the following: what is the European *demos* based on? Is there more than one European *demos*? And, are the different European *demoi* territorially-bound?

The European Democratic Subjects

Among the different democratic subjects in the EU, it is important to distinguish between the national *demoi* which subsist as a basic layer of European democracy and the European *demos* that is either independent or imbricated in national *demoi*, thus raising difficult issues pertaining to the nature of that imbrication.

The national demoi The national *demoi* are clearly the basic subjects of European democracy; they retain sovereign competences in many areas of European law-

making. They are also the indirect source of the democratic legitimacy of all intergovernmental decision-making at the European level. Finally, even if the European *demos* is much more than the sum of national *demoi*, it is, as we will see, plural in nature and hence cannot be detached from each single national *demos*. Thus, even supra-national European law-making implies national *demoi* in its legitimation process. This explains why the EU is often regarded as a Union of both states and peoples (Nicolaïdis, 2003).¹⁶ European democracy is a whole that cannot simply be assessed either from a purely national or a purely European standpoint. To quote Nicolaïdis, European democracy is neither a “Union of democracies” nor a “Union as democracy” (Nicolaïdis, 2003, p. 5; Bohman, 2004 and 2005).

The European demoi If the European *demos* is more than the mere sum of national *demoi*, the question remains as to its exact constituency. There are two distinctions worth dwelling on here: first, the distinction between the *demos* and the *ethnos* and, second, the distinction between a single *demos* and many *demoi*. A third question arises, once one accepts the existence of a European *demos* that is imbricated in the many national *demoi*: that of the territorial or functional nature of the European *demoi*.

Demos or *ethnos*. Traditionally, the *no-demos* thesis has been phrased around the paradox of the existence of a *demos* without an *ethnos* in Europe. In many European national states, and in Germany in particular, the national *demos* is constituted on the pre-political grounds of an *ethnos*, whether that *ethnos* is regarded as racial, ethnic, cultural or religious. Some authors make it a condition of the existence of a European *demos* therefore that it relies on a European *ethnos*. In the absence of such pre-political elements of a European identity, they declare European democracy impossible.¹⁷ This is not a purely European view, however, and the issue of the pre-political origins of modern polities is a growing concern in a multi-cultural world (Canovan, 1996; Benhabib, 2004).

The problem with this view is twofold. First of all, the link between the *demos* and the *ethnos* is not absolute at the national level. Not all European democracies developed on the basis of an *ethnos* historically. Moreover, many democracies are multinational. And, finally, there is a growing tendency to dissociate citizenship rights from nationality in European states facing the challenges of immigration and the social and political integration of migrants. Secondly, the *demos-ethnos* linkage need not necessarily apply to post-national democracy and European

¹⁶ See, for example, the Preamble to the Treaty establishing a Constitution for Europe: “Grateful to the members of the European Convention for having prepared this Constitution *on behalf of the citizens and States of Europe*” (emphasis added).

¹⁷ One may distinguish between ethno-nationalists (89 BVerfGE 155, [1994] I CMLR 57, *Maastrichturteil*) and civico-nationalists (e.g., Grimm, 1995), depending on whether the reasons to found the *demos* in an *ethnos* are pre-political or related to the national boundaries of political association.

democracy in particular. This may be confirmed by EU citizenship which depends on national nationality, but not on a European nationality. As such, European democratic membership is decoupled from nationality and any form of pre-political identity apart from national ones. This has been exemplified lately by the extension in the 2000 Charter of Fundamental Rights of many of EU citizenship rights to third country nationals residing in the EU, thus calling for a redefinition of a denationalized European citizenship (Davis, 2002).

As a consequence, the European *demos* may be understood in civil and political rather than in ethno-cultural terms. On this view, European citizens do not by definition share the same nationality nor do they need to share the same identity. The substance of their membership in the same European *demos* lies in a commitment to the shared values of the Union (Weiler, 1999, p. 344 ff.). These shared trans-European values are best captured by what Habermas calls the European "constitutional patriotism" (Habermas, 2001a and 2001b).¹⁸ Authors diverge, however, on whether or not this European *demos* already exists (Soysal, 2003) or whether its emergence is at the most possible and desirable in the foreseeable future (Habermas, 2001a and 2001b). They diverge also on whether the European *demos* fosters the different *ethnoi* corresponding to the national *demos* (cosmopolitan communitarians: e.g., Weiler, 1999) or is indifferent to them (cosmopolitan globalists: e.g., Lacroix, 2004b).¹⁹

Demos or *demos*. If one accepts the possibility of a European *demos* constituted politically without an *ethnos*, another question arises. There may indeed be one or many subjects of European democracy (Bohman, 2005; Gerstenberg and Sabel, 2002), depending on whether there is a distinct and overarching European *demos* or, on the contrary, a *demos* of many European *demos* in which are imbricated the national *demos* linked by European values.

According to some authors, there cannot be a European democracy without a single European *demos*. These authors group pure intergovernmentalists, who are skeptic of the European political construction, but also supranationalists, who believe in a European super-state. What they have in common is the statist model of post-national democracy, according to which there can only be one overarching *demos* in a democracy (Nicolaidis, 2003, p. 5). For the former, however, this *demos* can only exist if it matches a pre-existing *ethnos* in Europe, and, as there is none, all we have are national *demos* and hence no European democracy (Grimm, 1995). For the latter, by contrast, the true post-national European *demos* need not match a pre-existing *ethnos* in Europe and can be developed on purely civil and political grounds by developing a European public sphere, etc. (Habermas, 2001a; Zürn, 2000). According to this approach, all members of a national *demos*

¹⁸ See also Cronin (2003); Lacroix (2002, 2004a and 2004b).

¹⁹ Whereas Habermas (2001a) considered that the new European *demos* would eventually replace the national *demos* and *ethnoi*, the new Habermas (2005) seems to cling to the latter more closely.

are also members of a European *demos* and European membership can hence be understood on the model of concentric circles of political membership.²⁰

Those who reject the statist model of the European polity approach the latter's democratic legitimacy differently and do not look for a single state-like *demos* in Europe. They acknowledge the existence of a complex European *demos*, but emphasize the plurality of European *demos* constituting it without an overarching and distinct European *demos*. Rather than having a single subject, European democracy would have a plurality of *demos* at its core. These *demos* are more together, however, than the mere sum of many distinct democracies with their different national *demos*, because all of them are distinctly European. Europe is not only a union of states in which *demos* are connected indirectly through their leaders, but also a union of peoples in which these *demos* are connected directly (Nicolaidis, 2003, p. 5). If European democracy is neither a Union of democracies nor a Union as democracy, it should be regarded as a Union as *demos*-cracy (Nicolaidis, 2003, p. 5, and 2004; Bohman, 2004 and 2005). If European membership is not to be viewed merely as an overarching *demos*, it should therefore be understood as an additional form of *demos* that is necessarily imbricated to every single national *demos* as a *demos of demos* (Cohen, 2000). This is exemplified by the fact that EU citizenship is dependent on national citizenship.

Authors differ on how the different European and national *demos* may relate to constitute more than a mere sum of national *demos* organized intergovernmentally and more precisely how the Europeanness of these *demos* emerges. The European *demos* no longer refer in this case to national *demos* but to the European interconnection of national *demos*.²¹ A first approach may be to understand individuals as belonging simultaneously to two *demos* based critically on different subjective factors of identification, in the way someone may regard herself as being both Irish and Catholic. The problem with this approach is that Europeanness may be dispensable; just as one can be a Catholic without being Irish or be Irish without being a Catholic, membership to the European *demos* could be detached from membership to national *demos*. This would not be otherwise were the European *demos* an overarching and single territorial *demos*. A second approach understands individuals as belonging simultaneously to a national *demos* and to the European *demos* in a way that both memberships cannot be dissociated. One can only be a European citizen by being also a national citizen, but more importantly one cannot be a national citizen without also being a European citizen (Weiler, 1999, p. 346).

Territorial or functional *demos*. A third question that needs to be addressed, even once one accepts that the European *demos* need not be *ethnoi* nor be grouped

²⁰ See Weiler (1999, p. 344).

²¹ In this sense, I follow Weiler (1999), although not for the same reasons: one need not believe in the value of fostering national *ethnoi* to believe in the importance of maintaining many *demos* in Europe as opposed to promoting a single European *demos* à la Habermas (Lacroix, 2004b).

under an overarching single European *demos*,²² is that of the deterritorialization of European democracy.²³ The idea underlying European *demos*-cracy is indeed to instill transnational and hence trans-European democratic politics (Bohman, 2005). Since communication should take place both in existing national institutional and non-institutional channels, Dryzek's approach to decentering democracy and taking it away from institutions (Dryzek, 1999 and 2005) is not sufficient. Moreover, transnational deliberation among European *demos* does not aim at replacing national democratic processes, but rather at complementing them on specific matters; it therefore operates on a radically different mode from that of national deliberation.²⁴ Thus, if multinational democracy and transnational deliberation are to become more than wishful thinking, the solution has to lie in the deterritorialization of democracy.²⁵ According to Nicolaïdis, however, European *demos*-cracy "requires informed curiosity about the political lives of our neighbours and mechanisms for our voices to be heard in each other's forums" (Nicolaïdis, 2003, p. 5). If transnational deliberation among many European *demos* is a normative requirement, rather than a descriptive statement, however, it needs to rely on a normative argument. But how can this transnational deliberation be justified if democratic constituencies and fora are territorially defined and bounded and democratic requirements are therefore limited to an electoral constituency?

Of course, the deterritorialization of democracy will never be absolute given the need for located authorities and for an electoral constituency constituted of all those affected, but also accordingly by a criterion of territorial proximity.²⁶ The different national *demos* remain profoundly territorial. What matters, however, for deterritorialized *demos*-cracy is the European functional connection between

²² According to Habermas (2001a), indeed, the European *demos*, like the national *demos*, is territorially-bound. For a critique, see Gerstenberg and Sabel (2002).

²³ Even those authors who defend the co-existence of multiple *demos* do not necessarily abandon the idea of their territorial boundedness. See, for example, Held (1995a, pp. 154, 236) on an "overarching legal framework" and the critique by Bohman (2005).

²⁴ Thus, Thompson (1999, pp. 120–25) is too restrictive when he argues against cosmopolitan democracy for a deliberative form of transnational democracy in national democratic processes only.

²⁵ See Schmidt (2004, pp. 980–81) who speaks of "de-differentiation of European polities" due to European integration. Most authors like Nicolaïdis (2003), Póitres Maduro (2002) and Weiler (1999) do not explore how the transnational democratic discourse they encourage can be justified. This problem is even more acute for Nicolaïdis (2003) who understands the European *demos*-cracy to encompass national *demos* only.

²⁶ Although the EU is a multi-layered entity that "de-borders the nation-state," it can clearly be analyzed as a territorial polity surrounded by external borders. See von Bogdandy (2000, pp. 34–36) and most recently the reference to the European continent in the Preamble to the Treaty establishing a Constitution for Europe. Of course, as we will see, just as in the case of national democracy, this does not mean that European democracy need necessarily be purely territorial, but only that it could be taken to be such.

the many territorialized national *demoi*. It is important therefore to distinguish the subject of democracy, the European functional *demos of demoi*, from the territorial entities in which the national *demoi* are located.²⁷ It is essential to understand, however, that the functional link between the different territorial national *demoi* is a political one, albeit not necessarily an electoral one, and not only a moral one. It seems artificial indeed to separate a moral constituency that deliberates from a political one that decides (contra Cheneval, 2006). Deliberation cannot be separated that neatly from the decision-making process (see Besson, 2003). Moreover, deliberation that matters politically amounts to a large extent to an institutionalized process that already calls for issues of clarification in terms of representation and forum, for instance. This actually explains how one may refer to this European functional *demos of demoi* as a real *demos* and to EU Member States' citizens taking part in local politics in another Member State as European citizens.

3 Towards Deterritorialized Democracy

The institutional and normative practices that need to accompany deterritorialized and cosmopolitan democracy have not yet been articulated theoretically (Archibugi, 2004; Benhabib, 2004). Reasons may be found in the persistence of what one may refer to as the paradox of the democratic polity. In a globalized world, this paradox and the hiatus between territorial democratic processes and their deterritorialized impact generate increasing unease and a representation-of-interests problem and hence call for an argument for democratic deterritorialization.

The Paradox of the Democratic Polity

Advocates of deterritorialized democracy face the ancient and famous paradox of democratic legitimacy (Benhabib, 2004, ch. 4). Self-rule, which lies at the core of democracy, also implies self-constitution; the community which binds itself by the laws it generates also defines itself as a democratic subject by drawing boundaries (Whelan, 1983; Offe, 1998). The difficulty is that these boundaries are usually not only civic, but also territorial. In fact, these territorial boundaries often match pre-political territorial boundaries.²⁸ As a consequence, the will of the democratic sovereign can only extend over the territory under its jurisdiction. The problem is that the territorial limits of the polity contradict the democratic requirement that all those affected by a decision be given a voice in the decision-

²⁷ See Schachar (2003) who suggests a "*jus connexio*" instead of a "*jus sanguinis*" or a "*jus soli*" which both remain eminently territorial.

²⁸ Even those authors who consider that the *demos* need not pre-exist politics and can be politically constituted use a territorially-bound conception of the *demos*. See, for example, Habermas (2001a).

making process. This gives rise to the *paradox of the democratic polity*: the polity is both a condition and a limit on democracy. Without a bounded polity, there can be no democracy, but democracy may not extend further than the boundaries of the polity (Poiares Maduro, 2002). Thus, democracy is paradoxically limited in undemocratic ways; it cannot apply to its own constitution and to the determination of its own boundaries.

This paradox transfers to cosmopolitan democracy in a global world. Since global democracy cannot exist without a *demos*, the issue of the self-constitution of the *demos* re-arises in the global context (Archibugi, 2004, p. 461). Even though political boundaries need no longer be conceived in state-centric terms, and although post-national citizenship need not be grounded in nationality or other pre-political elements of collective identity, they remain committed to locality (Benhabib, 2004, ch. 4). Democratic governance is mostly thought to draw boundaries and create rules of membership at some locus or another, even if it is smaller or larger than those of a national state. Supranational polities, whether regional or global, overlap territorially delineated national entities and they share therefore at least in part the same constituencies, thus simply adding another layer of territorialized democracy rather than functionally opening national democracies or other non-state, albeit territorially distinct, polities to one another.

The Argument for Deterritorializing Democracy

The territorial boundaries of democracy generate a problem of political equality (Beitz, 1983) and lack of inclusion contrary to one of the basic tenets of democracy and democratic participation (Aristotle, 1988, III: 1275b13–b21, VI: 1317a40–1318a10; Dryzek, 2001, pp. 651, 662): when (territorially) elected representatives are the ones to deliberate and make decisions, not all those affected by these decisions can take part in the deliberation and in the vote that leads to the final decisions. The problem with territorialized democracy in a global world lies therefore in the growing hiatus between the exclusivity of the democratic process and the scope of its potential impact outside that democratic process. The stakeholders' communities in a relevant and growing number of specific issues do not necessarily coincide with states' territorial borders (Archibugi, 2004, p. 439; Held, 1995a and 2004). Thus, it is a representation-of-interests problem, which arises from the fact that those inside the polity can impose potential harms (intentionally or not) upon those outside their *demos*. For example, a wealthy polity like the European Union may regularly undertake actions with negative environmental externalities that impose severe pollution and health risks upon those residing outside its geographical boundaries. In understanding democratic polities as closed territorial entities, democratic theory ignores one of the most important components of cosmopolitan democracy: the imbrication of polities and the impossibility of assessing the democratic credentials of one polity in isolation of others'. It has become, in other words, counterproductive to apply

traditional models of democratic accountability to territorially isolated polities when they are already functionally much more imbricated than it seems (Bohman, 2005).

There is a twofold *deficit* in territorial democracies: first, they do not control many decision-making processes that impact on national polities, but take place outside their borders; and, second, national polities exclude from participation and representation many interests which are affected by their decisions. This may occur in three main *settings*. First of all, decisions in a national democracy may affect those taken in another national democracy. Secondly, decisions taken in a transnational process may affect those taken in a national democratic process. Finally, decisions taken in an international or supranational democratic process may affect those taken in national processes. This is the well-known problem of the many majorities overlapping over the same territory (Thompson, 1999). What this means, is that the problem is not only one of *detritorialization* of decisions, as in the first setting, but also of their *overterritorialization* as in the two second groups of settings; whereas the former requires more inclusive democratic processes, the latter calls for both inclusion and exclusion. Indeed, in case of *overterritorialization*, the citizens affected by decisions taken outside their polities get a say in those decisions, even though in a more diluted and indirect way. Finally, one can identify two sets of *interests* that supersede states' borders. On the one hand, there are the matters that involve all inhabitants of the planet. Many environmental problems, for instance, are authentically global, since they influence the destiny of individuals irrespective of their nationality. But, on the other hand, there are also cross-border issues relevant to a few political communities.

There is no agreed set of criteria as to how to judge what makes a multitude of people and an "overlapping community of fate" (Held, 1995a, p. 136) a political community, i.e. a *demos*. It is a largely contingent question that depends on historical events and developmental trends (Offe, 1998, 114). As we have seen before, political communities are bound by a *we-feeling* or a form of solidarity. Solidarity does not, however, necessarily respect state boundaries, and this forces us to try to understand which elements bring individuals together (Calhoun, 2003; Archibugi, 2004). If communities of fate *de facto* overlap, it is regressive to anchor a political community in a geographically delimited "population." True, the *demos* is not antecedent and independent from political institutions. In some institutional contexts, sharing common institutions has given birth to a *demos*. To think that the *demos* is independent from institutions would therefore be equal to thinking that the *demos* could ever be independent from history (Archibugi, 2004). Institutions need no longer depend only on territorial boundaries, however; many are established to fulfill certain cross-border functions and this is the case of many transnational bodies. After all, it is history that made territorial boundaries the relevant boundaries of modern democracy. Ancient democracy and citizenship did not depend on nationality and territory and there is no reason why migration and globalization might not put this linkage into question (Preuss, 1995; Benhabib,

2004, ch. 4). True, the boundaries of national democracies are currently largely defined by pre-political and hence pre-democratic conditions (Whelan, 1983; Offe, 1998). Democracy can help, however, retrospectively mend the democratic deficits in its constitution and boundaries. After all, political equality commands inclusion and respect for all affected interests, and political constituents need not be restricted to electoral ones.²⁹ Defining the identity of a democratic people is an ongoing process of constitutional self-creation. While we can never eliminate the paradox that those who are excluded will not always be among those who decide, we can render these distinctions fluid and dynamic through processes of continuous and multiple democratic iterations (Benhabib, 2004).

If the European functional *demoi* may be constituted on grounds of deterritorialized solidarity, one needs to determine what makes it the case that someone is a citizen of one European functional *demos* rather than of another. Most authors mention the fact of being “affected” by a polity’s decision as sufficient. Stakeholders in these overlapping communities of fate are not, however, strictly speaking *bound* by the democratic decisions taken by other polities. They are at most strongly affected by them and this is a purely factual criterion which anyone can fulfill and which does not therefore suffice to trigger normative consequences and democratic rights in particular (Gutmann and Thompson, 2004; Gould, 2004). In practice, however, the difference is often moot, since stakeholders simply have to abide by the new factual or legal situation thus created. As such, their being “affected” is already, albeit indirectly, normative and not only factual. Of course, the line must be drawn somewhere (Thompson, 1999, p. 120); the criterion must be one of degree of affectation of the interests, which must be comparable to a *de facto* obligation. Thus, for instance, what makes the national *demoi* in Europe part of a functional European *demos* is the fact that they mutually influence each other’s normative orders (Besson, 2004a).

An objection to the deterritorialization of democracy lies in national sovereignty. Neither the idea of national sovereignty, residing in the national parliament, nor that of popular sovereignty *tout court* are easily compatible with the idea of deterritorialized democracy. This is particularly clear in the European context. Because sovereignty in the EU can only be exercised in coordination with non-national polities, it presupposes a cooperative understanding of sovereignty that pools sovereignty between national *demoi* and European institutions (Besson, 2003 and 2004a, p. 271; Magnette, 2000, pp. 161–66). Purely territorial sovereignty has gradually been replaced by a differentiated and overlapping functional form of sovereignty in the EU (Walker, 2003, pp. 22–23). On this account, the exercise of sovereignty becomes reflexive and dynamic as it implies a search for the best allocation of power in each case, thus putting into question and potentially improving others’ exercise of sovereignty as well as one’s own. Since democratic

²⁹ Political equality should therefore be associated to the idea of “*sympoliteia*” among citizens of the City and Others as opposed to strict “*isopoliteia*” among citizens of the same City.

rule is one of the values protected by popular sovereignty, the exercise of sovereignty implies looking for the best level of decision to endow those affected by that decision with the strongest voice and hearing in Europe (Weiler, 1997, p. 112 ff.; MacCormick, 1999, p. 135; Poyares Maduro, 2002).

4 Deterritorialized Deliberation in the EU

I argued before for the specific relevance of *deliberative democracy* in the EU and this specificity is confirmed, I will argue, by the latter's ability to support the deterritorialization of democracy in Europe and beyond. In what follows, I would also like to make *proposals of institutional design* that make the most of the unique deliberative potential of the complex interconnection of public spheres and of the reflexive and iterated nature of democratic deliberation inside and outside the EU. These *demoi-cratic* proposals should help counter traditional measures proposed to further European democracy, which, by ignoring the inherent plurality of the European polity, have contributed to entrenching existing territorial units (Follesdal, 2000; Schmidt, 2004, p. 977) and thus to weakening democratic accountability both at national and European levels and both inside and outside Europe (Schmidt, 2004). The proposals will concern deliberative *demoi-cracy's* fora and its modes of representation.

Deliberative Deterritorialization

Extending the idea of a community of stakeholders beyond territorial boundaries has recently been made much easier by deliberative democracy theories. According to these theories, indeed, the essence of democracy is not to be found only in representation or voting, but also in deliberation. Deliberation can cope with fluid boundaries and allows for transnational communication (Thompson, 1999, pp. 120–25). What matters for deliberative democracy is indeed the character of political interaction, rather than its locus. As such, deliberative democracy broadens the scope of democratic accountability beyond national borders (Dryzek, 1999, p. 44; Gutmann, 1999; Gutmann and Thompson, 2004, p. 36 ff.; Gerstenberg and Sabel, 2002; Eriksen and Fossum, 2000a; Schlesinger and Kevin, 2000; Blichner, 2000; Lord, 2004; Lord and Magnette, 2004). If one extends democratic deliberation across territorial polities to all those significantly affected by a decision, one may therefore count a new kind of deliberative constituents or subjects, i.e. moral-political constituents, besides electoral or formal political constituents (Gutmann and Thompson, 2004, pp. 37–38; Thompson, 1999, p. 120). This is the true meaning of *demoi-cracy*, i.e. democratic deliberation across different territorial *demoi* with citizens of these different *demoi* deliberating with each other, thus constituting one *demos* along different functional lines in each case.

Among the practical and ethical reasons for limiting deliberative democracy to territorially bound democratic polities are, on the one hand, the complexity of transnational deliberation and, on the other, the absence of the grounds of reciprocity that underlie the justification duty in public deliberations (Gutmann and Thompson, 2004, p. 36 ff.). The practical limitations of transnational deliberation need not, however, be higher than national ones. As I have already explained, indeed, transnational deliberation relies greatly on national democratic processes and the latter's complexity need not be enhanced by transnational participation. In fact, the European experience shows how the interests of citizens may be beneficially protected and the equality among them may be re-established through the consideration of non-national citizens' interests.³⁰ The inclusion of other European interests in national political processes will indeed often lead to the satisfaction of dispersed national interests that were previously underrepresented in the national process (Poiare Maduro, 2002; Schmidt, 2004, p. 977). This contributes therefore to enhancing the inclusiveness and accountability of national democratic processes in EU Member States (Schmidt, 2002 and 2004; Duina and Oliver, 2005). As to the ethical grounds for limiting deliberative democracy to territorial entities, it finds its limitations in those decisions which affect and constrain significantly and hence bind, albeit informally, people in other polities as much as citizens themselves. This mutual influence of national decisions on one another provides the very ground for reciprocity in deliberation.

Of course, one may wonder how transnational deliberation can influence decision-making if in the end non-citizens have no *power to decide*. They do not take part in electoral contests and cannot therefore be sure, once they have ascertained the representation of their interests in democratic deliberations, that this will necessarily lead to decisions that take their opinions into account. This objection only cuts some ice, however, if one presumes that there is no such thing as the power of the better argument (Blichner, 2000, p. 162). Deliberation influences the constitution of citizens' opinions and judgments and as such it has a clear influence on the outcome of the decision-making process. In fact, as Dryzek argues, it may even be beneficial in divided polities to establish a distance between deliberation and decision-making and this both through a deferral in time and a delocalization in space (Dryzek, 2005, p. 223; Besson, 2005b, ch. 10); opinions are expressed and debated more coolly and in a more reflexive way. Furthermore, deferred and diffuse deliberation in a transnational public sphere adds to the benefits of national deferral those of the transnational deterritorialization of deliberation (Dryzek, 2005, pp. 232–33).

The Fora of Deterritorialized Deliberation

Any democratic account can expect to be asked about the institutions that will house the democratic processes. Hence the question of the forum of *demos*-cratic

³⁰ Thus, the idea of "*sympoliteia*" can be said to contribute to "*isopoliteia*".

deliberation across polities. Literally, a forum is the institutionalized or non-institutionalized place (Bohman, 2005; Gutmann and Thompson, 2004, p. 62) in which the agent of deliberation, i.e. the people or *demos*, deliberates. It may refer to territorial as much as to functional fora. In principle, fora of deliberation correspond to the territorial boundaries of the polity and do not transcend them. When democracy is deterritorialized and its agent is not only a *demos* but many *demoi*, the question of the forum of deliberation needs to be addressed separately from that of the relevant existing territorial polity, be it the EU or its Member States. The progressive deterritorialization of European democracy may be said to take place, first, within the EU, and then, second, between the EU and the rest of the world.

Deterritorialized deliberation within the EU The EU transcends the statist model of democracy in enabling extensive transnational communication among national *demoi* in the Union that is unknown outside federal super-states, which have a single overarching *demos*. This takes place at many different levels of governance: first, national, second, European and third, transnational.³¹ These constitute a network of national, transnational and international agencies and assemblies that cut across spatially delimited locales (Held, 1995a, p. 237; Dryzek, 1999). Deterritorialized democracy is not only about being multi-layered, but also multi-centered and imbricated at all levels (Nicolaidis, 2003, p. 6); it is not about taking decisions at different places and multiplying deliberation fora, but about taking them together in those same places (Schmidt, 2004).

National deterritorialized deliberation. The first forum of deterritorialized deliberation one may think of is that of national deliberations. Non-citizens of a national *demos* are included in the deliberations of that *demos* in those domains in which they constitute with other non-national European citizens a further functional European *demos*. Multiplying transnational or international decision-making authorities to further transnational deliberation may be necessary, but it also tends to undermine democratic accountability within national democratic processes themselves. It is thus central to start by enhancing the representation of foreign interests in national deliberations. This may take place through special tribunals or fora in which all affected foreign interests are discussed (Thompson, 1999, pp. 121–22). In the long run, however, the aim should be to include these deliberations in ordinary democratic deliberations.

One may distinguish two correlative elements of the progressive deterritorialization of national democratic processes in the EU. First of all, and most importantly, the European Other has become part of the European *demos* that is a functional layer of all national *demoi*. As such, she is a true functional citizen of each territorially-bound national *demos*. For instance, every single

³¹ *Demoi*-cracy cannot therefore be limited to the transnational level, but also applies to supranational and national governance in the EU. Contra: Nicolaidis (2004).

European citizen may vote and be eligible in local and European elections in any other European country. There is, in other words, a right to choose one's polity in the EU. Of course, this is *per se* a territorial membership linked to residence on the territory of any of the Member States; as such, the European citizen, who is also a non-citizen of the Member State in which she resides, has at least a territorial link to that polity. This ability to choose one's polity, and the advantages this generates for the chosen polities,³² should lead, secondly, to the preventive *internalization* of the interests of members of other European *demos* potentially affected by national decisions in the national political processes at stake. This is the case in particular in the increasing number of areas where national decisions affect European ones and thus eventually all other national decisions. Interestingly, this may occur even without the territorial and electoral presence of European non-national citizens. One may hope that gradually the inclusion of non-citizens' interests in national deliberations fora will result in the mutual internalization of those interests, thus leading to a certain emulation among national democratic processes (Poiares Maduro, 2002). Of course, this is easier in some countries than in others (Schmidt, 2004, p. 978). For instance, in countries with a strong federal tradition of subsidiarity, the representation of external interests is common and a further layer of externalization or deterritorialization will come more naturally than in strongly centralized polities. First of all, however, this potential enhancement of national democracy needs to be conscientized and then institutionalized (Schmidt, 2002 and 2004).

European deterritorialized deliberation. There is another European forum in whose deliberations non-citizens may easily be included: supranational and international deliberations in which different national *demos* are represented and in which most affected non-citizens will thus be represented by their respective national *demos*.

International fora of deliberation group global or at least regional *demos* that are as territorially delineated as national *demos* and allow therefore for an overall representation of affected interests. This is a straightforward way in which foreigners who cannot actually participate in national deliberations, may still exercise some influence over national decisions, since public officials are often to some degree more accountable to those foreigners in international fora (Gutmann and Thompson, 2004, p. 39). The difficulty here lies in the modalities of such deliberations, although they are technically easier to overcome than in national deliberations. Most of the time, indeed, intergovernmental organizations are dominated by government officials rather than by stakeholders. *Supranational* fora may correct these shortcomings of international deliberation in representing non-territorial interests. Like international fora, supranational fora of governance are clearly territorial. Overlapping all territorial polities in Europe, they allow

³² One may think, for instance, of taxes or other economic benefits derived from trans-European migration.

for the representation of the interests of all citizens residing in the polities they gather. They are more directly democratic, however, through deliberation in the European Parliament in particular, which functions like a national Parliament in representing the interests of all European citizens.

The European public sphere need not, however, be understood only on the model of a national and territorially-bound public sphere. It should be seen as the trans-European network constituted of national public spheres and a European functional public sphere that goes deeper than the surface of parliamentary deliberations at EU level (Blichner, 2000; Eriksen and Fossum, 2000a). In fact, there is growing evidence of the deterritorialization of democracy even at the supranational level of governance in the EU. This takes place through the modalities of defense of European interests which are no longer grouped and represented along territorial lines and national polities, but increasingly across transnational groupings of interests. The representation of functionally organized interests is something that new trans-European political parties can enhance, for instance. Similarly, the representation in the European Parliament of Europeans by any Europeans and hence by European Others can contribute to the desegregation of public spheres in Europe.

Transnational deterritorialized deliberation. The deterritorialization of democracy also occurs at the transnational level, whether it is at an organized infranational level of governance in the EU or simply across national borders. Transnational and infranational governance is indeed by definition trans-territorial. One may mention two examples of organized infranational democratic deliberation. The difficulty here lies in the modalities of such deliberations given that the locus of deliberation does not match any of the territorial boundaries of existing polities (Schlesinger and Kevin, 2000).

First of all, the deliberations generated by the *open method of coordination* (OMC). The increasingly prevalent OMC aims at addressing problems created by European integration in Member States (Joerges, 2002; Scott, 2002, p. 71). OMC is in essence a form of community-based control as between Member States (Scott, 2002, p. 71). There are many ways of implementing this procedure, but one of the most promising ones puts the emphasis on the cooperation among national authorities' decisions. These have to focus on a common problem and to consider their own policy choices in relation to this problem by comparison to other Member States' choices. European infranational cooperation in the OMC context might even be a way to redeem the latter's democratic legitimacy in a space devoid of legal and political constraints apart from the Treaty itself (Gerstenberg and Sabel, 2002, p. 570). It will indeed lead Member States' authorities to account for their decisions a second time at the national level through the publicity gained at the European level, as well as to account for them before the European authorities that take part in the OMC. Thus, even though the OMC does not directly associate legislative authorities, it has an impact on them. More importantly, it will constrain Member States' authorities to account

to each other for the lack of European coherence of their decisions overall, thus generating a form of transnational democratic practice in Europe (Eriksen and Fossum, 2002).

Secondly, the deliberations generated by *transnational interparliamentary cooperation*. This other key illustration of democratic deterritorialization in Europe lies in the competition and cooperation that prevail among democratic authorities.³³ The importance of dialogue between parliaments throughout Europe has been emphasized a lot in recent years (Blichner, 2000, p. 142 ff.). A Protocol to the 2004 Treaty establishing a Constitution for Europe actually establishes a series of measures to strengthen the involvement of national parliaments in EU decision-making. The benefits of the creation of this trans-European parliamentary public sphere could be measured in terms of both national and European democratic legitimacy. Transnational legislative dialogue and mutual comparison could add onto national standards of democratic legitimacy; they contribute to enhancing the democratic quality of national legislation by introducing a form of double representation of the European *demos* and hence of double checking on national legislation (Blichner, 2000, p. 162). National decisions in Europe are indeed increasingly affected by European, but also by other national decisions in which they have no democratic representation (Poiars Maduro, 2002 and 2003). Of course, more work remains to be done to ensure the cooperation among national and European democratic authorities in practice.

Deterritorialized deliberation beyond the EU The EU also transcends the statist model of democracy in enabling, as a consequence of sharing a political community with the European Other (Nicolaidis and Lacroix, 2003, p. 136), post-national communication with the non-European Other and other *demos* outside the Union. The deterritorialization of democracy within the EU necessarily has an impact on the representation of interests external to the EU within European democratic processes. This is the case for interests that belong to non-EU citizens residing in the EU and outside the EU. This deterritorialized deliberation takes place through purely transnational, infranational or European channels of governance and I will not distinguish among them here.

First of all, the interests of *third country nationals residing in the EU*. It is a consequence of European integration and the inclusion of European citizens in other European polities than theirs that the social and political rights of third country nationals residing in the EU are currently being gradually extended. Of course, the link of these non-national citizens to national polities in the EU remains eventually territorial, since it is dependent on residence in a Member State. However, the tendency is to grant the same political rights to third country

³³ According to Poiars Maduro (2002), this democratic reinforcement function of cooperative sovereignty is actually constitutive of the legitimacy of the European polity itself.

nationals residing in the EU as to non-national EU citizens and hence to allow them the same possibilities of “democratic forum-shopping” in all national polities as EU citizens (Davis, 2002). This implies as a consequence that national deliberations should internalize the interests of those non-EU citizens affected by them, just as they internalize the interests of EU citizens who are nationals of other Member States and this whether these third country nationals reside in the Member State in question or not.

Secondly, the interests of *third country nationals outside the EU*. If the political rights of EU citizens in national polities is about to give rise to more political rights for third country nationals residing in the EU, the next step in deterritorializing national democracies in the EU is to factor in the interests of third country nationals residing outside the EU and whose interests are affected by EU decisions. This can already be illustrated in the field of human rights protection in which the EU exports human rights standards to third countries and hence develops external policies that comply with its internal standards (Besson, 2006). This implies in return taking the interests of those countries, which the EU asks to respect its own democratic standards, into account in European deliberations (Alston and Weiler, 1999, pp. 21–23). It is therefore as if democratic arrangements and the related responsibilities in the EU had been, first, concentrated at the transnational level and then shifted one rung up the ladder of the global institutional framework in Member States’ relationship to third countries. The EU provides a magnified picture of what the institutionalization of a deterritorialized and transnational democracy could look like beyond Europe; the relevant subjects of EU democracy are no longer only national *demos* and maybe a pan-European *demos*, which are all territorially defined, but also the many functional *demos* which overlap existing national ones grouping European national and non-national citizens, as well as non-European citizens along the lines delineated by the issues addressed (Nicolaidis and Lacroix, 2003, p. 127).

The Modes of Representation of Deterritorialized Deliberation

Even if one accepts the principle of having non-citizens as moral-political constituents of democratic deliberation, it remains to be seen how this can be transposed into practice. This requires explaining why democratic representation matters most, how it can be made more reflexive and, finally, what this means for *demos*-cratic representation in the EU.

From equal participation to equal representation Not all stakeholders can participate equally in the democratic processes in which the decisions that affect them will be taken. Since direct participation has already become secondary in most democratic deliberations at the national level, representative deliberation seems the most realistic mode of communication among the different *demos* (Besson, 2005a, ch. 10, and 2005b).

In fact, democratic representation may even be seen as an enhancer of democratic *participation* and deliberation thanks to the distance it creates between deliberation and decision-making and to the relationship of election and accountability between representatives and their constituencies (Besson, 2005b). The relationship of representation is indeed best described as a process (Young, 1997, p. 358 ff.; Kuper, 2004; Urbinati, 2000 and 2002). Representatives and their constituency should be in constant dialogue about the deferred political decision from the moment of authorization to the moment of accountability (Young, 1997, pp. 355–57). This explains the importance of the impulse to political participation and the development of an extensive public sphere which, in sufficient deliberative conditions, should be triggered by the spatial and temporal gap opened by representation between deliberation and decision (Urbinati, 2000 by reference to Mill, 1991, p. 413; Mansbridge, 1999, pp. 227–28; Parkinson, 2003, pp. 190–91). Not only can representation enhance democratic participation, but it can also increase the protection of political equality not only primarily among citizens and non-citizens who are equally affected, but indirectly also among citizens themselves (Urbinati, 2000 and 2002). Simple majorities cannot exclude minorities as easily as in a direct democracy; it takes a majority to elect and authorize representatives, another for these to act and still another to make them accountable. The deferred nature of the decision and the increased scope of deliberation also leave more time and space to diverging opinions and perspectives to make themselves heard and maybe to convince and change majorities until the decision-making stage. Although the representation of non-citizens' interests cannot be as inclusive as the direct participation of all, this incomplete inclusion is compensated by the correctives representation provides to the excesses of majoritarianism and hence of the majority in the electoral constituency.

Of course, the representation of moral-political constituents differs from that of electoral constituents in that the relationship of representation is not punctuated by the election and accountability of representatives. There is a form of representation, however, that has been developed for diverse and divided societies where not all citizens can be represented descriptively and which might contribute to the representation of non-citizens' interests: reflexive representation. This institution may help represent moral-political constituents despite their electoral absence and conceptualize reflexive representation in the EU.

Reflexive representation in general Reflexive representation requires from each representative that she project herself into the place of others in her own internal deliberation (Arendt, 2001, pp. 19–20), rather than leave the confrontation with diversity to external and interactive deliberation (Goodin, 2003b, p. 169 ff.). It corresponds to Kant's idea of "enlarged mentality" (Kant, 2001, p. 216) and to Arendt's idea of "representative thinking" (Arendt, 1970 and 2001). This implies, in particular, taking into account the diverging opinions and perspectives of others when deliberating and taking decisions, even when those people are not represented. The problem with this approach, however, is that, without minimal

representation or means of asserting a voice in the making of the decision, it is too easy to assume that a decision will benefit non-citizens simply because our representatives use reflexive means of deliberation. There are two ways of ensuring an effective representation of non-citizens' interests through reflexive representation.

First of all, *diverse representation*. Without some kind of minimal descriptive representation, reflexive representation cannot be as diversified as required by the representation of non-citizens. It is necessary to give representatives the incentive to make other perspectives imaginatively present (Goodin, 2003b, p. 171; Gargarella, 1998, p. 262; Eckersley, 2000, p. 128). Ideally, therefore, it is a mixture of both the descriptive and reflexive forms of representation which should be used to represent the views of non-citizens affected by our decisions. This is what Eckersley calls diverse representation (Eckersley, 2000, pp. 128–29). Although minimal descriptive deliberation would be ideally required, it is very unlikely that moral-political constituents be represented as fairly as electoral constituents in national deliberations except by foreigners' tribunes. As Goodin argues, it might actually be better for the quality of deliberations not to have a full descriptive representation of non-citizens as people tend to cut deals in such circumstances (Goodin, 2003a; Phillips, 1995, pp. 24–25). If, on the contrary, they realize the existence of moral-political constituents who are not citizens through their descriptive representation, but also understand at the same time that not all perspectives in conflict are represented, they might be more inclined to be cautious and respectful of others' interests (Goodin, 2003a).

A second and more realistic way of ensuring the effective reflexive representation of non-citizens' interests lies paradoxically in the *electoral sanction*. The success of democratic accountability greatly depends on the moral capacities of citizens and public officials (Gutmann and Thompson, 2004, p. 39). As such, the support of elected representatives by their electoral constituents will in principle follow their championing the cause of moral-political constituents and this should encourage the former to keep those interests in mind when deliberating. In fact, it is also a consequence of the proposed model of diverse representation that the relationship of representation is enhanced in quality the more affected interests it encompasses; these can indeed be discussed in deliberations with electoral constituents and trigger disagreement and further deliberation both among representatives and among representatives and constituents (Kateb, 1981, p. 368; Mill, 1991; Urbinati, 2000 and 2002; Besson, 2005b).

Demoi-cratic representation in the EU There are many specific reasons for the relevance of reflexive *demoi-cratic* representation in the European context and I will limit myself to examining four of them here.

First of all, *the fear of elitism*. This concern is so important that an account of representation based on diversity and inclusion of all affected interests could convince many of those who see the future of European democracy in more participatory and inclusive modes of governance (Mény, 2003; Moravcsik,

2003; Magnette, 2003a; Curtin, 2003). By creating sufficient contestation and deliberation among representatives, among citizens and among citizens and representatives, European reflexive representation may contribute to politicizing the European Union and hence to legitimizing it (Magnetete, 2003a; Lord and Magnetete, 2004). Second, the difficulty of *citizens' apathy*. The proposed account could also help solve the European "passive citizenry" problem; it relies on and encourages active and responsive citizenry and a permanent dialogue and questioning between citizens and their representatives (Kuper, 2004). This is particularly important in a complex representative configuration like Europe's in which two levels of representation are operating; once the dialogue between representatives and represented has been launched at the national level, it can only enrich and be enriched in return by the European relationship of representation thanks to the deliberation-generative nature of the proposed model (Besson, 2005b; Kuper, 2004). This phenomenon will actually be enhanced by the reflexive representation of non-citizens' interests.

Thirdly, *the possibility of differentity*. As this model of representation is grounded in *diversity* and the inclusion of external interests, representation through difference is vested with a civilizing role in the context of different and often clashing national identities.³⁴ Representation could help create unity in Europe without negating diversity thanks to the differentiated relationship it constitutes between citizens and representatives (Young, 1997, p. 357; Urbinati, 2000 and 2002). Being represented by a European Other can contribute to a civilizing and educating form of citizenship through which Europeans can learn more about each other without, however, losing their own national identities and references. Finally, the issue of *popular sovereignty*. The constitutive and cultural role of representation can explain how European *demoi*-cracy can dispense with having to find a pre-existing and territorially-bound European *demos* (Lindahl, 1998); representatives help constitute but also differentiate the represented constituency and vice-versa (Young, 1997, pp. 354–58, and 2000; Plotke, 1997, p. 30; Ankersmit, 2002). On this account of representation, therefore, popular sovereignty no longer has to be considered as lost in the European context; European functional sovereignty adds itself onto national territorial sovereignties without negating them, and all of them can remain popular in a more or less direct sense (Lindahl, 1998; Walker, 2003, pp. 22–23; Besson, 2004b).

Conclusion

The idea of *demoi*-cracy has now become an inescapable part of recent proposals attempting to remedy the democratic deficit in the EU. It emphasizes the deliberation among many European *demoi* rather than within either one European *demos* or many national *demoi*. Seductive as it is, the idea challenges

³⁴ See Lindahl (1998) on "*xenonomy*" and Weiler (1999) on "*differentity*."

the territorial boundaries of democracy and raises the famous paradox of the democratic polity that is both constituted and limited by territorial boundaries. If the many European *demoi* are to include the interests of all affected non-citizens in their deliberations or even to deliberate transnationally, this implies breaking the mould not only of traditional territorial fora of deliberation, but also of their territorial constituency.

The purpose of this chapter was to unpack the normative requirements and practical implications of the idea of *demoi*-cracy and to assess the justification and modalities of the progressive deterritorialization of democracy both generally and in the EU. The European Union indeed provides prime empirical evidence of what one may refer to as the gradual deterritorialization of democracy at the national, transnational, international and supranational levels of European governance and this to include non-citizens' interests both within and beyond Europe. This in turn explains the particular relevance of the deliberative model of democracy in Europe. It recenters attention on European citizens and the many functional *demoi* in which they may participate depending on the issue, rather than only focusing on each single national or European territorially-bound *demos*. Based on that model, this chapter ventured different institutional proposals aiming at making the best of Europe's deterritorialized democracy in terms of the forum of deliberation and forms of representation. The proposed model may in turn be transposed to other non-European post-national political processes where transnational and deterritorialized democratic deliberation may prove crucial to successful legal and political integration. The cosmopolitan democracy project is "still in its infancy" (Archibugi, 2004), and it is through institutional achievements like that of European deliberative *demoi*-cracy that it can be further developed both in theory and in practice.³⁵

References

- Alston, P. and Weiler, J.H.H. (1999), 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in P. Alston, M. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press), pp. 3–97.
- Ankersmit, F.A. (2002), *Political Representation* (Stanford, CA: Stanford University Press).
- Archibugi, D. (2004), 'Cosmopolitan Democracy and Its Critics: A Review', *European Journal of International Relations*, 10, pp. 437–73.
- Arendt, H. (1970), *On Violence* (London: Allen Lane).
- Arendt, H. (2001), 'The Crisis in Culture: Its Social and Its Political Significance', in R. Beiner and J. Nedelsky (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, MD: Rowman and Littlefield), pp. 3–26.

³⁵ See on the "third transformation of democracy," Dahl (1989, p. 224) and most recently Bohman (2005).

- Aristotle (1988), *The Politics* (Cambridge: Cambridge University Press).
- Beetham, D. and Lord, C. (1998), *Legitimacy and the EU* (London: Routledge).
- Beitz, C. (1983), 'Procedural Equality in Democratic Theory: A Preliminary Examination', in J. Chapman and R. Pennock (eds), *Liberal Democracy, Nomos XXV* (New York: New York University Press), pp. 71–90.
- Beitz, C. (1994), 'Cosmopolitan Liberalism and the States System', in C. Brown (ed.), *Political Restructuring in Europe: Ethical Perspectives* (London and New York: Routledge), pp. 123–36.
- Bellamy, R. and Castiglione, D. (2000), 'The Uses of Democracy: Reflections on the European Democratic Deficit', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 65–84.
- Bellamy, R. and Castiglione, D. (2004), 'Normative Theory and the European Union: Legitimising the Euro-polity and its Regime', in L. Tragardh (ed.), *After National Democracy: Rights, Law and Power in the New Europe* (Oxford: Hart Publishing), pp. 9–40.
- Benhabib, S. (1996), 'Toward a Deliberative Model of Democratic Legitimacy', in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press), pp. 67–94.
- Benhabib, S. (2004), *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press).
- Besson, S. (2003), 'Democracy and Disagreement – From Deliberation to Vote and Back Again. The Move towards Deliberative Voting Ethics', in M. Iglesias and J. Ferrer (eds), *Globalization, Democracy and Citizenship* (Berlin: Duncker and Humblot), pp. 101–35.
- Besson, S. (2004a), 'From European Integration to Integrity – Should European Law Speak with Just One Voice?', *European Law Journal*, 10(3), pp. 257–81.
- Besson, S. (2004b), 'Sovereignty in Conflict', *European Integration Online Papers*, 8(15), <http://eiop.or.at/eiop/texte/2004-015a.htm>.
- Besson, S. (2005a), *The Morality of Conflict. Reasonable Disagreement and the Law* (Oxford: Hart Publishing).
- Besson, S. (2005b), 'The Paradox of Democratic Representation', in L. Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot: Ashgate), pp. 125–61.
- Besson, S. (2006), 'The European Union *qua* Agent of Global Justice', forthcoming.
- Blichner, L. (2000), 'The Anonymous Hand of Public Reason: Interparliamentary Discourse and the Quest for Legitimacy', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 141–63.
- von Bogdandy, A. (2000), 'The European Union as a Supranational Federation: A Conceptual Attempt in the light of the Amsterdam Treaty', *Columbia Journal of European Law*, 6, pp. 27–54.
- Bohman, J. (2004), 'Constitution Making and Democratic Innovation: The European Union and Transnational Governance', *European Journal of Political Theory*, 3, pp. 315–37.
- Bohman, J. (2005), 'From *Demos* to *Demoi*: Democracy across Borders', *Ratio Juris*, 18(3), pp. 293–314.

- Calhoun, C. (2003), 'The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism', in D. Archibugi (ed.), *Debating Cosmopolitanism* (London: Verso), pp. 86–116.
- Canovan, M. (1996), *Nationhood and Political Theory* (Cheltenham: Edward Elgar).
- Chalmers, D. (2003), 'The Reconstitution of European Public Spheres', *European Law Journal*, 9(2), pp. 127–89.
- Cheneval, F. (2006), 'The People in Deliberative Democracy', in this book, ch. 8.
- Closa, C. and Fossum, J.E. (2004), 'Introduction: Constitution-Making and Democratic Legitimacy in the EU', in C. Closa and J.E. Fossum (eds), *Deliberative Constitutional Politics in the EU*, ARENA Report (Oslo: Arena), pp. 1–20.
- Cohen, J. (1989), 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity* (Oxford: Blackwell), pp. 17–34.
- Cohen, J. (1996), 'Procedure and Substance in Deliberative Democracy', in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press), pp. 95–119.
- Cohen, J. (2000), 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos', *International Journal of Sociology*, 14(3), pp. 245–68.
- Craig, P. (1999), 'The Nature of the Community: Integration, Democracy and Legitimacy', in P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press), pp. 26–52.
- Cronin, C. (2003), 'Democracy and Collective Identity: In Defense of Constitutional Patriotism', *European Journal of Philosophy*, 11(1), pp. 1–28.
- Curtin, D. (1997), *Postnational Democracy: The European Union in Search of a Political Philosophy* (The Hague: Kluwer).
- Curtin, D. (2003), 'Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance', *Social and Legal Studies*, 12(1), pp. 55–75.
- Dahl, R. (1989), *Democracy and Its Critics* (New Haven, CT: Yale University Press).
- Dahl, R. (2001), 'Is Post-national Democracy Possible?', in S. Fabbrini (ed.), *Nation, Federalism and Democracy* (Trento: Editrice Compositori), pp. 35–58.
- Davis, R.W. (2002), 'Citizenship of the Union ... Rights for All?', *European Law Review*, 27, pp. 121–137.
- Duina, F. and Oliver, P. (2005), 'National Parliaments in the European Union: Are there Any Benefits to Integration', *European Law Journal*, 11(2), pp. 173–95.
- Dryzek, J.S. (1999), 'Transnational Democracy', *The Journal of Political Philosophy*, 7(1), pp. 30–51.
- Dryzek, J.S. (2000), *Deliberative Democracy and Beyond* (Oxford: Oxford University Press).
- Dryzek, J.S. (2001), 'Legitimacy and Economy in Deliberative Democracy', *Political Theory*, 29(5), pp. 651–69.
- Dryzek, J.S. (2005), 'Deliberative Democracy in Divided Societies. Alternatives to Agonism and Analgesia', *Political Theory*, 33(2), pp. 218–42.
- Eckersley, R. (2000), 'Deliberative Democracy, Ecological Risk and "Communities of Fate"', in M. Saward (ed.), *Democratic Innovation: Deliberation, Association and Representation* (London: Routledge), pp. 117–32.
- Elster, J. (1998), 'Introduction', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 1–18.

- Eriksen, E.O. and Fossum, J.E. (2000a), 'Post-national Integration', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 1–28.
- Eriksen, E.O. and Fossum, J.E. (2000b), 'Conclusion: Legitimation through Deliberation', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 256–69.
- Eriksen, E.O. and Fossum, J.E. (2002), 'Democracy through Strong Publics in the European Union?', *Journal of Common Market Studies*, 40(3), pp. 401–24.
- Follesdal, A. (2000), 'Subsidiarity and Democratic Deliberation', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 85–140.
- Follesdal, A. (2004), 'Legitimacy Theories of the European Union', *ARENA Working Paper*, 15/04.
- Gargarella, R. (1998), 'Full Representation, Deliberation and Impartiality', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press), pp. 260–80.
- Gerstenberg, O. and Sabel, C.F. (2002), 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?', in R. Dehousse and C. Joerges (eds), *Good Governance in Europe's Integrated Market* (Oxford: Oxford University Press), ch. 10.
- Goodin, R.E. (2003a), 'Representing Diversity', Paper presented to the ECPR Joint Sessions 2003, <http://www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws14/Goodin.pdf>.
- Goodin, R.E. (2003b), *Reflective Democracy* (Oxford: Oxford University Press).
- Gosepath, S. (2002), 'Globale Gerechtigkeit und Subsidiarität. Zur internen Beschränkung einer subsidiären und föderalen Weltrepublik', in S. Gosepath and J.-C. Merle (eds), *Weltrepublik: Globalisierung und Demokratie* (München: Verlag Beck), pp. 74–85.
- Gould, C. (2004), *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press).
- Grimm, D. (1995), 'Does Europe Need a Constitution?', *European Law Journal*, 1, pp. 282–302.
- Gutmann, A. (1999), 'Deliberative Democracy and Majority Rule', in H. Hongju Koh and R.C. Slye (eds), *Deliberative Democracy and Human Rights* (New Haven, CT: Yale University Press), pp. 227–54.
- Gutmann, A. and Thompson, D. (1999), 'Democratic Disagreement', in S. Macedo (ed.), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford: Oxford University Press), pp. 243–79.
- Gutmann, A. and Thompson, D. (2004), 'What Deliberative Democracy Means', in A. Gutmann and D. Thompson (eds), *Why Deliberative Democracy?* (Princeton: Princeton University Press), ch. 1.
- Habermas, J. [1998](2001a), 'The Postnational Constellation and the Future of Democracy', in J. Habermas (ed.), *The Postnational Constellation – Political Essays* (Cambridge: Cambridge University Press), pp. 58–112.
- Habermas, J. (2001b), 'So Why Does Europe Need a Constitution?', *New Left Review*, 11, <http://www.newleftreview.net/NLR24501.shtml>.
- Habermas, J. (2005), 'The Kantian Project of the Constitutionalization of International Law. Does it still Have a Chance?', in M. Escamilla and M. Saavedra (eds), *Law and Justice in a Global Society* (Granada: Anales de la Cátedra Francisco Suarez), pp. 115–26.

- Held, D. (1995a), *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press).
- Held, D. (1995b), *Democracy and the Global Order: From the Nation State to Cosmopolitan Governance* (Cambridge: Polity Press).
- Held, D. (2004), *The Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press).
- Held, D., McGrew, A., Goldblatt, D. and Perraton, J. (1999), *Global Transformations. Politics, Economics, and Culture* (Stanford, CA: Stanford University Press).
- Jachtenfuchs, T. (2001), 'The Governance Approach to European Integration', *Journal of Common Market Studies*, 3, pp. 245–64.
- Joerges, C. (2002), "'Deliberative Supranationalism" – Two Defences', *European Law Journal*, 8(1), pp. 133–51.
- Kant, I. (2001), *Kritik der Urteilskraft* (Hamburg: Meiner).
- Kateb, G. (1981), 'The Moral Distinctiveness of Representative Democracy', *Ethics*, 91, pp. 357–74.
- Kuper, A. (2004), *Democracy Beyond Borders: Justice and Representation in Global Institutions* (Oxford: Oxford University Press).
- Lacroix, J. (2002), 'For a European Constitutional Patriotism', *Political Studies*, 50, pp. 944–58.
- Lacroix, J. (2004a), 'A Reply to Bellamy and Castiglione', *Political Studies*, 52(1), pp. 194–96.
- Lacroix, J. (2004b), *L'Europe en procès: quel patriotisme au-delà des nationalismes?* (Paris: Cerf).
- Lafont, C. (2006), 'Is the Ideal of a Deliberative Democracy Coherent?', in this book, ch. 1.
- Lindahl, H. (1998), 'The Purposiveness of Law: Two Concepts of Representation in the European Union', *Law and Philosophy*, 17, pp. 481–507.
- Lord, C. (2004), 'Legitimising a Contested Polity: The Case of the EU', in C. Closa and J.E. Fossum (eds), *Deliberative Constitutional Politics in the EU*, ARENA Report (Oslo: Arena), pp. 169–94.
- Lord, C. and Maignette, P. (2004), 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU', *Journal of Common Market Studies*, 42(1), pp. 183–90.
- MacCormick, N. (1995), 'Sovereignty, Democracy and Subsidiarity', in R. Bellamy and D. Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (London: Lothian Foundation Press), pp. 95–104.
- MacCormick, N. (1999), 'Sovereignty, Democracy and Subsidiarity', in *Questioning Sovereignty* (Oxford: Oxford University Press), ch. 9.
- Maignette, P. (2000), *L'Europe, l'Etat et la Démocratie* (Bruxelles: Complexe).
- Maignette, P. (2003a), 'Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union', *Journal of European Public Policy*, 10(5), pp. 677–94.
- Maignette, P. (2003b), 'European Governance and Civic Participation: Beyond Elitist Citizenship?', *Political Studies*, 51(1), pp. 1–17.
- Maignette, P. (2004), 'Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe', in E.O. Eriksen, J.E. Fossum and A. Menendez (eds), *Developing a Constitution for Europe* (London: Routledge), pp. 207–25.

- Mancini, F. (1998), 'Europe: The Case for Statehood', *European Law Journal*, 4, pp. 29–42.
- Mansbridge, J. (1999), 'Everyday Talk in the Deliberative System', in S. Macedo (ed.), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford: Oxford University Press), pp. 211–42.
- Marti, J.L. (2003), 'The Democratic European State: Republicanism and Deliberative Democracy', in J. Ferrer and M. Iglesias (eds), *Law, Politics and Morality: European Perspectives I, Globalization, Democracy and Citizenship – Prospects for the European Union* (Berlin: Duncker and Humblot), pp. 137–73.
- Marti, J.L. (2006), 'The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness and Equal Political Autonomy', in this book, ch. 2.
- Mény, Y. (2003), 'De la démocratie en Europe: Old Concepts and New Challenges', *Journal of Common Market Studies*, 41(1), pp. 1–13.
- Mill, J.S. (1991), *Considerations on Representative Government* (Amherst, NY: Prometheus Books).
- Moravcsik, A. (2003), 'Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, 40(4), pp. 603–24, republished in J.H.H. Weiler, I. Begg and J. Peterson (eds), *Integration in an Expanding European Union, Reassessing the Fundamentals* (Oxford: Oxford University Press).
- Neyer, J. (2003), 'Discourse and Order in the EU: A Deliberative Approach to Multi-level Governance', *Journal of Common Market Studies*, 41(4), pp. 687–706.
- Nicolaïdis, K. (2003), 'The New Constitution as European *Demoi*-cracy?', *The Federal Trust Constitutional Online Paper* 38/03, <http://www.fedtrust.co.uk/default.asp?groupid=0&search=online%20constitutional%20papers>.
- Nicolaïdis, K. (2004), 'We, The Peoples of Europe ...', *Foreign Affairs*, 83(6), pp. 97–110.
- Nicolaïdis, K. and Lacroix, J. (2003), 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms', in R. Foot, J.L. Gaddis and A. Hurrell (eds), *Order and Justice in International Relations* (Oxford: Oxford University Press), pp. 125–54.
- Offe, C. (1998), 'Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights', *Journal of Political Philosophy*, 6, pp. 113–41.
- Van Parijs, P. (1998), 'Should the European Union Become More Democratic?', in A. Follesdal and P. Koslowski (eds), *Democracy and the European Union* (Berlin: Springer), pp. 287–301.
- Parkinson, J. (2003), 'Legitimacy Problems in Deliberative Democracy', *Political Studies*, 51, pp. 180–96.
- Phillips, A. (1995), *The Politics of Presence* (Oxford: Clarendon).
- Plotke, D. (1997), 'Representation is Democracy', *Constellations*, 4(1), pp. 19–34.
- Pogge, T. (1997), 'Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit"', *The Journal of Political Philosophy*, 5(2), pp. 163–82.
- Poiaras Maduro, M. (2002), 'Where to Look for Legitimacy?', <http://www.ieei.pt/images/articles/674/PaperMPM-IEEucp.pdf> (visited on 09/02/06), reprinted in E.O. Eriksen, J.E. Fossum and A. Menendez, *Constitution Making and Democratic Legitimacy*, ARENA Report 5/02 (Oslo: Arena).
- Poiaras Maduro, M. (2003), 'Europe and the Constitution: What if This is as Good as it Gets?', in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press), pp. 74–102.

- Preuss, U. (1995), 'Problems of a Concept of European Citizenship', *European Law Journal*, 1, pp. 267–81.
- Schachar, E. (2003), 'Children of a Lesser State. Sustaining Global Inequality through Citizenship Laws', *Jean Monnet Working Paper*, No. 02/03.
- Schilling, T. (1996), 'The Autonomy of the Community Order – An Analysis of Possible Foundations', *Harvard Journal of International Law*, 37, pp. 389–409.
- Schlesinger, P. and Kevin, D. (2000), 'Can the European Union Become a Sphere of Publics?', in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (London: Routledge), pp. 206–29.
- Schmidt, V. (2002), 'The Effects of European Integration on National Governance: Reconsidering Practices and Reconceptualizing Democracy', in J. Gröte and B. Gbikpi (eds), *Participatory Governance* (Opladen: Leske and Budrich), pp. 141–76.
- Schmidt, V. (2004), 'The European Union: Democratic Legitimacy in a Regional State?', *Journal of Common Market Studies*, 42(5), pp. 975–97.
- Scott, C. (2002), 'The Governance of the European Union: The Potential for Multi-Level Control', *European Law Journal*, 8, pp. 59–79.
- Soysal, Y. (2003), 'European Identity and Narratives of Projection', in K. Nicolaïdis and S. Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (Oxford: European Studies at Oxford Series), pp. 62–65.
- Thompson, D. (1999), 'Democratic Theory and Global Society', *The Journal of Political Philosophy*, 7(2), pp. 111–25.
- Urbinati, N. (2000), 'Representation as Advocacy', *Political Theory*, 2(86), pp. 758–86.
- Urbinati, N. (2002), *Mill on Democracy: From the Athenian Polis to Democratic Representation* (Chicago: University of Chicago Press).
- Urbinati, N. (2003), 'Can Cosmopolitical Democracy Be Democratic?', in D. Archibugi (ed.), *Debating Cosmopolitics* (London: Verso), pp. 67–85.
- Walker, N. (2003), 'Late Sovereignty in the European Union', in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing), pp. 3–32.
- Weiler, J.H.H. (1995), 'European Democracy and Its Critics: Five Uneasy Pieces', in T. Cottier and C. Kaddous (eds), *Democracy and Federalism in European Integration* (Bern: Stämpfli), pp. 5–31.
- Weiler, J.H.H. (1997), 'Legitimacy and Democracy of Union Governance', in G. Edwards and A. Pijpers (eds), *The Politics of European Union Treaty Reform* (London: Pinter), pp. 249–68.
- Weiler, J.H.H. (1998), 'Europe: The Case Against Statehood', *European Law Journal*, 4, pp. 43–62.
- Weiler, J.H.H. (1999), 'To Be a European Citizen: Eros and Civilization', in J.H.H. Weiler (ed.), *The Constitution of Europe* (Cambridge: Cambridge University Press), pp. 324–57.
- Weiler, J.H.H. and Haltern, U. (1996), 'The Autonomy of the Community Legal Order: Through the Looking Glass', *Harvard Journal of International Law*, 37, pp. 411–48.
- Whelan, F.G. (1983), 'Prologue: Democratic Theory and the Boundary Problem', in R. Pennock and J. Chapman (eds), *Liberal Democracy, Nomos XXV* (New York: New York University Press), pp. 13–47.
- Young, I.M. (1997), 'Deferring Group Representation', in I. Shapiro and W. Kymlicka (eds), *Ethnicity and Group Rights, Nomos XXXIX* (New York: New York University Press), pp. 349–76.
- Young, I.M. (2000), *Inclusion and Democracy* (Oxford: Oxford University Press).

- Zürn, M. (2000), 'Democratic Governance Beyond the Nation State: The EU and Other International Institutions', *European Journal of International Relations*, 6(2), pp. 183–221.

Chapter 10

Institutional Reform and Democratic Legitimacy

Deliberative Democracy and Transnational Constitutionalism

James Bohman

Introduction

The European Union (EU), such as it is, remains the most developed project in transnational democracy. As a polity, it has progressed to the constitutional phase, in the sense that its democratic legitimacy has become an issue for public deliberation and popular ratification. The likely failure of its current constitutional proposal seems to many to be a stunning defeat for those who have taken up the cause of establishing democracy beyond the nation state. However important for emerging polities, constitutionalism is nonetheless only one aspect of democratic legitimacy (albeit one that is particularly important in an institutional structure as complex as the EU, which has grown by layers in different treaties). The need for democratic legitimacy was already explicitly recognized in the Maastricht Treaty, a central purpose of which was already to democratize the EU. However, some treaty provisions with this aim may have had unintended undemocratic consequences, such as making decision-making less transparent. The impasse of the current constitutional convention shows the many difficulties and dilemmas that any polity inevitably confronts when creating legitimate institutions of democratic reform, all of which cumulatively lead to a potentially vicious circle: it is not democratic enough to propose the means and ends for achieving its own democratization.

Despite the seeming impasse that the failure to ratify the constitution may bring about, several different possibilities for democratization beyond the nation state remain open to the EU, each of which depends on a different understanding of the type of political body the EU is supposed to be. The most familiar option takes the EU to be a formal intergovernmental organization of states, by which the constitutionalism implicit in the treaties creates a normative framework for intergovernmental regulation for the sake of common interests. Here, the

parties to the constitution are Member States, and thus the intergovernmental organizations that are established by the treaties have democratic legitimacy indirectly through the delegation of state authority. In this constitutional context, the principal/citizen is empowered to demand greater transparency and accountability from the agent/organization so that the focus of any process of democratic reform is found in determining the scope of delegated authority and in providing a clearer definition of the principals. This is certainly how citizens often try to influence international organizations such as NAFTA or the WTO whose purposes are specific and functional rather than political. On the other hand, the EU has, for more than a decade, been shifting from its self-conception as an economic community with a common market and is now engaging in polity building as a community of communities. The most significant marker of the success of transnational political legitimacy is the emergence of a distinctly European citizenship with its own rights and powers, a significant step already taken in the 1993 Maastricht Treaty. In order to be distinctive, the normative powers of European citizens have to be at least potentially independent from their powers as citizens of individual Member States. And yet, aside from lines at airports and political petitions, the benefits of European citizenship are still pale in comparison to the rich array of rights and opportunities that have emerged from long historical struggles for democratic reform within states.

One of the central features of democratic constitutionalism is lacking in any such treaty-based understanding of the "material constitution" that effectively governs the European Union: namely, that "the People" can be the source of democratic renewal and change. Lacking a constitution to solve this problem, it is unclear how the EU can become more democratic and can thus democratize itself to some degree, much less become a democracy. Since the EU is an unprecedented political community, questions about the nature of its future democracy remain open. What sort of democracy is suggested by some of the more novel aspects of European integration? How can its deliberation be organized? Most of all, how can it creatively solve the problem of creating legitimate transnational institutions and methods for democratic reform, including, if necessary, a more democratic process of constitution-making?

I begin my argument about constitutionalism beyond the nation state by discussing three necessary conditions for legitimate institutions for reform: these include formal, deliberative, and popular conditions. I argue that even in the absence of a fully constitutionalized condition for formal legitimacy, it is still possible for the European Union to initiate democratic reform processes that have deliberative and popular legitimacy. Second, I argue that the fundamental reflexive aim of the constitution itself, as well as of the popular and deliberative processes of constitution-making, must be to create conditions of legitimate democratic reform. Central to the reform of the EU is the development of a more robustly deliberative citizenship in which citizens have the minimum normative powers necessary for genuine democratization. Even if there are abundant reasons why the constitution should concern itself with problems of organizing democratic

authority across the various levels and sites of political power and authority, these issues cannot be addressed until the vicious circle of the democratic illegitimacy of the European Union is overcome. Finally, in dealing with this second issue, I suggest some ways in which these deliberative and popular deficits can be overcome with respect to the process and aims of constitution-making itself.

Addressing such procedural issues is not yet sufficient to understand the problems of democratizing the transnational polity. For this reason, it is first necessary to reach an understanding of the specific problem that a transnational constitution is supposed to solve: the republican problem of non-domination. Attending to the lack of democratic legitimacy and the related increased potential for domination by transnational institutions might help in understanding the democratically motivated discontent felt by many citizens within the EU. Before making specific proposals concerning the provisions of a transnational constitution, however, the novelty of this polity makes it necessary to reconstruct the European Union as an ideal type in order to show just where such problems of domination might occur and what resources exist for addressing them in innovative practices and institutions, and which resources may themselves be useful in organizing legitimate processes of constitutional reform in a transnational rather than merely a national manner. Above all, democratization requires new popular and deliberative processes. If you want to reform a transnational polity, you have to ask the right people under the right description, as having normative powers to establish their own duties and obligations. Getting this type of democratic reform off the ground requires some formal legitimacy, even if the formal conditions are themselves the objects of change.

1 Democratically Legitimate Reform

In the existing structure of the European Union, power of initiative is shared by the Member States through the Council. That is, such a power resides in the executive branch, with a procedure for its being carried out by a mixed body. For this reason, the 2004 constitutional proposal is a product of the current treaty structure and inherits all of its problems of democratic legitimacy. I do not consider other possible sources of legitimacy, such as problem-solving capacity or effectiveness emphasized by Fritz Scharpf as “outcome legitimacy” (Scharpf, 1999). In most constitutional democracies, there are three different aspects of democratic legitimacy, broadly understood, that play the role of legitimating democratic reforms. I will illustrate each of these aspects of legitimate democratic reform through processes that are part of constitution-making or constitutional change. The *formal legitimacy* of any process of reform is found in the institutional authority to initiate it where this authority can be specifically delegated to some particular office or constitutionally specified in some explicit amendment procedure. *Popular legitimacy* is found to the extent that the People have genuine opportunities to shape or assent to such reform, minimally the popular ratification

of proposed changes or amendment, and that these opportunities are common knowledge among citizens. Popular legitimacy has a belief component, but is not reducible to citizens' pro or con attitudes. Finally, democratic reform has *deliberative legitimacy* to the extent that the deliberative process of citizens offering reasons to each other in mutual justification plays some role, such as an influence over the process of drafting of the constitution or parts of a constitution. Deliberative legitimacy is usually measured by the quality of deliberation: that is, either by qualities such as the freedom, openness or publicity of the deliberative process, or by the quality of the reasons or outcomes, as measured by some independent standard. While the latter, more epistemic standard is preferred in some forms of inquiry, it is unlikely that a constitutional proposal can be settled by appeal to some procedure-independent standard.

It is now clear that the proposed EU constitution has little more than formal legitimacy, especially since the process of its formation lacked any genuinely deliberative and popular features. Its deliberative resources were internal to the body that was formed by the Council and thus only served to increase the popular sense of illegitimacy. We might get the same result in Canada or the United States if proposed changes to the formal structure of NAFTA were put up for a vote, since NAFTA more clearly than the EU lacks the resources to reform itself democratically (given that its formal legitimacy could be met by the bylaws of the organization and its deliberative legitimacy refers to panels of experts as the subjects of deliberation). But such merely formal legitimacy is not yet democratic, precisely because it does not require that the opinions and interests of those outside the formally named bodies need to be heard and addressed. In fact, no one except these formally designated members has any legitimate say in the process of proposing such reforms, except in the ratification phase. Above all, the current constitution codifies rather than improves the status quo and thus does not respond to the popular dissatisfaction with the current EU structure.

The problem goes even deeper for the EU, since there is no "People" (yet) that it is organizing institutionally. Instead, the more modest goal is that of "bringing the peoples of Europe together in a closer Union." The "peoples" that were to ratify the treaty were the national publics, not the citizens of Europe. When put to a vote to ask these peoples as citizens of Member States, the publics of France and the Netherlands rejected the democratic legitimacy of this constitution as a democratic reform. The purpose of the democratic reform would be to address the issue of the potential losses of freedom from domination in a polity in which the political subject of democracy is plural, *demos* rather than a *demos* (Bohman, 2005). This attempt to create a democracy of *demos* may seem paradoxical if citizens are to achieve the ideal of self-rule by becoming both authors and subjects of the laws of Europe (Habermas, 2001). Yet, as Bruce Ackerman has pointed out against such a "monistic" interpretation of constitutional structures, there is no one privileged place in which the popular will is located by some naïve synecdoche that takes the part for the whole. The EU has no legislative body, since its Parliament does not have the authority to enact the law directly. The only

solution is, then, as Henry Richardson has put it, to look for a way in which “the processes that form the popular will can be distributed across the various parts of the constitutional structure” (Richardson, 2002, p. 70). The difficulty here is that in the case of the European Union it is the executive power of the Council, as empowered in the 2001 Laeken Declaration, that has the legitimate right to make such a proposal, independently of any exercise of the popular will. But if citizens are to be engaged both as citizens of Europe and of the Member States, their will must be engaged at various stages and locations in the process.

For all the difficulties of formal legitimacy in the EU, the initiative of executive power need not exclude popular legitimacy. Here we might think of other institutions of legitimate democratic reform. For example, a Citizens’ Assembly was empowered by the Premier of British Columbia to make a specific proposal for the reform of the province’s electoral system as the result of internal processes of deliberation among the randomly chosen ordinary citizens who made up the Assembly. Seen as a product of delegated executive power, something more than the transfer of normative powers is required for the Assembly to acquire fuller popular democratic legitimacy: namely, that the transparent process of its construction makes it a “minipublic” in Archon Fung’s terms (Fung, 2003). As a minipublic, the Assembly used its delegated power by deliberating as citizen-representatives on behalf of the people, whose will could best be formed under the more ideal conditions that were fulfilled in the Assembly’s deliberation (especially considering the complexities of various voting systems). The legitimating potential of such empowered participation in this case did not reside in the mere fact that the selection process somehow mirrored the wider public, but rather in the way in which the Assembly’s judgment helps to shape public judgment about reform processes in some normative sense – as the opinion that the public *ought* to hold. The force of such a claim must be tested when the powers of the Assembly are transferred back to the public as a whole. In order to secure popular as well as deliberative legitimacy, the Assembly’s proposal had to be voted upon by all citizens. Nonetheless, the direct participation of citizens in the proposal stage permits many citizens to already recognize its popular legitimacy even if the collective body of citizens was not actually present in deliberation. If this kind of procedure were repeated in various states or locations throughout the European Union, then it would not be paradoxical at all that the proposal voted upon would have some kind of popular credentials and thus increased democratic legitimacy.

In order to understand popular legitimacy democratically, however, more needs to be said about how such delegated exercises of citizens’ powers are consistent with popular rule understood distributively. Here we may appeal to some idea of minimum popular democratic legitimacy, or more simply to the *democratic minimum* that makes citizens the sources of authority. Citizens would have to deliberate by employing just these shared normative powers ascribed to them in virtue of being citizens, and not merely those specific powers delegated to them by the Council’s executive power. The Council itself, which delegated its powers

to an intergovernmental body of representatives of heads of state and national parliaments with no mechanisms for popular consultation, produced the current proposal. Thus, the source of the legitimacy of the proposed Constitutional Treaty is merely intergovernmental, and its deliberations did not carry with them deliberative or popular legitimacy accorded by the direct or indirect deliberation of citizens at large. Having no sense of the popular legitimacy of the constitution-making process, the *populus* asserted its normative powers and exercised its freedom by saying "no" when they lacked any other power.

The democratic minimum requires more of legitimate authority than that it simply grant the permission to be consulted (here by a body of citizens that such an authority created). The inadequacy of consultation without empowerment can in fact be seen through the classical republican contrast between citizen and slave. Unlike slaves, citizens have the shared ability to initiate deliberation; this entails the ability not just to have officials or rulers respond to their interests, but also to set the items on an agenda and thus to be secure in their freedom from domination. As Arendt put it: "Beginning, before it becomes an historical event, is the supreme human capacity; politically, it is identical with human freedom" (Arendt, 1973, p. 479). This capacity marks the specific democratic contrast between citizen and slave, between having distinctively political rights that entail normative powers to do certain things and the inability to participate effectively in the absence of such powers. As Isaiah Berlin noted, this is true even if the master is an enlightened, liberal-minded despot or Rousseauian lawgiver who may permit a large measure of personal freedom, since whatever freedoms are granted to the slave she remains dominated and thus lacks any intrinsic normative authority (or powers) even over herself; at best, she may only respond to the initiatives of others. Thus, the capacity to begin, rather than permission to be consulted or even given opportunities for contestation provides the basic measure for the normative status of persons required for the democratic minimum.

Consider two alternative accounts. Both Philip Pettit's account of tracking and Allen Buchanan's interpretation of accountability and human rights offer more minimal views of the democratic minimum. Both might object that in order to have the minimum of democratic legitimacy one does not have to be able to initiate deliberation so much as to hold those who do deliberate accountable. According to Pettit, assemblies and minipublics are justified for being more able to "track" the "public good" of citizens than officials, where the democratic minimum is understood here in objectivist terms as something that officials can fail to track correctly for epistemic reasons (Pettit, 1997, p. 88). Domination, however, is not merely due to epistemic failures, but is more a matter of who is entitled to offer interpretations of the public's good. Moreover, it would be equally wrong to say that deliberative assemblies must merely track, but rather also serve to form the popular will (rather than be ruled by the reasoning of others). In Buchanan's perhaps more modest alternative, the democratic minimum is related to accountability which, he writes, is achieved by attaining the right combination of "representative institutions that most reliably achieve the accountability

necessary for protecting basic human rights" (Buchanan, 2004, ch. 3). While desirable in itself, the sort of accountability and the formal legitimacy it would entail need not be the specific goal of a new constitution since it is not clear that strengthening the powers of representatives in the European Parliament by itself would be sufficient to gain much popular or deliberative legitimacy. Neither Pettit nor Buchanan succeeds in defining the minimum so that it is sufficiently fine-grained, prospective and open to placing second-order questions about institutions and procedural justice on the democratic agenda. Satisfying these demands requires that such political rights and the powers of citizens function more directly as the mediating terms between democracy and justice.

In order to develop the virtues of this particular republican account, the democratic threshold of "freedom as the capacity to begin" can be further operationalized in two ways: first, in terms of the capacity of citizens to amend the basic normative framework, that is, the power to change the ways in which rights and duties are assigned; and second, in terms of the capacity of citizens to set an item on an open agenda and thus to initiate joint, public deliberation. The first problem is solved via constitutionalism in the broad sense of the term. A political order meets the democratic minimum in the first case only if it is a suitably reflexive order. Instituting reflexive democratic powers over the agenda as one such normative power solves the second problem. Even with these powers in place, constitutions cannot guarantee that citizens are the fully self-determining authors of all their obligations. As a result, such capacity to initiate a challenge and reorder the legal order itself (including rights, duties and boundaries) is a necessary condition for non-domination. The institution of these constitutional features of democratic reflexivity is not an apparent goal of the EU Constitutional Treaty, and the goal of democratization in the treaties is the limited condition of transparency.

In both these respects a more reflexively democratic constitution gives citizens normative powers over political rights that include the power to change the assignment of rights and duties. However, it may be necessary to develop new institutions and fora for deliberation for this to be possible. More specifically, greater institutional differentiation and new normative powers may be necessary when the existing forms of will formation do not succeed in creating the proper distributive conditions for forming a popular will. Only in virtue of participating in forming such a popular will are citizens able to see the constitution as democratic rather than as arbitrarily imposed. Once initiated, the capacity of citizens to deliberate about the terms of democratic governance, including the rights, duties and powers of citizenship, constitutes a source of democratic legitimacy: the popular legitimacy provided by the opportunity and the capacity of citizens to exercise their freedoms and then to decide upon and authoritatively enact such reform since this is what explains the value of ratification votes. The democratic minimum, rather than the veto exercised in voting is the source of distributed popular legitimacy.

Even with this increased overall democratic legitimacy, citizens may still decide that the constitutional proposals for reform lack deliberative legitimacy for procedural reasons. Considered more fully, the claim to deliberative legitimacy is much stronger than popular legitimacy as such: namely, that if other citizens underwent a similar process, they too would arrive at a similar reasoned judgment and that this fact is manifest to other citizens in the deliberative role. Thus, the judgment is not only for reasons that they could accept, but also for reasons that they could accept owing specifically to the recognition of the deliberative legitimacy of the minipublic that proposes the changes. The internal deliberative legitimacy achieved procedurally among participants does not automatically extend to those who have not participated in it. It is clear then that the procedures used to increase the deliberative legitimacy of democratic reform may fail to attain the proper threshold of popular legitimacy and are furthermore subject to the same sort of veto.

By putting all these aspects of legitimacy together, we get a much more complex and demanding picture of democratic reform. Legitimacy does not arise from any one source, but is distributed among legislatures, courts and ultimately implemented in executive and administrative bodies. This requires well-established forms of institutional coordination. In the case of democratic and constitutional reform the process is even more protracted and requires many different steps, but it can issue in a popular will to change those very institutions that have not yet formed a popular will. In the end, formal, popular and deliberative legitimacy should be manifested at various locations and stages of the process (even if in the case of democratically illegitimate institutions reform can be initiated without any formal legitimacy whatsoever). In this sense, Rousseau is right that popular sovereignty should not be alienated into any particular deliberative body or institutional location but distributed across the whole constitutional structure and extended across long periods of will formation.

The power of initiative possessed by all citizens who participate in deliberation is crucial for judging the deliberative legitimacy of the results. While the attempt to make a minipublic or popular assembly duly and descriptively representative seems to be an appropriate goal in the case of constructing a minipublic for electoral reform, the distributed character of institutions of democratic change lessens the legitimating significance of representativeness. Once deliberation begins, issues such as procedural openness and the availability of a proper set of alternative proposals play a more direct role. One consequence of this complex process is that, in cases of democratic reform, deliberation is historically extended, sometimes for decades, as the popular will is still being formed. At the very least, that is what the negative results of the current referenda indicate. In cases of conflict, citizens look to the quality and responsiveness of the process of deliberation to ensure that the addressees of the justification have been able to shape the discussion and its outcome in relevant ways.

This leads to the general conclusion that I want to draw from this section. The popular will that legitimates the reform itself could only be formed if the

process of constitution-making and ratification already had all the hallmarks of legitimate institutions of democratic reform. In the case of the European Union, the process must not only be formally, popularly and deliberatively legitimate, it must also have an added feature: it must to some degree instantiate the requirements of legitimacy of the kind of democracy that it is meant to institute. It could well be constitutionally legitimate when judged *post facto*. For that reason, it must distribute the popular will in a way that is appropriate to the type of transnational polity that it is, rather than by a process that is based upon an interpretation of its legitimacy as an intergovernmental body that is many degrees of delegation removed from democratic sources of political authority (Dahl, 1999). This reflexivity is a further feature of legitimate institutions of democratic reform. Above all, for transnational polities such as the EU, the body of citizens or officials that proposes the new constitution must be transnational and not intergovernmental.

2 Democratic Legitimacy: Reconstructing the Ideal Type of a Transnational Polity

In the last section, I argued that the democratic core of constitutionalism is tied to its reflexive character, that is, to its capacity to make the basis of democracy *itself* the subject of the democratic deliberation of citizens. Such a self-transformative polity requires that a constitution enable its citizens to have just this normative power, a power that can be exercised in the capability to initiate deliberation that may change the terms of democratic cooperation. If the institutional structure is large and multi-leveled (as the EU's surely is), then this power must be present not merely in its legislative and parliamentary core, but must also be distributed throughout its various levels and dispersed sites of deliberation. From the criterion of non-domination implied by the democratic minimum it also follows that some distinctly transnational form of federalism is the proper general type of institutional design, provided that it could be shown to be adequate to the democratic minimum with respect to the imposition of order and the possibilities of popular control. It also follows that the democratic deficit of the EU is, in the case of democratic reform, more properly a "deliberation deficit" that also leads to a "popular deficit."

Some have argued that deliberative legitimacy is local, rising to no higher level than that of a nation state (Kymlicka, 1999; Dahl, 1999). Properly organized with dispersed power, however, large and numerous units also have deliberative advantages. At least some existing practices of the EU employ particular institutional structures of cooperation to take advantage of the dispersal of power and deliberation in multi-leveled and polycentric polities. These diverse and dispersed structures could be (or become) democratic insofar as they are constitutional orders that provide for deliberation about the proper location for any political deliberation and authorization. Without allowing for access to

political influence over just such decisions, larger democracies have the potential for dominating smaller ones in transnational polities. Republican constitutional arguments for the separation of powers within the state can then be used against classical modern sovereignty so that republican cosmopolitan institutions ought to further separate powers by disaggregating state monopolies and functions into a variety of institutional levels and locations as well as by disaggregating centralized transnational powers and redistributing them to citizens and opening them up to their deliberation.

One clear instance of this constitutionalism is implicit in the institutionalization of human rights in the 1950 European Convention for the Protection of Human Rights and the recent 2000 Charter of Fundamental Rights of the European Union. What is the purpose of this new layer of human rights enforcement beyond that already provided by the constitutions of Member States? With the accompanying supranational European Court of Human Rights that grants rights of individual petition, there are (at least in the juridical dimension) multiple new institutions and memberships that can be invoked in making claims about human rights. Such overlapping, differentiated and polyarchical structures permit greater realization of these rights and their claims against domination, as the citizens of *demos* exercise the various entitlements gained from their overlapping memberships. In such a structure, human rights are constitutive of membership in a plural democratic polity and become a secure basis on which to assess new governance institutions procedurally, including, for example, the transparency of committees and the broad inclusion of participants in deliberations related to committees and methods of policy coordination. Even without any police powers, such differentiated institutions best realize rights in multiple *demos* with diverse entitlements rather than in a single form of citizenship that uniquely constitutes the *demos*. The Charter functions in just this transnational way, not as a binding document but by reinforcing EU level adjudicative institutions and case law that is nonetheless grounded in the constitutional traditions of the Member States.

How do multiple levels and sites promote the democratic minimum and especially its central normative power of initiating deliberation about claims to justice? We can answer this question in two ways. One way is to see how the institutional design and practices of the EU could be used to promote this fundamental normative power, the power that is basic to the right to have rights. The EU could do so by providing a variety of locations and sites for deliberation in which publics interact with institutional powers and authorities. This division of powers could not be exclusively territorial or else it would be indistinguishable from a large nation state. The second way to promote deliberation follows from these features. To achieve more robust interaction across various levels and diverse locales and to promote citizens' capacity to initiate deliberation at multiple levels, large federalist institutions require a written constitution. If the EU is already well-ordered and institutionally thick, then a new federalism need not reorganize institutions as much as settle the specific constitutional question: how is it that this structure can be sufficiently reflexive so as to make it democratic in the sense

that issues of the nature of the polity, of rights and duties, must pass through the public deliberation of all its citizens?

Given the shape of the political institutions of the European polity, most cosmopolitans argue that the first step towards a supranational democratic order is to create a more effective and empowered European Parliament (EP), perhaps with a bicameral structure. The point here is not to see the EP as some privileged source of democratic legitimacy but as one of the locations for distributing deliberative and popular powers. This would clearly shift the location of various normative powers in Community institutions – including the rights to initiate legislation, to set directives and objectives for administrative bodies and to review implementation in conjunction with the Commission – from the Council to the people. As an elected body, the EP can potentially represent and empower more diverse interests. With the general weakening of legislative bodies now found in many large nation states, however, it is unclear whether such a body would in fact overcome the gap between European institutions and the interests of the citizens they supposedly represent. The problem is not that the traditional separation of powers in federal constitutions would too radically alter the current shape of the EU, but that such a separation now needs to be understood in terms of a plurality of overlapping processes of distributed will formation (Shaw, 1999).

While the proposed constitution does indeed support greater parliamentary powers (through expanding the co-decision powers of national parliaments as a mechanism for democratization), it is unclear whether introducing a further source of legislative initiative is really so problematic in a structure that already has several and needs them in order to promote a thickly institutionalized democratic minimum. As long as the EP is not the sole source of legislative legitimacy, a new constitutional right to be included among those institutional bodies able to initiate policy debates could function as one among many mediating mechanisms for public influence and accountability. It could do so in virtue of its tiered structure, which has the advantages of large and numerous legislatures that permit the emergence of a forum in which many diverse cultural and social perspectives are gathered. By reforming the EP with greater powers of initiative the public spheres with which it interacts thereby acquire greater access to the influence necessary for the constructive use of their communicative freedom in defining the terms of debate and deliberation. This proposal thus helps the EU meet the democratic minimum, if only with indirect legitimacy.

Nonetheless, simply giving the EP greater powers is insufficient to meet the democratic minimum for processes of democratic reform. Rather, more direct forms of public deliberation have emerged within the polyarchy of various procedures for the responsive implementation of basic policies. This issue concerns the form of inquiry that institutions take to be necessary to inform their decision-making processes. As Michael Dorf and Charles Sabel have argued, a “directly deliberative” design in many ways incorporates epistemic innovations and increased capabilities of economic organizations in the same way as, for instance, the New Deal institutions in the United States followed the

innovations of industrial organization in the centralized mass production they attempted to administer and regulate (Dorf and Sabel, 1996). Roughly, such a directly deliberative form of organization uses nested and collaborative forms of decision-making based on highly collaborative processes of jointly defining problems and setting goals already typical in many large firms with dispersed sites of production. These forms of organization have been established in constitutional orders that do not require uniform policies, but permit a broad range of experimental initiatives with public testing across levels and sites of mutual accountability and authority.

Given these requirements necessary for plural and dispersed polities, directly deliberative designs have a new salience that is perhaps surprising only in light of previous turns toward centralization as solutions to problems of scale. Non-domination requires yet a different strategy, and I have already discussed the ways in which distributive publics or minipublics open up new directly deliberative possibilities for reform. Here we can see directly deliberative designs as a way of producing distributed rather than plebiscitary or “mass” popular legitimacy, the legitimacy to vote either yes or no in a referendum on some democratic reform and to participate in a mass public that is persuaded by various appeals for its loyalty. Such mass publics are particularly important in saying no to inadequate or self-defeating democratic reforms that do not increase overall democratic legitimacy. We might think of these mass publics as mobilized when the issues of reform reach a broad enough audience to give them the popular salience that they lacked. However, such publics at best capture *de facto* public opinion and should best be seen as indicating that the popular will lacked sufficient opportunities to be formed more fully and deliberatively.

In the European context, this deliberative design is often considered to be a form of rule by committee or “comitology” with deliberative features. Under the current institutional structure and its Community Method, the power to initiate such policy coordination and testing lies solely with the Council. While not yet democratic, these committees can become a structural model of practices of inquiry for democratic reform. This mode of inquiry is explicitly recognized by the 2004 Constitutional Treaty in Part III, although none of its practices, such as the Open Method of Coordination (OMC) discussed below, are specifically named (Articles III-107, 148, 179, 180) and the powers of initiative and of policy coordination are still currently left entirely with the Commission (Sabel and Cohen, 2003). Distributing such powers to a single location rather than across multiple levels and sites in the overall structure violates the basic institutional principle of republican federalism that powers ought to be widely distributed and iterated at various levels. This principle ought then to be basic to any attempt to reform the EU in light of its potential for legal and bureaucratic domination. At present, practices such as the OMC lack the deliberative and popular legitimacy that would make them a means by which to reach reflective equilibrium among competing public proposals and thus are not yet a means for democratic reform

(Jacobsson and Vifell, 2003). Nonetheless, in a democratically reformed EU they could become a source of deliberative legitimacy.

The biggest difference between the EU and such delegative institutions as the WTO is precisely that the EU is itself a polity and thus already has a constitutional framework for accountability through open and multi-perspectival deliberative inquiry. The EU's explicit recognition of political rights as human rights empowers those affected by authoritative decisions with normative powers, including rights of participation. This makes it possible for citizens of the EU to make claims rather than simply challenge decisions; that is, they may appeal not only to basic principles of democracy and human rights, but also to political institutions that should be responsive to their claims and to a political community beyond that constituted by some specific functional task or treaty provision.

Constitutionalism also has another wider and more important role, to the extent that it is internalized in deliberative institutions: not only does it create some broad institutional distinctions between good and bad reasons; it also creates the demand for reflective equilibrium in decision-making. Such equilibrium is necessary because norms of deliberation are part of the normative framework of inquiry into possible institutional reforms, so that at the very least actors are constrained to show the coherence of specific norms and decisions involving basic norms. On the basis of this equilibrium effect of constitutionalization, Neyer argues that "noncompliance with the outcome of a deliberative procedure not only rejects the specific deal [that has been reached], but implicitly opposes the whole normative structure of which the specific norm is a part" (Neyer, 2003, p. 293). To be truly democratic and reflexive, however, participants must be empowered to change the normative framework as well. Otherwise, constitutions would not have the resources to institute the requisite change within continuity that is necessary to retain their reflexive and polity-building roles.

By placing it in a normative and political framework, delegated authority is embedded in a polity and a reflexive legal order that constrains its exercise by empowering citizens to make legitimate claims independently of the particular epistemic community typically given such authority in functional organizations. However much such epistemic communities may constrain the exercise of authority and open decision-making processes to reflect exogenous influences, they filter such influences through their authoritative perspective, usually in order to reflect their current common theoretical commitments. Comitology goes a step further by embedding such deliberative processes in a wider set of political commitments and constraints of institutionalized interaction. Even if committees provide incentives for argumentation and reason-giving rather than bargaining among institutional actors, they do not by themselves organize sufficient opportunities for empowered discursive interaction to be responsive to a wide range of influences and perspectives. Calls for greater transparency or for participation by civil society are not really the answer, however, since the weaknesses here are more structural. The transnational principle of institutional

differentiation (rather than the simple separation of powers) calls for multiple and iterated processes within a revisable normative framework.

How do weaknesses in its deliberative institutions contribute to the EU's democratic deficit? Here the difficulty lies not with the breadth of its deliberative processes, but rather with their democratic depth. Even on the best interpretation offered by their defenders, committees currently function as fora for political processes and as coordinating bodies across various levels of governance; they are, however, deficient as argumentative fora to the extent that they are only "semi-public" and relate primarily to networks of administrative agencies and private policy experts. A committee-based procedure, however deliberative, retains the weaknesses of the hierarchical relations of experts, officials and citizens within which it is embedded. In cases of democratic reform, a minipublic provides an institutionally constructed intermediary in popular will formation, although it could act in such a way as to become an agent for the creation of a larger public with normative powers.

Organized in this way, institutionalized deliberation becomes more responsive by virtue of strengthening and shortening the feedback loops necessary for implementation and learning in decentered, yet public, decision-making. Democracy could be deepened by such empowerment, and it could also be broadened by facilitating interaction between institutions and publics, especially if they institute something closer to what Frank Michelman calls the "full blast condition" for deliberation (Michelman, 2002, p. 59). In other respects, the current constitutional moment is also an institutional learning process that is rather like the case of the New Deal-type reforms of the American nation state, motivated by both democratic and functional failures of its existing, not fully constitutionalized use of administrative and political power (Ackerman, 1991, ch. 1). It might also permit the emergence of wider and deeper forms of deliberative interaction across institutions and *demos* than have been realized thus far. Since deliberation in transnational polities does not aim at the same solutions to all problems, it requires only that EU-level institutions serve to establish the legitimate diversity that would be constitutionalized in provisions related to the normative status of membership, with these in turn based on human rights. In order to institutionalize experimental practices, the constitution must reflect such a multi-level and federalist division of normative powers. Deliberative legitimacy is then tied directly to the presumption of plurality, which could be built into the constitution of a transnational democracy.

If the constitutional order helps build the polity, this leaves open an important question: who are the citizens of the Europolity? Given the new immigration in Europe, the public sphere is undergoing a different "structural transformation" with the potential for the domination of citizens over non-citizen residents and immigrants without the empowered participation and recognition of the latter as members of the public with communicative freedom (Habermas, 1989). The transformation of inquiry in the EU on the effects of policies on human rights and normative powers also depends on incorporating a cosmopolitan perspective

of the Generalized Other into its public judgments and practices of assessment. The duties of EU citizens to the large numbers of non-citizens who reside in the EU include granting them some powers to influence deliberative processes so that these remain democratically legitimate. With their commitments to human rights contained in the Charter of Fundamental Rights explicitly constitutionalized, a more democratic EU would have greater constitutionally-based obligations toward non-members, obligations that already exist in virtue of all residents of Europe having the normative powers that emerge from the commitments of a democracy of *demoi*.

This cosmopolitan perspective may also provide the impetus for ongoing collective learning at the constitutional level to go beyond some of the limits of the EU as a bounded community. For human political rights to be realized, the EU must be a community within a larger political community, a collection of *demoi* integrated as a larger democratic community. This transforms the problem of boundaries from an external to an internal one. With the recognition of the full range of human rights of all persons within a complex and differentiated institutional structure, the EU shifts from a regional to a cosmopolitan polity. Although the distributive publics and institutional deliberation can be iterated across regions as much as across states, this internalization of the perspective of the human political community provides the greatest potential for the democratization of the European polity. This requires a stronger and more demanding recognition of the right to nationality, with the danger that the failure to incorporate non-citizens "may lead to divided societies marked by severe inequalities and conflicts," including permanent minorities and excluded groups at the regional level (Castles and Miller, 1999). Democracies with deep commitments to human rights have special obligations to humanity and thus to the non-domination of non-citizens in ways that non-democratic polities do not. Such deep inequalities and conflicts also describe the source of the democratic deficit at the international level and the failure of international institutions and forms of authority to incorporate the perspective of humanity. It is in this respect and not merely in its institutional structure and commitment to multilateral foreign policy that the EU could provide a model for transnational democratization. Without this cosmopolitan dimension, the constitutional framework would lack the universality to locate developing claims to rights of citizenship within a highly differentiated institutional order.

Conclusion: Resolving the Paradox of Democratic Reform

If extending and deepening democracy are among the aims of the constitutional reform of the EU, it is easy to see why such a project is the continuation of what is best in the EU. In order to be democratic, the EU must not only achieve a democratic form of regional integration, it must also meet the repeated challenge of creating the conditions for democratic non-domination given the polity building of European integration. Given that meeting this challenge demands a

transnational democratic minimum, the constitutional debates in the EU could well be a precursor to a process that is iterated in many different polities and many different institutions. From a constitutional perspective, the signal innovations of the EU could be given greater coherence by putting them in the service of realizing a democracy of *demoi* rather than in a single *demos*. Once the EU achieves a more fully reflexive order and a more differentiated institutional structure, the question shifts away from whether the EU is a democracy to how it can be more deliberatively and popularly legitimate. Such deliberation might be made more feasible if it were to attain greater popular legitimacy and more vibrant publics. The task of its reform is to create just these conditions.

A crucial claim of my argument is that the differentiated and deliberative processes that the new constitution would enable are at the same time the proper model for the constitution-making process itself. Constitutional assemblies, at least in part, construct the public to whom they make a proposal to be ratified. While not a founding moment, these reforms should initiate a new phase in which the citizens of Europe begin the process of constructing institutions by which they govern themselves. If this is the problem that the constitution must solve, the first task that the Council should undertake is to empower the public to deliberate and propose some of the means to achieve these aims and democratic reforms.

Should the citizens of Europe adopt a new constitution? An affirmative answer implies that European integration has reached a more explicit and reflexive polity-building stage and that EU authority is willing to do more than just subject the results of their deliberation to ratification according to the opinions of its mass publics. These citizens have judged and may well in the future continue to judge that the process lacks the legitimacy necessary for democratic reform. Democratic legitimacy across *demoi* is the work of generations and thus cannot be achieved simply by the act of writing and ratifying a constitution. A democratic constitution for Europe will not create a *demos* but it will create a basis for legitimate democratic reform that is currently lacking in the EU.

References

- Ackerman, B. (1991), *We the People*, Vol. 1 (Cambridge, MA: Harvard University Press).
- Arendt, H. (1973), *The Origins of Totalitarianism* (New York: Harcourt Brace).
- Bohman, J. (2005), 'From Demos to Demoi: Democracy Across Borders', *Ratio Juris*, 18(3), pp. 293–314.
- Buchanan, A. (2004), *Justice, Legitimacy and Self-Determination* (Oxford: Oxford University Press).
- Castles, S. and Miller, M.J. (1999), *The Age of Immigration* (London: St Martin's).
- Dahl, R. (1999), 'Can International Organizations Be Democratic? A Skeptic's View', in I. Shapiro and C. Hacker-Cordón (eds), *Democracy's Edges* (Cambridge: Cambridge University Press), pp. 19–37.

- Dorf, M. and Sabel, Ch. (1996), 'The Constitution of Democratic Experimentalism', *Columbia Law Review*, 1, pp. 267–473.
- Fung, A. (2003), 'Recipes for Public Spheres', *The Journal of Political Philosophy*, 3, pp. 338–67.
- Habermas, J. [1962] (1989), *The Structural Transformation of the Public Sphere* (Cambridge, MA: MIT Press).
- Habermas, J. (2001), 'So Why Does Europe Need a Constitution', *New Left Review*, 11, pp. 5–26.
- Jacobsson, K. and Vifell, A. (2003), 'Integration by Deliberation? On the Role of Committees in the Open Method of Coordination', in E. Eriksen, C. Joerges, and J. Neyer (eds), *European Governance, Deliberation, and the Quest for Democratization* (Oslo: ARENA), pp. 411–51.
- Kymlicka, W. (1999), 'Citizenship in an Era of Globalization', in I. Shapiro and C. Hacker-Cordón (eds), *Democracy's Edges* (Cambridge: Cambridge University Press), pp. 112–26.
- Michelman, F. (2002), *Brennan and the Supreme Court* (Princeton, NJ: Princeton University Press).
- Neyer, J. (2003), 'Discourse and Order in the EU: A Deliberative Approach to Multi-level Governance', *Journal of Common Market Studies*, 41(4), pp. 687–706.
- Pettit, P. (1997), *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press).
- Richardson, H. (2002), *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press).
- Sabel, C. and Cohen, J. (2003), 'Sovereignty and Solidarity: EU and US', in J. Zeitlin and D. Trubek (eds), *Governing Work and Welfare in the New Economy: European and American Experiments* (Oxford: Oxford University Press), pp. 345–75.
- Scharpf, F. (1999), *Governing in Europe: Effective or Democratic* (Oxford: Oxford University Press).
- Shaw, J. (1999), 'The Interpretation of European Citizenship', *The Modern Law Review*, 40, pp. 293–317.

Chapter 11

Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?

Roberto Gargarella

Introduction

In this chapter I will explore the implications of deliberative democracy in what concerns the judicial enforcement of social rights. The idea of writing this chapter emerged after a period of research that included the reading of numerous judicial decisions in the area of social rights. I then arrived at a few conclusions, which I will use as the baseline of the present chapter. The conclusions were the following:

- 1 Despite the importance acquired by the theory on deliberative democracy, the literature on this topic seems to have had almost no impact on judicial decisions concerning social rights. This outcome seems particularly perplexing given that judges frequently refer to democracy-related arguments in their decisions regarding social rights.
- 2 In spite of the high level of argumentative sophistication reached by (numerous) US and Latin American judges, one does not find interesting judicial elaboration in their (more or less explicit) references to democracy in cases related to social rights. This outcome is also strange given the significant theoretical advances made by judges in their thinking about democracy in other areas of the law, particularly those of free speech and freedom of the press.
- 3 In many of the examined decisions there was a remarkable lack of care in the transition from premises about democracy to conclusions regarding what judges were supposed to do or (most commonly) not do concerning the enforcement of social rights. Typically, a judge would assert her need to respect democracy, and consequently the importance of respecting the will of the legislator, and then conclude from these premises that she is not allowed to enforce the particular social right that she is required to enforce.
- 4 Probably the most surprising finding was the following. In their references to democracy-related arguments, different judges at different times resorted to (mainly two) very different notions of democracy. Some judges used (what I will call) a pluralist notion of democracy, while others made reference to (what I will call) a more progressive, populist or participatory notion of it.

The remarkable fact is that, no matter which of these opposite conceptions they used, they almost invariably reached the same conclusion, namely, that respect for democracy required judges not to enforce social rights.

Of course, when judges justify their decision not to enforce social rights, they also appeal to other arguments, beside the one based on the requirements of democracy. They assert, for example, that social rights are too costly (while civil and political rights are not). In a similar vein, judges sometimes distinguish between “negative” and “positive” rights (that is, rights that require the state to refrain from acting, and rights that require the state to “do something” in order to fulfill its obligations) and assume that they are allowed to force the state to “stop doing something,” but that they cannot force it to act “positively.” Also sometimes, judges justify their decision not to enforce social rights by making reference to the need to respect the separation of powers (an argument that is closely associated with the one on democracy, although it is not the same). Now, assuming that none of these arguments sounds very promising, in what follows I will concentrate my attention on the use of the democratic argument, in its various forms, and the problems raised by this choice.

In the next part of this chapter, I will provide a rough summary of the pluralist and participatory approaches to democracy, and show the consequences that are normally derived from their choice in what concerns the relationship between the judiciary and social rights. More specifically, I will analyze the curious fact that two opposite views of democracy seem to arrive to quite the same recommendations regarding the judicial enforcement of social rights. Then, I will examine a third variation of the democratic argument, connected to the theory of deliberative democracy, and explore its implications regarding judicial review and, more particularly, the judicial enforcement of social rights.

1 From Pluralist Democracy to Social Rights

In a nutshell, judges who adhere to the pluralist view of democracy assume that (i) one of their main duties is to pay due respect to the democratic will of the people; (ii) the “locus” of the democratic will of the people is the Constitution; and (iii) they are required not to enforce social rights because “the people” did not incorporate social rights into the Constitution.

It was Alexander Hamilton, one of the first legal thinkers who advocated for such an approach, where the Constitution was seen as the main and exclusive “locus” of the will of the people. In *The Federalist Papers*, n. 78, Hamilton maintained that the genuine will of the people resided in the Constitution, and not in the transient decisions of the legislature. For that reason, he believed that it was totally justified for judges, in certain circumstances, “to pronounce legislative acts void.” In his opinion, this “conclusion by any means supposes a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to

both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." In so doing, Hamilton inaugurated a new way of thinking about the relationship between the Constitution, democracy, and the judiciary. Later on, Justice Marshall transformed this opinion into a judicial dictum that made history. In the well-known decision *Marbury v. Madison* (5 US 137, 1803), he justified both judicial review and judicial supremacy as ways of protecting the real will of the people. In his opinion, "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." And – he added – "as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent." Committed to protect democracy, judges had no alternative but to invalidate all those norms that defied the authority of the Constitution.

Of course, in order to achieve that conclusion and define what norms actually defied the authority of the Constitution, judges had to assume a broader view about the meaning of democracy and also a certain theory regarding how to interpret the Constitution. The theory of democracy that seems to be implied in this analysis is related to what is usually called a Madisonian or pluralist view of democracy (which I will consider synonyms), and which assumes that the object of the Constitution is to prevent mutual oppressions in a world that is characterized by the presence of *factions*. Factions, it is here assumed, unremittingly attempt to expand their powers even at the cost of violating other people's rights. In addition, this conception of democracy conceives the citizenry as a group of people mainly moved by passions or self-interested impulses, which normally prevent them from deciding in a rational way, and according to the interests of the whole.¹ That is why, for this view, the constitutional system is mainly directed at reducing, rather than expanding or promoting, the influence of interest groups, and particularly majority groups, in politics.² Not surprisingly, this view of democracy is usually associated with a low degree of civic political participation: for those who advocate this view, the fact of political apathy favors rather than undermines political stability, which here appears as one of the crucial political values. The other side of this coin seems to be the defense of a "technocratic" decision-making procedure, that is to say a process where decisions are elaborated by independent experts who are duly isolated from the people at large. Political authority is, as a result, distributed between different elites, which in turn accede to power, according to the people's periodical vote.³

¹ This is what James Madison presented as an inevitable principle of politics when he affirmed that "in all very numerous assemblies, of whatever character composed, passion never fails to wrest the scepter of reason" (Hamilton et al., 1999, n. 55).

² This was Madison's view, as stated in Hamilton et al. (1999, n. 10).

³ The requirements of democracy are fulfilled as far as periodic elections are in place and in each election the people have a fair chance to choose between at least two different political parties (Held, 1997, ch. 5). Other basic rights necessary for this purpose – such

On occasions, and in what regards constitutional interpretation, judges who adhered to the pluralist view seemed to maintain that the right way to interpret the Constitution required them to follow (one or another version of) what we presently call an originalist theory of interpretation, which proposes interpreting the Constitution according to its original understanding (whatever it is). Within the US context, the text of the Constitution, as well as its main sources have been read as committed to a strong individualism and hostile towards what came to be called “state activism.”⁴ The Constitution seemed to call for a minimal state, namely a state that does not interfere with individual personal choice and leaves ample room to private economic initiatives. Such a state, it is here assumed, properly honors individual liberty and favors economic progress.

Highly respected legal authorities, such as Justice Story or Thomas Cooley, supported this view, arguing for the constitutional need to protect private property against the “absolutism” and caprices of legislative majorities (Forbath, 1999). In this respect, for example, Cooley wrote in his famous 1868 treatise that a “legislative enactment is not necessarily the law of land,” particularly if it affected the people’s “liberty of contract” (Cooley, 1868).

More or less explicitly, courts have defended this view of democracy in order to strike down laws aimed at re-structuring the economy or “repairing” some of the ill consequences derived from the so-called “free forces of the market” (say, high levels of poverty or unemployment). In the same vein, judges have relied on this view of democracy and the state in order to justify their abstinence regarding social rights. In the US, for example, the Court used the “commerce clause” of the Constitution to restrict the powers of Congress; it invoked the constitutional protection of “liberty of contract” to restrict any public attempt to regulate the relationship between employers and employees; and it set limits to Congress’ initiatives to delegate powers to the President and federal agencies. In addition, and since the beginning of the twentieth century, it invalidated hundreds of regulatory norms through the use of the Fourteenth Amendment, which established that “no state can deprive any person of life, liberty or property without due process of law.”

Probably the most significant and famous case in this respect is *Lochner v. New York* (198 US 45, 1905), where the Supreme Court wondered “which of two powers or rights shall prevail – the power of the state to legislate or the right of the individual to liberty of person and freedom of contract.” In other words, the justices wondered whether collective or individual choices should prevail, and their answer was clearly the latter. The strong individualist and anti-collectivist

as freedom of expression, freedom of association – also appear as requisites of this view of democracy.

⁴ Some authors have characterized this view of the State as “proceduralist” (Sandel, 1996), given that the State is supposed to be reduced to its minimum expression, renouncing to its “regulatory” impulses as well as to the aim of imposing any kind of “substantive” outcomes.

bias defended by the Court in *Lochner* persisted within the tribunal for at least 25 years. During those years, the Supreme Court invalidated numerous economic regulations, normally invoking the due process clause of the Constitution. One of the most remarkable demonstrations of this bias came in *Coppage v. Kansas* (236 US 1, 1915) – one of many similar cases where the Court invalidated public efforts to compensate the workers' unequal bargaining power. Similarly, in *Adkins v. Children's Hospital* (261 US 525, 1923), the Court invalidated a statute establishing minimum wages for women stating: "we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." In recent times, and guided by Justice Rehnquist (who called himself a pluralist), the Court gave new life to the pluralist/originalist reading of the Constitution (curiously, however, some of the members of the Court resorted, at times, to populist arguments, as we will see below).

2 From Populist Democracy to Social Rights

Judges who adhere to the populist view of democracy assume that (i) one of their main duties is to pay due respect to the democratic will of the people; (ii) the main locus of the will of the people resides outside the Constitution, in the "here and now;" and (iii) given that the people, "here and now," do not take active measures for the enforcement of social rights, then judges have to be respectful to that sovereign decision, rather than try to impose their own views against it.

A first version of this view became popular among political leaders and public figures during the time of both the French and the American Revolutions. Particularly among the radical wing of both revolutions, it seemed clear that the place of the judiciary was one fully subordinated to the political branches. Judges had to solve conflicts, mediating between opposite claims, but had no role to play regarding the content and meaning of the Constitution. Judges – it was then assumed – lacked authority to challenge what political authorities decided to do. As reflected in the metaphor of the judiciary as the "mouth of the law," judges were confined to apply rather than interpret or somehow modify the will of the democratic legislator. In line with this view, the first legislative report on the role of the judiciary prepared after the French Revolution concluded that judges should not have the "dangerous privilege" of interpreting the law or including their views in the law. In the United States, a general sentiment of hostility towards the judiciary – a sentiment manifested in some popular rebellions, epitomized by the "Shays rebellion" – became extended through the lower classes after the end of the Revolution. That general hostility towards the judiciary represented the highest expression of a more profound conviction according to which judges should not get involved in "political" issues, as broadly understood.

The populist view of democracy that was then developed came to challenge the pluralist conception of democracy, particularly the limited role that the latter

reserved for political participation: populists considered political apathy as a defect – rather than a virtue – of democracy. According to (at least some versions of) the participatory conception, democracy required a self-governing community, based on active and virtuous citizens. In its ideal form, this self-governing society is composed of citizens who are identified with their community and who have strong solidarity bonds with their peers.

The works of Jean-Jacques Rousseau, Thomas Paine or Thomas Jefferson represent important antecedents of this conception of democracy. Of course, their writings differ in multifarious aspects. However, and at this stage, it may be worth emphasizing some of the coincidences that united them, from which I will mention only two. First of all, these authors believed that ensuring the value of political participation required the fulfillment of certain social and economic preconditions. Usually, these preconditions include the organization of the community in small units and the “cultivation” of civic virtue. More interestingly for our purposes, they required the existence of an egalitarian society, composed of individuals situated in similar social positions. For Rousseau, for example, the existence of disparate or opposing interests – in other words, the fragmentation of society into factions – made it impossible for the people to recognize their common interests. In these cases, he assumed, each individual tended to identify with and defend the interests of his group, wrongly considering that this partial interest represented the interest of the whole. In sum, the formation of the “general will” – in the end, self-government – required equality. That is why a society committed to the value of self-government was supposed to be primarily concerned with the distribution of resources.⁵ Clearly, these types of concerns differ dramatically from those that characterize the pluralist thinking. Pluralists, as we have seen, tried to remove all these socio-economic questions from the political agenda believing that the final distribution of resources had to be the outcome of a spontaneous interaction between the different members of society. In addition, populists advocated for an institutional organization that pays more attention to popular intervention in politics than to the establishment of controls and limits upon the people’s will. Some of them directly objected to the idea of representative democracy, suggesting a connection between delegation of power and tyranny.

Quite recently, many authors and judges have rescued this view of democracy in their discussions about the proper role of judges in the face of social rights. And, perhaps surprisingly – given that the participatory discourse has traditionally been associated with progressive forces – some conservative authors began to advocate for a reduced participation of the judiciary with regard to the enforcement

⁵ There are many good illustrations of this view, including Thomas Jefferson’s agrarian writings; Thomas Paine’s early proposals for a “basic income;” José Artigas’ “Reglamento Provisorio” for an egalitarian distribution of resources in Uruguay (1815); or Ponciano Arriaga’s initiatives (in Mexico’s 1857, Constitutional Convention) in favor of enacting a Constitution mainly aimed at resolving the problem of an unequal distribution of land.

of the socio-economic rights of the most disadvantaged. This claim became particularly strong after the famous *Warren Court* began to impose its progressive agenda (in terms of anti-discriminatory rights, freedom of speech, due process, prisoners' and detainees' rights and also, incipiently, welfare rights). Facing the "threat" of such a progressive and "activist" Court, some influential judges and academic figures, such as Judge Easterbrook or Judge Bork, wondered: "Why should the Court, a committee of nine lawyers, be the sole agent for overriding democratic outcomes?" (Bork, 1997; Easterbrook, 1992). The opinions of these legal authorities contributed to give foundation to a new "federalist" reading of constitutionalism according to which judges had to be strongly deferential to the people's views as expressed through their local parliaments.

Notably, this view regarding the role of judges and the Constitution has not only been adopted by conservative doctrinaires, but also by some of the most progressive scholars of our time. Michael Walzer gave a strong impulse to that view through his famous work "Philosophy and Democracy," where he attacked the idea of introducing philosophy through the law and, in so doing, criticized judicial activism (Walzer, 1981). Walzer's work persuaded, at least in part, influential authors such as Frank Michelman – an author who has been one of the leading figures arguing for a constitutional interpretation that makes room for social rights.⁶ However, and trying to honor his commitment to a broad (republican) view of democracy, Michelman maintains that social rights can only become operative when a governmental body decides to provide welfare benefits to particular individuals.⁷

What is more remarkable is that this democratic argument has been used not only regarding documents, like the US Constitution, which are silent in terms of social rights, but also regarding socially advanced Constitutions, like most Latin American Constitutions. In the US, the democratic argument recommended not to derive social rights from a Constitution that did not mention them, because by doing so judges would become legislators. Now, in Latin America, Constitutions do tend to include numerous social rights among their clauses. However, once again, the democratic argument has been understood as demanding judicial abstinence. In most cases, this abstinence has been justified by stating that constitutional references to social rights are only directed at the political branches of power that control the national budget and have democratic legitimacy to distribute resources among different social groups. This was, for example, what Argentina's Supreme Court maintained in the case *Ramos, Marta v. Provincia de*

⁶ Michelman partially accepts and partially rejects Walzer's proposal. See a discussion of the topic in Michelman (1987).

⁷ This is clearly not the case of Frank Michelman. Michelman's view concerns what judges should do in the US and is based on the assumption that US democratic authorities are hostile to social rights. However, he does maintain that in other countries, such as South Africa, democratic authorities favored the inclusion of social rights in the Constitution (e.g., Michelman, 1998).

Buenos Aires,⁸ where the Court claimed that the Constitution “did not require the judiciary [but the political branches] to guarantee the general welfare.”

This conclusion is not exactly the same as the one we got to after our analysis of pluralist theories. Participatory theories require judges to respect whatever legislators do concerning social rights, while elitist theories encourage them to invalidate all legal decisions that put at risk a (very broad) conception of property rights. However, and in spite of this initial difference, both views condemn “judicial activism.” In other words, both conservative and progressive theories of democracy seem to work together in their conclusion that judges are allowed and required to enforce civil and political but not social rights, which seems perplexing.

Now, those who are interested in the judicial enforcement of social rights may reasonably wonder whether the answers suggested by the previous approaches – which concluded in a general hostility towards the enforcement of social rights – are sound. In this respect, there are a few doubts that are worth mentioning. First, judges who refuse to enforce social rights should tell us why they use the interpretative theories that they use, rather than alternative ones that could have taken them to different outcomes. For example, they should tell us why the best interpretation of the Constitution is, say, one that requires us to “discover” and implement the political and economic programs that our “Founding Fathers” advocated (and, beside this, they should explain to us how they chose among the – foreseeable – different plans that circulated among the elite at the time in question), rather than other interpretative theories that required us to think, say, in terms of the best available theory of justice. In particular, it is worth noting that, for those who wanted to insist on the originalist route, it is becoming increasingly difficult to maintain the conclusion that social rights cannot be judicially enforced. This is because most modern constitutions have incorporated long lists of social rights and/or have given constitutional status to international treaties that explicitly require judges to adopt a different attitude toward social rights.

In addition, one should wonder what these judges do in order to arrive to their preferred decisions from their previous choice of their favorite theory of democracy. To illustrate this claim, it is not clear that the adoption of a participatory view requires judges to abstain from enforcing social rights rather than implementing them. In effect, one could reasonably maintain that such a populist view requires, from all public officers, including judges, to take steps towards the implementation of certain basic social, economic or cultural rights. The idea is that, in order to honor the values that populist democrats want to honor (say, the values of public participation in politics, the value of having a genuinely collective decision-making process), one needs to ensure that certain basic rights are in place and at work.

In the following sections, I shall concentrate my attention on a third, different conception of democracy, namely a deliberative conception. More specifically,

⁸ 12/3/2002; JA 2002-IV-466.

I will explore what judges should do regarding social rights if they took as their point of departure such an understanding of democracy.

3 From Deliberative Democracy to Judicial Review

Although it is possible to distinguish many different versions of the conception of deliberative democracy (Elster, 1998; Bohman, 1996; Cohen, 1989; Nino, 1991), I will here propose a version of it characterized by the following two features. First, I will assume that this view of democracy requires public decisions to be adopted after a wide process of *collective discussion*. Second, I will assume that the deliberative process requires, in principle, the intervention of *all those potentially affected* by the decision at work.⁹

On the one hand, this view significantly differs from pluralist theories, particularly as a consequence of its second distinctive feature. In effect, deliberative democracy requires public decisions to be grounded on an ample consensual base shaped through the participation of all different social sections of society. For this view, the less the scope and intensity of civic participation, the weaker the reasons for considering the final outcome of the deliberative process to be impartial (Nino, 1991). Wide collective intervention is seen as a primary and necessary (although not sufficient) condition for that impartiality. On the other hand, this deliberative model has coincidences with participatory views of democracy concerning the value that both views give to political participation. However, it differs from important versions of the participatory view as a consequence of its defense of public debate. Rousseau's work may help us to understand the meaning of this objection. According to Rousseau's *Social Contract*, public deliberation was not only unnecessary for the sake of creating impartial decisions, but a circumstance that made impartiality impossible. In effect, for Rousseau, public deliberation threatened to divide society into factions. For him, deliberation worked against social unity and helped citizens to think more about their own interests, and less about what they had in common with the rest. In other words, deliberation is taken to undermine the very ideal of creating a "general will" (Manin, 1987).

Now, the question is what would follow, regarding the enforcement or non-enforcement of social rights, if we took this deliberative conception of democracy as our departing point. And, as the answer to this question depends on a previous and broader one, related to the connection between deliberative democracy and judicial review, I will start by exploring this issue in more detail.

⁹ This definition is connected to the one advanced by Jon Elster. For him, "the notion includes collective decision-making with the participation of all who will be affected by the decision or their representatives: this is the democratic part. Also, all agree that it includes decision-making by means of arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality: this is the deliberative part" (Elster, 1998, p. 8).

To begin with, the relationship between deliberative democracy and judicial review does not seem to be an easy one. As Dennis Thompson claims, deliberative democracy does not exclude judicial review as a possible institutional arrangement, but it insists that there will often be reasonable disagreement about what liberties should be inviolable and that, even when there is agreement about them, there will be reasonable dispute about their interpretation and how they should be weighed against other liberties. Liberties are subject to revision as a result of new philosophical insights or empirical evidence and, most importantly, challenges raised in actual democratic deliberations (Thompson, 1999).

Thompson, I believe, adequately casts some doubts about the value that judicial review has for deliberative democrats. Although I will say something about why the latter could resist (certain versions of) judicial review, I will first try to show what reasons they have for supporting it, even (or particularly) in what regards the enforcement of social rights.

First of all, if we take as a starting point the fact that we are all fallible, we have a first reason to welcome, in principle, all those devices that help us to correct our decisions. Our decisions are and will always be liable to factual and logical mistakes, lack of information or prejudices. In addition, as we all know, the political system suffers from numerous problems which facilitate the adoption of partial decisions. There is an ample literature, both theoretical and empirical, commenting and documenting the undue influence that interest groups and powerful interests exercise in the political process. According to this literature, the political system tends to become unduly biased or over-sensitive to the pressures of certain groups, which affects both its majoritarian character and its ambition to foster impartiality.

Such difficulties should move deliberative democrats to resist decisions that (i) come to undermine present or future deliberation (*deliberation-restrictive* decisions); (ii) are the product of an ill-functioning deliberative system (decisions that result from *procedural vices*); or (iii) are the circumstantial outcome of a decision-making process that, in a particular occasion, failed to consider some relevant arguments or in other ways are not publicly justified (decisions that are based on *imperfect deliberation*).¹⁰ That is why it is necessary to ensure that – as

¹⁰ If we take into account Carlos Nino's view on deliberative democracy, protecting this system would require an examination of "the breadth of participation in the discussion by those affected by the decision ultimately taken; the freedom that participants enjoy to express themselves in deliberation; the equality of the conditions under which that participation is carried out; the satisfaction of the requirement that the proposals be properly justified; the degree to which debate is principled rather than the mere presentation of interests; the avoidance of frozen majorities; the extent to which the majority supports the decisions; the distance in time since the consensus was achieved; and the reversibility of the decision." And he adds: "The rules of the democratic process try to ensure that these conditions are met to the maximum degree possible in order to make the enactments of that process reliable guides to moral principles" (Nino, 1996, p. 199). Following Nino's epistemic view, I would also maintain that judges in a deliberative democracy should

Cass Sunstein has claimed – “it is deliberation – undistorted by private power – that gave rise to that outcome” (Sunstein, 1985, p. 68; Habermas, 1996, pp. 274–86). In sum, a well-organized deliberative system may require the existence of institutional mechanisms that came to preserve and enhance its deliberative character.

Taking into account these considerations, one may easily come to the conclusion that judges are institutionally placed in an exceptional position for contributing to foster deliberation: the judiciary is the institution in charge of receiving complaints from all those who are, or feel they have been, unduly treated by the decision-making process. There is no other institution whose corridors are daily filled by those in need of help and public attention. Judges are (quite) naturally inclined to look at the political system from the perspective of those who suffer from it – they are required to look at this system, paying attention to its weaknesses, failures and ruptures. Even better than that, judges are institutionally obliged to listen to the different parties in a conflict – and not only to the side that claims to have been mistreated.

Now, it is not only that judges are institutionally well-placed to enrich the deliberative process and help it correct some of its improper biases. It is also the case that judges have many different tools that facilitate their task in this respect, as it has been ratified by the actual practice of judicial review. For one thing and, as a consequence of their institutional position and the means they have at their disposal, judges have very good chances to detect how the deliberative process is working. At the same time, judges have many chances to act in ways that are respectful to the people’s final authority: they have sufficient techniques and procedural means that allow them to act consequently. They may decide to remand a certain norm to Congress forcing it to think twice about that norm; they may declare that a certain right has been violated without imposing a particular solution to the legislators; they may establish that a certain violation of rights needs to be remedied in a certain time without taking the place of the legislator for deciding what remedy to adopt; they may offer the legislator a set of alternative remedies leaving to them the final decision of which one to choose.

4 Judicial Review, Deliberative Democracy and Social Rights

In principle, the above considerations seem to be perfectly applicable to the area of social rights. Judicial review may be a crucial instrument for enhancing deliberation concerning social rights, which involves numerous and crucial public questions. Moreover, judicial activism in the area of social rights may be considered particularly relevant given the intimate connection that exists between

prevent the adoption of decisions that interfered with individuals’ personal morality given democracy’s lack of epistemic power in this respect. However, I will not discuss this issue at this stage of my argument.

social rights and political participation.¹¹ As Carlos Nino maintained, “social and economic conditions of individuals, such as their level of education, are preconditions for free and equal participation in the political process” (Nino, 1996, p. 201).¹² In sum, one may reasonably claim that the absence of public policies aimed at putting social rights into practice may hinder the political involvement of the most disadvantaged and thus undermine the entire value of the democratic process.¹³

At the same time, there is no good reason to think that judicial intervention in this area will necessarily conflict with democracy (here, deliberative democracy). By contrast, also in this area, judges may decide in ways that are fully respectful of the higher authority of the people and their representatives. In her book on social rights, Cécile Fabre listed a few possibilities in this respect. In her view, courts could, for example, (i) “state that a constitutional right has been breached, without asking for remedies;” (ii) “state that a constitutional right has been breached, and [ask] the state to provide remedies; a) without specifying how and without setting a deadline; b) without specifying how, but by demanding that they do it by a certain deadline;” (iii) “state that a constitutional right has been breached, [ask] the state to provide remedies, and specify what kinds of remedies should be provided, how, and by when” (Fabre, 2000, p. 148; Gloppen, 2006).

Cass Sunstein made a similar point arguing against those who believe that judicial “activism” in the area of social rights necessarily implies “displacing democratic judgment about how to set priorities” (Sunstein, 2004, p. 228). For him, the fact that there are certain constitutional “commitments” regarding social rights, and – I would add, following his analysis – the fact that judges take certain specific steps towards the enforcement of these rights “can promote democratic deliberation, not preempt it, by directing political attention to interests that would otherwise be disregarded in ordinary political life” (Sunstein, 2004, p. 228). Sunstein’s renewed view on the topic emerged after his study of some of the rulings of the post-apartheid South African Court which showed him that it was possible for the Court to opt for a “third path” between two undesirable and unjustifiable

¹¹ See in this respect, for example, Cohen (1989). More generally, see John Rawls’s discussion on the “fair value” of political liberties. I thank Pablo Gilabert for his comments on this issue.

¹² This view has even been recognized by the US Supreme Court in some of its landmark cases. Thus, for example, when it maintained that “education is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.” (*Brown v. Board of Education* 347 US 483 (1954)).

¹³ “Some goods are so fundamental to the proper working of the democratic system that if they are not provided the democratic process will deteriorate so much that its epistemic value vanishes. If someone is starving or very ill and deprived of medical attention or lacks all possibility of expressing his ideas through the mass media, the democratic system is harmed in the same way as if we were disenfranchised” (Nino, 1996, pp. 201–202).

options, namely, ensuring protection of “fully individual rights,” and assuming that Courts had no role at all to play in the matter (Sunstein, 2004, p. 227).

The example of South Africa’s jurisprudence has indeed been revolutionary in its effects in helping the world legal community to understand that it was possible both to support an active role for the judiciary in the area of social rights and still affirm the primacy of political authorities. Two of the most remarkable decisions of South Africa’s Supreme Court, in the *Grootboom* case¹⁴ and in the *Treatment Action Campaign* case,¹⁵ are particularly telling in this respect. The first one involved a complaint presented by 900 plaintiffs who lived in conditions of extreme poverty, in miserable shacks, and claimed for the respect of their housing rights. Facing this situation, the South African Court required the State to create a program designed to meet its constitutional obligations, including reasonable measures designed to “provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions.” The second case concerned AIDS, which is one of South Africa’s most dramatic social problems, and the government’s decision to prohibit the administration of an antiviral drug – nevirapine – except in exceptional circumstances (which included, for example, the creation of special research centers). Here, the Court asserted that the government was under the duty to “devise and implement within its available resources a comprehensive and coordinated program to realize progressively the rights of pregnant women to have access to health services to combat mother–child transmission of HIV.” The Court’s decisions in these cases were particularly interesting because they demonstrated how, in practice, it was possible for judges to contribute to the discussion of certain fundamental public issues without pre-empting democracy. The Court made this contribution not only by addressing issues that political authorities were not addressing (or were addressing in improper ways, i.e. by discriminating certain groups), but also by doing so through means that were respectful to the superior authority of the people and their representatives. As we can see from these rulings, the Court did not impose its views on political authorities, defining, for example, what remedies ought to be adopted. However, it is undoubtedly clear that its decisions came to foster a discussion that was absent or improperly carried out until that moment and thus forced politicians to assume responsibilities that they had refused to assume in an adequate way. By so doing, the Court made a crucial effort in the direction of socially “including” people who were virtually marginalized from public conversation.

The Indian example is as interesting as the South African one, although for different reasons – particularly for the frankness and radicalism of the Indian

¹⁴ *Government of the Republic of South Africa v. Grootboom* [2000] Interights Commonwealth Human Rights Law 72 (4 October 2000); (2001) (1) SA 46 (CC).

¹⁵ *Minister of Health and Others v. Treatment Action Campaign and Others* (2002) (5) SA 721 (CC); (2002), 10 BCLR 1033.

Supreme Court's decisions in terms of social rights.¹⁶ Surely, from the perspective of deliberative democracy, it is not obvious that all its decisions (during its most "active" period) were equally defensible – some of them, one could reasonably think, exceeded the dialogic virtues that deliberative democrats praise, and represented the imposition of the (in this case progressive) views of the Court upon political authorities. However, we may say that, in general terms, the Court's activity could still be defended from a deliberative perspective at least in two respects. First, the Indian jurisprudence represents a fresh and illuminating example of an anti-formalism that is particularly healthy in the area of social rights, where there still exist brutal barriers that prevent the most disadvantaged from presenting their views to the public. The most striking example of the Indian Court's anti-formalism is the so-called "epistolary jurisdiction," created by the same Court and according to which a mere letter – rather than only a formal petition – written on behalf of a disadvantaged group, constituted a sufficient condition for activating a proceeding before the Supreme Court. Moreover, the Court found that its liberal rules of standing and the epistolary jurisdiction were not sufficient for the purposes it had assumed. The Court considered that it was also crucial to create new instruments to provide the tribunal with the information required for deciding a case. For the main tribunal it was "unrealistic to expect either the disadvantaged petitioners, or the activists working with them, to supply the evidence needed by the court to adjudicate upon the issues" (Hunt, 1996, pp. 165–66). That is why, for example, it decided to create "socio-legal commissions of inquiry" as "court commissioners."¹⁷

A second innovative feature in the Indian Supreme Court's case-law (which is already evident from the previous comment) was the way in which it explicitly defied traditional assumptions regarding the notion of separation of powers. According to these more traditional notions, the Court is supposed to systematically assume a deferential attitude towards the decisions of the political branches unless grave violations of the law were produced. Against this view, the Indian Court assumed a more "aggressive" role and tried to actively collaborate with the political branches in the creation of more impartial decisions. For example, in the *Azad Rickshaw Pullers Union v. Punja*,¹⁸ the Court decided not to strike down a polemic statute but rather collaborate with Congress in the rewriting of it in order to make the norm more properly inclusive. In the Court's opinion,

¹⁶ According to Justice Bhagwati "the portals of the Court are thrown open to the poor, the ignorant and the illiterate and their cases have started coming before the Court through public interest litigation" (Bhagwati, 1985, p. 572).

¹⁷ For example, in *Bandhua Mukti Morcha v. Union of India* (2 S.C.R. 67, 1984), the Court created a commission of inquiry composed of members of the civil society in order to help it with the implementation of the measures that were then ordered. In *Sheela Barse v. Union of India* (3 S.C.R. 443, 1986), it organized a committee to ensure compliance with provisions in prison manuals (see Scott and Macklem, 1992).

¹⁸ 1 S.C.R. 366 (1981).

the “Court and counsel agreed on this constructive approach and strove through several adjournments, to mould a [new regulative] scheme.” For Craig Scott and Patrick Macklem, who analyzed these cases in a detailed study of South Africa’s new jurisprudence on social rights, “the Indian experience suggests that it may be appropriate to allow the judiciary to advocate certain solutions in order to prod the other branches into general debates and concrete responses that in the long run are more democratically legitimate and effective” (Scott and Macklem, 1992, p. 130).

Finally, I would like to introduce a few comments about the case of the Colombian Supreme Court given that it probably represents the most sophisticated expression of a Court both committed to the enforcement of social rights and deliberative democracy. The Colombian Court, in effect, has dealt with numerous cases concerning social rights and has done so in ways that have been extremely respectful to democratic deliberation. The Court has accepted numerous popular claims (“*tutelas*”) directed at enforcing social and economic rights (Cepeda, 2004, p. 618). The interesting thing about the Colombian Court is the extreme care and capacity with which it reconciles its “activism” with its respect for deliberative democracy. The Court demonstrated its courage and commitment to deliberative democracy in a diversity of decisions where it struck down laws when they had been approved without any public debate altogether or when they had not been the product of a reasonable process of public deliberation. A striking illustration in this respect is its 2004 decision striking down the so-called *Anti-terrorist statute*, which represented a crucial part of the executive’s political agenda. The Court proceeded in that way when it realized that more than a dozen of the representatives who voted for the polemic statute had changed their views on the topic from one day to the next, without giving any public explanation about their change of views.

This commitment to deliberative democracy seems also evident in its ample social-rights case-law and particularly in the new and complex legal doctrine developed by the Court, which is known as the “modulation of the effects of decisions.” According to Chief Justice Cepeda, the general purpose of these modulative constitutional judgments “do not arise as a consequence of judicial interference with Congressional powers, rather they arise as a means to harmonize the necessity to preserve the Constitution with the Court’s deep respect for the decisions of the legislature. It is through such ‘modulative’ decisions that the Court seeks to uphold the validity of laws as far as constitutionally possible” (Cepeda, 2004, p. 566). Modulative decisions may be of different types, namely “interpretative,” “expressly integrative,” and “materially expansive” decisions. They may also refer to the moment at which the tribunal’s ruling becomes effective. In some remarkable cases, for example, the Court deferred the effects of its decisions under the assumption that their immediate application would endanger other fundamental constitutional values. Trying to give Congress enough room of maneuver, the Court postponed the application of its unconstitutionality decisions for a certain period. For example, in its famous decision T-153 (1998) about the

severe abuses committed inside national prisons, the Court recognized the validity of the prisoners' claims and established that the government had a four-year term to remedy the inmates' situation. In addition, the Court acknowledged that it was the Congress, rather than the judiciary, which was the branch in charge of deciding how to put an end to these pervasive abuses. The Court followed a similar strategy in another difficult decision, T-025 (2004), which involved the issue of the *desplazados*, namely entire populations that were displaced from their place of residence as a consequence of the (illegal) violence that they suffered. The Court considered that the policy of the government towards the *desplazados* was – in its profound inadequacy and inefficacy – unconstitutional, but it did not try to impose an alternative route to public authorities. By contrast, the Court asserted that it would closely follow the government's decisions on the topic and make sure that these decisions were both in agreement with the Constitution and capable of putting an end to the *desplazados*' desperate situation.¹⁹ In all these cases, the Court showed the factual possibility of intervening in ways that were fully respectful of the authority of the legislator.

These examples illustrate the ways in which courts can assume a strong and even aggressive attitude concerning the implementation of social rights and, at the same time, not abandon – but rather honor – their commitment towards deliberative democracy.

5 Judicial Review, Judicial Supremacy and Judicial Motivations

The previous sections provided some support for the thesis that deliberative democrats should advocate for judicial review, even in (or particularly in) the area of social rights. I would now like to introduce a few critical notes that cast some doubts on the previous claims, even though they will not negate their force and importance.

First, I will distinguish between the concepts of *judicial review* and *judicial supremacy*. Judicial review is the activity through which judges revise the validity of legal and administrative norms. Judicial supremacy has to do with “the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone” (Kramer, 2001, p. 6). In spite of the wide support enjoyed by judicial supremacy within legal circles, it is that very feature – a feature that usually goes together

¹⁹ By contrast, the Court's decision in the famous *UPAC* case, which actually involved three decisions (the first of which issued in May 1999, decision C-383, 1999) related to the financing of social housing that had become completely inefficient due to unexpected changes in the country's economic situation. The Court maintained that the government's policy had become unconstitutional, which was quite obvious for a majority of jurists, but also imposed an alternative financing scheme to the government, making it difficult for the legislators to design their own agenda.

with the practice of judicial review – which generates most tensions with those who advocate for deliberative democracy or other strongly majoritarian views of democracy.

Those who value democracy, among other reasons, because of its majoritarian components (as deliberative democrats do) have reasons to adhere to this criticism, which is ultimately grounded on the idea of equal respect.²⁰ Judicial supremacy would violate the idea of equal respect because it allows a minority of judges to impose their own views upon the rest of the population. That possibility becomes even more objectionable when one realizes, with Jeremy Waldron, that judges also adopt their decisions through the use of majoritarian procedures as a consequence of the strong disagreements that usually appear within the courts, which simply reproduce the disagreements that exist outside them.

Deliberative democrats have some reasons to add to this initial criticism. For example, deliberative democrats who believe in the epistemic virtues of public discussion (Nino, 1991) may say that judicial supremacy is wrong because it implicitly relies on the intellectual virtues of a selected few, rather than on the epistemic capacities of the citizenry as a whole. Advocates of deliberative democracy may also say that judicial supremacy is wrong because it defies another fundamental requirement of deliberative democracy, which is that basic public questions should be subject to an open and ongoing debate. Against what this principle requires and practically speaking, judicial decisions tend to acquire the force of “final” decisions. This seems to be true even though it is not theoretically impossible for the other branches to promote their own views and even if we admit that, sometimes, the same Court reverses its own past decisions taking into account the pressures coming from the other branches or from the people at large. This is so because Courts can persist with their opinions and finally impose their views upon all the remaining actors.²¹ The image of a dialogue seems somehow improper when judges have the opportunity to insist successfully on their own decisions, no matter how much Congress insisted on an opposite solution. The idea of dialogue, instead, seems normally to imply a certain type of equality that is not given in this case. In a “normal,” appropriate dialogue, your arguments and my arguments have equal chances to prevail, as long as they are good ones. Here, the dialogue seems tilted and, what is more worrisome, it seems unbalanced towards the wrong side: in actual, everyday, life it is not the people but the least democratic branch that has the ultimate constitutional authority.

²⁰ Quoting Feinberg’s view of participation and respect for the individual, Waldron says “[p]erhaps [the support of] the right to participate has less to do with a certain minimum prospect of decisive impact and more to do with avoiding the insult, dishonor or denigration that is involved when one person’s views are treated as of less account than the views of others, on a matter that affects them as well as the others” (Waldron, 1999, p. 238).

²¹ In this respect, for example, see Dworkin (1977).

The second critical note derives from a reflection about judicial motivations, an issue that has been surprisingly neglected by academic literature. In effect, academics seem to be satisfied in their role of public intellectuals or social reformers after defining an ideal model of judicial behavior. They say, for example: "if judges did *x* or *y* then nobody could complain about what they did because their task would be wholly justified." This statement may be very important – as a contribution to define a regulative ideal – but it is clearly incomplete in the sense that it does not tell us why we should expect judges to follow that ideal. For example, some authors think that judicial review would be fully justified if judges concentrated their efforts on safeguarding the political process (Ely, 1980);²² or if judges became the "voice of the powerless minority" (Fiss, 1976);²³ or if they learned to "leave things undecided," avoid abstract generalizations, reason by analogy and not through broad general principles and move carefully, step by step, taking "one case at a time" (Sunstein, 1999).

Probably, if judges behaved in the ways described, their actions would be less objectionable from the perspective of deliberative democracy. Also in defense of such proposals, one should admit that, at least in principle, the existing institutional framework does not prevent the achievement of the desired outcomes: judges may decide to work for the disadvantaged and insular minorities or may decide to act in a minimalist way. The problem is, however, that we do not have good reasons to think that judges will collectively decide to act in the recommended way at a certain time or over a certain period of time. In other words, the proposed changes are materially feasible but also, at the same time, highly improbable to obtain. This is so, among other reasons, because judges have no incentives to behave in such a way – even though it may be the case that, occasionally, an individual judge decided to follow one of those theoretical recommendations because she found them particularly illuminating. However, in general terms, why should we expect judges to abdicate from their enormous powers and do so in the ways and in the occasions recommended by

²² John Ely conceptualizes the process to have failed where: (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest and thereby denying that minority the protection afforded other groups by a representative system (Ely, 1980, p. 108).

²³ Thus, in "Groups and the Equal Protection," Fiss affirmed that "[w]hen the product of a political process is a law that hurts [disadvantaged minorities], the usual counter-majoritarian objection to judicial invalidation – the objection that denies those 'nine men' the right to substitute their view for that of 'the people' – has little force. For the judiciary could be viewed as amplifying the voice of powerless minority; the judiciary is attempting to rectify the injustice of the political process as a method of adjusting competing claims" (Fiss, 1976, p. 153).

some academics? Can we seriously expect this to happen? This is why deliberative democrats have reasons to keep their skepticism toward judicial review.

Conclusion

It is important to distinguish between two things, namely, (i) the fact that deliberative democrats have reasons to be skeptical regarding judicial review, in general; and (ii) the fact that specific judicial decisions may be more or less in line with the aims of deliberative democrats. Undoubtedly, in order to be able to advocate for judicial review, deliberative democrats would need guarantees that they presently lack. This will continue to be so as long as judicial supremacy is maintained unmodified, as no institutional reforms are introduced for motivating judges to decide in ways more compatible with the goals of deliberative democracy, and as the institutional system is not re-organized so as to favor the establishment of a genuine and egalitarian dialogue between the different branches of power and also between them and the people.

None of these certainties, however, should prevent deliberative democrats from evaluating different judicial decisions differently according to their proximity or distance from the institutional ideal that they defend. Judicial decisions in the area of social rights should be no exception in this respect: some of them may be deemed to work towards the regulative ideal of deliberative democracy (i.e., by contributing to integrate groups that were improperly marginalized by the political system or by forcing political authorities to justify their decisions in a more solid way), while others may be deemed to work in the opposite direction (i.e., by assuming that the Constitution is compatible with only one economic model). And, I believe, it is relevant to acknowledge these distinctions, at least in order to leave behind a certain dogmatism that sometimes seems to affect our legal community: the one that maintains that “Democracy,” in capital letters, systematically requires judges not to enforce social and economic rights.

References

- Bhagwati, P. (1985), ‘Judicial Activism and Public Interest Litigation’, *Columbia Journal of Transnational Law*, 23, pp. 561–77.
- Bohman, J. (1996), *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, MA: MIT Press).
- Bork, R.H. (1997), *The Tempting of America* (New York: Free Press).
- Cepeda, M. (2004), ‘Judicial Activism in a Violent Context’, *Washington University Global Studies Law Review*, 3, special issue, pp. 529–700.
- Cohen, J. (1989), ‘The Economic Basis of a Deliberative Democracy’, *Social Philosophy and Policy*, 6(2), pp. 25–50.
- Cooley, T. (1868), *A Treatise on Constitutional Limitations* (Boston: Little Brown and Co).

- Dworkin, R. (1977), *Taking Rights Seriously* (London: Duckworth).
- Easterbrook, F.H. (1992), 'Abstraction and Authority', *University of Chicago Law Review*, 59, pp. 349–80.
- Elster, J. (ed.) (1998), *Deliberative Democracy* (Cambridge: Cambridge University Press).
- Ely, J. (1980), *Democracy and Distrust* (Cambridge, MA: Harvard University Press).
- Fabre, C. (2000), *Social Rights under the Constitution. Government and the Decent Life* (Oxford: Oxford University Press).
- Fiss, O. (1976) 'Groups and the Equal Protection Clause', *Philosophy and Public Affairs*, 5, pp. 107–77.
- Forbath, W. (1999), 'Caste, Class and Equal Citizenship', *Michigan Law Review*, 98, pp. 1–91.
- Gloppen, S. (2006), 'Analyzing the Role of Courts in Social Transformation', in P. Domingo, R. Gargarella and T. Roux (eds), *Courts and Social Transformation in New Democracies* (Aldershot: Ashgate), forthcoming.
- Habermas, J. [1992] (1996), *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press).
- Hamilton, A., Madison, J. and Jay, J. (1999), *The Federalist Papers*, ed. C. Rossiter (New York: Mentor).
- Held, D. (1997), *Models of Democracy* (Stanford: Stanford University Press).
- Hunt, P. (1996), *Reclaiming Social Rights* (Sydney: Dartmouth).
- Kramer, L. (2001), 'Foreword: We the Court', *The Supreme Court, 2000 Term, Harvard Law Review*, 115(4), pp. 16–74.
- Manin, B. (1987), 'On Legitimacy and Political Deliberation', *Political Theory*, 15(3), pp. 338–68.
- Michelman, F. (1987), 'Possession vs Distribution in the Constitutional Idea of Property', *Iowa Law Review*, 72, pp. 1319–50.
- Michelman, F. (1998), 'The Constitution, Social Rights and Reason', *South African Journal on Human Rights*, 14, pp. 499–507.
- Nino, C.S. (1991), *The Ethics of Human Rights* (Oxford: Oxford University Press).
- Nino, C.S. (1996), *The Constitution of Deliberative Democracy* (New Haven, CT: Yale University Press).
- Sandel, M. (1996), *Democracy's Discontent. America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press).
- Scott, C. and Macklem, P. (1992), 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution', *University of Pennsylvania Law Review*, 141(1), pp. 1–148.
- Sunstein, C. (1985), 'Interest Groups in American Public Law', *Stanford Law Review*, 38, pp. 29–87.
- Sunstein, C. (1999), *One Case at a Time. Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press).
- Sunstein, C. (2004), *The Second Bill of Rights* (New York: Basic Books).
- Thompson, D. (1999). 'Democratic Theory and Global Society', *The Journal of Political Philosophy*, 7(2), pp. 111–25.
- Waldron, J. (1999), *Law and Disagreement* (Oxford: Oxford University Press).
- Walzer, M. (1981), 'Philosophy and Democracy', *Political Theory*, 9, pp. 379–99.

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