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Democratizing the Transnational Polity

The European Union and the Presuppositions of Democracy

James Bohman

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James Bohman is Professor in Political Philosophy, Philosophy of Social Science, and 19th Century and Contemporary German Philosophy at Saint Louis University, USA.
E-mail: bohmanjf@slu.edu.

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Abstract

After briefly considering the problems of political authority and democratic reform typical of formal transnational institutions, this paper offers a theory of democratization for transnational polities. Democratizing a polity such as the European Union requires two conditions to be realized across borders: the emergence of transnational publics that create social relationships based on mutually recognized communicative freedom and the institutionalization of new normative powers of citizens that realize freedom as nondomination. In light of these conditions, the republican dimension of democratization can be made explicit in a conception of a democratic minimum, in which democratization depends upon the effective capacity of citizens to initiate deliberation. Current theories of cosmopolitan and transnational democracy (either from "above" or from "below") cannot elaborate sufficient institutional conditions that make democratization possible in a multilevel polity such as the EU.

Keywords

Civil Society – Cosmopolitanism – Deliberative Democracy – Democracy – Democratization – Europeanization – Public Sphere – Transnational Democracy – Transnational Institutions

Introduction

Even as cosmopolitanism became a distinctly political rather than merely moral ideal in the eighteenth century, many cosmopolitans remained deeply suspicious of the world state, seeing it as a version of universal monarchy[1]. Because of the deeply undemocratic character of current international political authority, many democratically- minded contemporary cosmopolitans have turned to the democratizing forces of transnational civil society in order to challenge the emerging globalized forms of power and domination. However important transnational associations and movements have been to many social struggles, they do not always promote the conditions for democracy; and when they do, they provide at best only one dimension of the process of transnational democratization. Instead, I argue here that the formation of transnational publics is more central than civil society to achieving the necessary conditions for democratization, precisely because they enable the emergence of the sort of communicative freedom across borders that could challenge potentially dominating forms of international authority. Some international institutions have incorporated democratic forms and practices, such as representation, voting and public hearings. But if democracy is at least in part to be defined in terms of inclusive and reflexive deliberation, then democratization requires more.

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

Practical questions about the appropriate means aside, the theoretical task of understanding democratization is made even more difficult conceptually by the fact that democracy cannot be understood univocally across types of polities or units of the same polity, precisely because it often takes a variety of institutional forms. But, as a working definition that fits this particular context, I offer the following. Democracy is that set of institutions by which individuals are empowered as free and equal

[1] Paper presented at the RECON Kick-off Conference, Oslo, 26 January 2007.

citizens to form and change the terms of their common life together, including democracy itself. In this sense, democracy is reflexive and consists in procedures by which these very rules and practices are made subject to the deliberation of citizens themselves. Democracy is thus an ideal of self-determination, in that the terms of democracy are made by citizens themselves and not others. This definition does not, however, suggest the more specific conception of self-determination that guides much of democratic theory since the eighteenth century, since the ideal of self-legislation in a bounded political community is thoroughly imbricated with democracy's current difficulties. If it is self-rule, it is the rule of the many and not of the few, and requires at the very least the terms of democracy themselves must pass through the deliberation of citizens.

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

Distinctive to transnational polities, however, is the democratizing effect of publics based not in the unified audiences of national mass media, but rather in communicative networks that are as dispersed and distributed as the authority with which they interact. As John Dewey (1988: 327) put it, the goal of such a process of institutionalizing dispersed authority is to create "those conditions under which the inchoate public may function democratically." In the case of transnational politics, the inchoate publics under consideration are plural, and that makes a great deal of difference as to how we are to conceive of their emergence and contribution to global democratization. But while these publics offer hope for transnational democracy, they are only necessary and not sufficient conditions. To the extent that transnational associations help to form such counterpublics (opposed to the public addressed in current international institutions), they contribute to the capacity of international society to democratize its relations of power and authority. However, counterpublics that challenge authority do not rule; and even if they did, we should not take this as a sign of an emerging "global" public that speaks for the collective will of humanity (or even one that speaks for the multilingual "Europe") (Kymlicka 2001: 94).[2] However

[2] For criticisms of the idea of a European-wide public sphere, see Schlesinger and Kevin (2000).

important civil society and public spheres are for developing communicative freedom, a further element is needed for democratization at the transnational level: there also must be some institutions in which people as not only members of publics and associations, but also citizens and bearers of rights. In the EU, these two conditions have been met to some degree, even if they have not been deeply entrenched.

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

Above and Below: Democratic Theory and Transnational Authority

Some conceptions of democracy demand that the people be able to control most decisions directly, by whatever means that might be achieved. In modern representative democracies, however, "the people" speak only intermittently and at best only indirectly influence those who control the levers of power. Without regularized channels of political influence (such as elections and representation) in the international sphere, challenge and contestation by the broader public sphere of international public opinion seem to be the only ways to exercise indirect influence over decision making. In the absence of formal democratic institutions, the public sphere is the only place in which informal nongovernmental organizations (NGOs) can challenge political decisions and attempt to organize public opinion around matters of common concern across borders. When successful, they may become integrated into a "regime" instituted to monitor the performance of various international institutions, as is the case, for example, with environmental groups who both monitor compliance to pollution and whaling regimes and represent environmental interests in discussions and negotiations of their relevant rules and policies.[3] In this way, NGOs now often act as surrogate publics and expand the scope of those who can influence decision making and implementation in public institutions. But would such regimes remain a permanent feature of a democratized transnational polity? Slaughter (2004) and others think of NGOs as products of informal governance networks, but they offer no real reasons that support their potential for democratization through communicative freedom or normative powers.

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

This sort of indirect public influence has some legitimizing force, but it does not by itself make such regimes "democratic," nor does it solve the problem of domination inherent in the relatively independent operation of their quasi-legal powers. Although participation in regimes that are mediated through NGOs may indeed increase the number of actors who participate in decision making, it does not solve the basic difficulty of these emerging forms of political domination: the widening gap between those who govern and define the terms of cooperation and those who are governed and thus still remain outside of civil society.[4] Indeed, the capacity to participate in international civil society is very demanding and presupposes certain kinds of statuses and powers not had by the world's poorest persons when faced with global corporate actors. Because of its entry requirements (such as the possession of some kind of recognized legal status), civil society can be as much the basis for inclusion as exclusion.

By comparison, state-oriented public spheres have significantly different features that have developed from long-term processes of democratization. Even when citizens do not influence decisions directly, they are able to exercise certain mutually granted normative powers as members of publics. In participating in free and fair elections, citizens have the normative power to change representatives and office holders and to express their consent to being governed. Given this channel for influence, citizens may be said to at least have "electoral sovereignty." This normative power of the collective will of the citizenry is dependent on the role of citizens within an institutional framework that allows for a distributed system of normative powers. In the event that political authority strays outside of the normal institutional channels of democratic influence, citizens can also exercise accountability through the "contestatory sovereignty" of the *demos*, as when the voice of the people becomes salient in periods of constitutional crisis or reform.[5] Even in a democracy, authority becomes unresponsive not only when citizens as a collective body are disempowered, but also because these democratic institutions were constructed for a public that is different from the one that currently exists. It is telling that in the international arena, many powerful institutions, such as the International Monetary Fund or World Bank, lack any mechanism for creating publics and channels of public influence over their agendas.

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

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[4] For a critique of such an idea of participation of civil society through NGOs interacting with experts, see Chatterjee (2004: 68-69).

[5] On the idea that the People speak only in "constitutional moments," see Ackerman (1991). Pettit (2000) generalizes this idea by distinguishing between the authorial and the editorial dimensions of "the people".

interests of scattered and unorganized principals" (Llewellyn 1930: 484; see also White 1985: 205). If democracy is the goal, then this reversal must be undone; and it cannot be undone merely through ad hoc popular consultation or through the use of largely self-appointed civil society organizations as surrogate publics.

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

This intermediate structure is necessary in global politics, in which top-down institutions remain remote from citizens, and civil society organizations alone cannot provide the basis for translating bottom-up deliberative opinion formation into political power. Such strategies fail because they ignore conditions necessary for the success of both democracy and empowerment that are found only by regularizing structural relationships between responsive institutions on the one hand and a vibrant civil society and robust public spheres on the other. For this reason, Dewey's (1988) causal conception of a public as "all those affected by a problem" remains incomplete and indeterminate. A public sphere institutionalizes a particular kind of relationship between persons. As members of a public, persons regard each other as having at the very least the capacity and standing to address and to be addressed by each other's acts of communication. Call this the "communicative freedom" of publics, a form of freedom that may take on a constructive role by which members grant each other rights and duties in their roles as participants in the public sphere. This freedom emerges from the interaction between the communicative power of participants in the public sphere and those more limited normative powers that they may have in their roles within various institutions. By acquiring such communicative freedom beyond the control of even a disaggregated authority, members of a public can use the creative and constructive powers of communication to bind asymmetrical authority in a way similar to the obligations typical of the relationships between office holders and citizens. One way that such a public can effect a reversal of control is to see its emergence as recapturing the constituent power of the people as more than simple subjects, now in a dispersed form, when their constitutive power as citizens has failed. Such constituent power can reconfigure the character and interests of the principal. The current gap between public spheres and institutions creates the open question for citizens whether or not such authority has been legitimately exercised. The beginnings of popular control and thus some of the preconditions for democratization are not to be found in the moment of original authorization by either the sovereign or the unified *demos*, but in something that is more spatially, temporally and institutionally dispersed. Publics fit this description.

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

Current transnational publics are weak, in the sense that they exert influence only through general public opinion without the benefits of institutionalized deliberation. Or, as in the case of NGOs with respect to human rights, publics may rely heavily on supranational judicial institutions, adjudication boards and other already constituted and authoritative bodies that exercise authority on the behalf of an indefinite plurality of persons. Nor will public spheres produce democratization on their own, as John Dryzek (2006: vii) insists when he argues that "deliberative and democratic global politics can most fruitfully be sought in the more informal realm of international public spheres." Absent in the informal realm is the republican dimension of democracy, which solves the problem of transforming communicative freedom into communicative power.

The Republican Conditions for Democratization: Communicative Freedom and Normative Powers

The proliferation of principal/agent relations is part of the context of globalization, in which various international organizations and administrative office holders act as agents for their principals, national governments (whether democratic or not). The problem they solve is the typical agency problem of networked social relations and activities that cut across many types of political borders. These sorts of social activities in question now affect an *indefinite* number of people and thus have a distributive character in the sense that I have been using the term. In order to face the problem of domination inherent in such processes, it would seem more is required than communicative freedom, that is, the freedom generated by the mutual recognition of others as participants in public spheres. It might seem that in addition to such freedom, a fair scheme of cooperation across borders is required—perhaps, as Rawls (1999: 121-122) suggests, a "law of peoples" that makes possible "a relation of fair equality with all other societies." Similarly, cosmopolitan democracy asks for the protection of freedoms that depend on membership in a specific political community or overlapping set of them. As Held (1995: 145) puts it, as "members of the political community citizens should be able to choose freely the conditions of their own association."

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

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

But what makes such interference arbitrary cannot be determined simply by reference to the interests or the wills of the affected parties. Arbitrariness as a predicate makes sense only on the normative background of rights, duties, roles, and institutions that actors take for granted in their social action, including various legal and political rights. For this reason, Henry Richardson (2002: 34) has criticized Pettit's republicanism for giving a "nonnormative definition of domination" that concedes too much to liberal noninterference. Richardson (2002: 34) argues instead that domination and nondomination are inherently normative notions, that "the purported exercise of a normative power—the power to modify the rights and duties of others—is essential to the idea of domination." Domination is thus not just the capacity to interfere arbitrarily in another agent's life, but also the capacity to make use of distinctly normative powers that operate against this institutionalized background of legitimate norms; it is thus the ability to impose obligations and duties arbitrarily.

The key here is then to recast the important term "arbitrary" in terms of the use of normative powers to purport to impose duties on others.

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

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

In no other role or location than as citizens in democratic institutions do members of modern societies exercise their normative powers of changing obligations and statuses under the condition of common liberty. In this case, obligations are not imposed, but are the product of the joint exercise of normative powers and communicative freedom that shape them. Certainly, other forms of authority exist in modern societies that also make it possible for these statuses and obligations to change without popular influence or the discursive control of citizens. Democracy itself is then the joint exercise of these powers and capacities, so that they are not under the control of any given individual or group of citizens but are jointly exercised by all. The central precondition for such nondomination is the existence of the public sphere, a space for the exercise of common communicative freedom. This space must now be transnational as well as a new kind of public sphere with new forms of technological and institutional mediation. Without this open structure of publics, the overlapping and crosscutting dimensions of interactions across various political communities could not now secure the freedom that is sufficient for nondomination. If this were the aim of transnational democratization, what sort of institutions would allow such interactions?

The Democratic Minimum and the Conditions for Legitimate Reform

Before developing this institutional and transnational account further, concepts of communicative freedom and normative powers have to be united in a way that helps to elaborate certain minimal conditions that make reflexivity possible. According to my working definition, democracy is that set of institutions and procedures by which individuals are empowered as free and equal citizens to form and change the terms of their common life together, including democracy itself. In this sense, democracy is

reflexive and consists in procedures by which rules and practices are subject to the deliberation of citizens themselves. Democracy is thus an ideal of self-determination, in that the terms of self-rule are made by citizens themselves and not others. The *democratic minimum* serves to designate just those necessary conditions of nondomination necessary for democratization, that is, for citizens to be able to form and change the terms of their common life. The same conception could be expressed in terms of basic human rights, but these would have to include political rights as well as rights of membership, such as the internationally recognized "right to nationality." Existing democracies often use human rights standards to deliberate about the adequacy of the established practices of the community. When these deliberative practices are part of the international system, human rights are the main currency of evaluation. But much like the democratic ideal itself, the content of human rights is often historically specific, as, for example, when international treaties argue for rights to vote and even for highly specific liberal conceptions of self-determination. Moreover, rights are often cast only in terms of juridical protections, leaving aside political rights that are equally basic freedoms. Any full account of human rights must include reference to those statuses that are implied by rights against tyranny and domination, which form the republican core of the basic freedoms that are central to human rights.

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

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

Given its goals, the theory of the democratic minimum requires thinking about democracy and the capacities of its institutions in new ways. Institutions need not be

ideally just to achieve the democratic minimum, but may rather need to equip citizens with certain powers. The obvious place to begin in developing the democratic minimum is in terms of the republican account of those human rights that contribute to having the status of being a free and equal citizen. I argue later that the absence of tyranny that is entailed by membership in humanity is a basic condition of any just polity. Nonetheless, this absence of tyranny may not reach the democratic minimum, although it certainly reaches something more fundamental in cases of extreme injustice. While the conditions necessary for nontyranny are part of nondomination, it may well be the case that democracies in settler societies that continue to act tyrannically toward aboriginal peoples have not yet met all their obligations to realize human political rights.

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

Another important aspect of democratic theory transformed by the focus on the democratic minimum concerns the requirements for legitimate authority. To grant only powers of consultation and contestation falls well short of democratization, as is manifested in the republican contrast between citizen and slave. Unlike the slave, a citizen has the ability to begin, *to initiate deliberation*, that Arendt calls the supreme human freedom. By contrast, whatever freedoms are granted the slave, she remains dominated and thus lacks any intrinsic normative authority even over herself; at best, she may only follow the initiatives of others. The capacity to begin indicates a fundamental authority, as being what Rawls calls "a self-originating source of claims." But such claims themselves are not self-authorizing, but also addressed to another such source, and thus take place within a community of persons with such authorization. The capacity to begin deliberation, rather than for the achievement of greater or lesser available liberties, thus provides the basic measure for the statuses of persons required for democratization. It should also be noted that extreme destitution creates conditions that are functionally equivalent to tyranny and the absence of political rights and other basic freedoms.[6]

With a deliberative democratic minimum in mind, we can now diagnose the complementary weaknesses of current cosmopolitan and transnational approaches.

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[6] Besides Sen's work on capability failure, see Pogge (2002).

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

These sorts of institutions permit the expansion of membership and jurisdiction and along with it new normative powers for citizens; under the proper circumstances of justice, their deliberative boundaries are porous. A polity that closes this open space for the initiation of deliberation on injustice may fail to meet the democratic minimum. Even if democratic in some respects, such a polity lacks the requisite resources for deepening and extending democracy. Such an arrangement may fail to produce justice due to democratic domination through law, that is, through the democratically arbitrary character of membership in a single *demos*. If nondomination is to be realized transnationally, borders must be included in the open agenda through which citizens are able to reorder the existing order and change the terms of democracy itself. It is indeed unlikely in an interdependent world with various new forms of nondemocratic authority that democracy can exist solely at one level, whether national, global or transnational. Thus, the democratic minimum has to be widely and multiply realized as a kind of common freedom realized in the whole of any just transnational order, a freedom from domination that can be had only if it is shared with others. Only under this condition, is it no longer possible for citizens to dominate other citizens.

Institutions and Democratization

In this section, I consider the adequacy of various accounts of transnational democracy in light of the demands of democratization rather than the content of any specific theory or ideal of democracy: that is, I ask whether such theories enable *democratization*, of creating the reflexive conditions necessary for enhancing democracy through more democracy. I have called this capacity of democracy to reform itself an aspect of the democratic minimum, since it is required both for reflexivity of institutions and for the nondomination of citizens. In order to develop a specific account of the transnational democratic minimum, let me turn first to the core dispute in theories of cosmopolitan democracy. It is really a dispute between two forms of political cosmopolitanism, neither of which provides an adequate theory of democratization under the current circumstances of globalization. In order to develop the particular alternative that I favor, I first develop an exhaustive typology of the main theories, which can be associated with two opposed pairs of thinkers: Buchanan

and Habermas on the one hand, and Held and Dryzek on the other. The current discussion can be reconstructed on four main axes: political or social, institutional or noninstitutional, democratic or nondemocratic, and transnational or cosmopolitan. After considering Buchanan, Habermas, Held and Dryzek as the best representatives of particular positions, I develop my own political, institutional, democratic and transnational account. This alternative account can be developed, such that it incorporates the strengths of each while overcoming their fundamental weaknesses.

The best place to begin is to consider the most minimalist account of international democracy, which is offered by Allen Buchanan. This minimalist impulse informs Rawls' work, so much so that he is best thought of as a social rather than a political cosmopolitan. Rawls proposes that we should determine the basic structure of institutions that peoples would agree to in the original position, while tempering the scope of these institutions through toleration required by the fact of pluralism. The result leaves no room for genuinely political and democratic institutions outside of states that organize peoples. Buchanan (2004: 176) endorses this moral minimalism about basic rights, but disagrees about "how minimal this minimum is". The next step for Buchanan (2004: 189) is to accept a minimal justification of democracy on instrumental grounds that democracy protects "basic" human rights through the "right combination" of representative institutions; these institutions are said to "most reliably achieve the accountability necessary for protecting basic human rights," understood as basic interests that are essential to leading a decent human life. Thus, Buchanan is a political cosmopolitan who endorses political rights and democratic institutions as necessary for the accountability of any institution, including international ones.

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

The second conception is associated with the work of Habermas and is more strongly democratic, to the extent that it is guided by a particular ideal of a self-determining people who govern themselves by acts of legislation. Democracy on the nation state

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

David Held's work on cosmopolitan democracy provides a more complete account than the previous two minimalist democratic positions. It is also more closely tied to an empirical examination of the impacts of globalization than Habermas's conceptual claims, and thus does not so easily take over the metaphysical assumptions of social contract theory. Not only does Held show how international society is already thickly institutionalized well beyond the systems of negotiation that Habermas makes central, he further recognizes that "individuals increasingly have complex and multilayered identities, corresponding to the globalization of economic forces and the reconfiguration of political power" (Held and McGrew 2002: 95). Such potentially overlapping identities are the basis for participation in global civil society, in nongovernmental organizations (NGOs) and in other transnational civil associations, movements and agencies that create opportunities for political participation at the global level. The enormous advantages of Held's approach over the other two approaches are thus threefold: an emphasis on a variety of institutions; a multiplicity of levels and sites for common democratic activity; and a focus on the need for organized political actors in international civil society to play an important role in a system of global democracy. For all these advantages, the self-legislating *demos* reappears in Held's (1995: 234) explicitly Lockean insistence that "the artificial person at the center of the modern state must be reconceived in terms of cosmopolitan public law". In order to reconstitute the community as sovereign, Held (1995: 154, 236) argues that the *demoi* must submit to the will of the global *demos*: "cosmopolitan law demands the subordination of regional, national and local sovereignties to an overarching legal framework".

That this framework is both a "legal" and an "overarching" one raises a potential democratic dilemma for such a global *demos*. In order to be *overarching*, the framework must instantiate a hierarchy of authority. In order to be *democratic*, the common framework will have to pass through the collective will and reason of its citizens, thereby recreating at the global level the contractual moment of a determinate "people" granting each other their mutual rights. In willing the general framework, the exact character of the rights and obligations that the common structure of political

action necessarily entails cannot be fully determined. At the same time, however, in order to be *enforceable*, these rights and duties must be specified in some way by an authoritative institution possessing the competence to do so, and thus it must act both legislatively and judicially. The dilemma can be put this way: if it acts judicially, it seems undemocratic; yet, if it acts legislatively, it has no special democratic status over other legitimately constituted legislative wills and requires a much more differentiated democratic structure, insofar as it cannot exercise the power of the *demos* without risking an increase rather than a decrease in domination. I return to this theme below when discussing the European Union.

The fourth and final position can be called "transnational" rather than cosmopolitan, precisely because it rejects the traditional state model in favor of a "bottom-up" strategy that promotes a robust transnational civil society as the nonjuridical basis for an alternative to the subordination of citizens to a common framework of public law. This account rejects the analogy to democracy in the nation state *tout court*, seeing states as tending toward ever-greater democratic decline democracy and thus hardly a model for international institutions. According to John Dryzek (2002: 93), its leading proponent, "there are imperatives that all states must meet" that are located in the core areas of its functioning, including economic growth, social control and legitimation. These imperatives impose "structural limitations" on the state's public orientation in matters of policy. Among these are the structural limitations of capital on redistributive policies, now exacerbated by the mobility of capital in globalization. In the international arena, Dryzek's approach is further supported by the increasing importance of NGOs and the emergence of transnational public spheres, consisting primarily of informal networks of association and communication. It is also supported by the emergence of various international "regimes," that is, agreements about the rules and decision making procedures that regulate specific activities or domains, including commercial whaling, the rights of children, nuclear accidents, and so on.

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

A normatively richer alternative is to reject both bottom-up and top-down approaches in favor of an approach that emphasizes vigorous interactions between publics and

institutions as the ongoing source of democratic change and institutional innovation. Here deliberation replaces contestation as the proper democratizing activity. An adequate theory must in this respect be more like Held's cosmopolitanism, with its well-articulated multileveled institutional structure. In this way, the account of transnational democracy offered here will preserve the best features of these other conceptions, while overcoming their fundamental weaknesses. Above all, it will emphasize open-ended, yet institutionally organized process of deliberation and decision making, the structural features of which are already realized to some degree in the EU.

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

I appeal to these processes not in order to defend Cohen and Sabel's (1997) idea of directly deliberative polyarchy, but rather to show a kind of institutional arrangement that has the potential for fulfilling the democratic minimum. Whether or not such a deliberative process ultimately succeeds in achieving the ends of democratization, this EU practice exhibits the structural features by which communicative freedom exercised across publics can be transformed into communicative power across institutional levels and sites. It is likely that such forms of deliberation would have to be organized around self-consciously constructed publics with certain decision making powers to act on behalf of other citizens, who in turn my have powers as members of other publics. Certainly, it helps in overcoming problems of administrative discretion and other sources of domination.

Another potential effect on such a conception of democratization applied to the EU would be to widen the scope of the principle of subsidiarity, even as it demands that this principle not exclude deliberation across the appropriate units. But the overall goal of such processes is to make the EU, its Member States, and local units more democratic at the same time by sharing authority and decision-making power. Similar processes are now being employed in recent "twinning practices," the aim of which is to self-consciously encourage democratization and the enactment of human rights through common deliberation and planning among Member and Applicant States

(Zeitlin and Sabel 2006: 68-71). These processes introduce the potential for the requisite reflexivity necessary for democratization in particular domains. One, perhaps surprising result of such mutual influence is policy differentiation rather than harmonization, a result that is consistent with the exercise of communicative freedom and normative powers across *demoi*.

Conclusion: Democratizing the Transnational Polity

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

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

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

representatives, can act as intermediaries among various *demoi* if these representatives see themselves primarily as citizens.

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

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