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Bohman, James

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From Self-Legislation to Self-Determination

Democracy and the New Circumstances of Politics

*James Bohman**

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Abstract: It is a distinctive feature of recent political order that democracy is no longer confined to the nation state. Democracy is now applied in complex, pluralist, and globalized settings. These settings are characterized by extensive, multiple and overlapping constituencies. Here we might think of the significance of these developments for self-determining individuals, who are able to influence those interdependencies that are problematic, such as domination and other ways in which self-determination can be undermined. Democracy serves to delegate power to higher and more complex units of decision-making organized around self-determination. Some of these units have generative properties, in the sense that they make it possible for deliberation to occur, without undermining self-determination. Contestability is part of self-determination, where this goes along with forums with the purpose of determining binding norms. In this way, forms of politics emerge based on the rights and powers of self-determining democratic citizens.

One of the distinctive features of recent political order is that democracy is no longer confined to the nation-state. This is significant in a variety of ways. More than simply being applicable in numerous contexts, democracy is no longer about “the People” in the singular, all with equal standing before the law. Rather, democracy must now be applied in complex, pluralist, and globalized contexts now characterized by extensive, multiple and overlapping constituencies that cut across boundaries as well as space and time. While many emphasize new non-state forms such as the European Union, they could do so more consistently and rigorously if they saw these developments in the context of a larger shift away from the long-held view that democracy is “self-legislation,” that is, the act of constituting a “People” in the singular. Such a People are the subject and authors of the laws that they give themselves, a form of what I call the self-legislation conception of democracy.

However much we have presupposed self-legislation in thinking about democracy at any level, it is not only misleading under present circumstances; it is also no longer the best way to realize democracy under present *global* circumstances. Rather, it has become increasingly clear that self-legislation, as practiced by Rousseau among others, has now become more regressive than progressive, in that its present realizations are more likely to promote rather than minimize domination. Indeed, the primary goal of existing theories

* Prof. James Bohmann Ph.D., Saint Louis University
Kontakt: bohmanjf@slu.edu

of democracy is to identify the progressive possibilities as they emerge from within the new circumstances of politics. However, given the circumstances of politics, we cannot expect for these kinds of possibilities will remain progressive in light of fundamental changes that have as their result that self-legislation now operates in a regressive manner. This is the first conundrum of the new circumstances of politics. What these circumstances suggest is that the institutionalization of democracy as self-legislation can no longer be considered as progressive.

Under current circumstances of politics, self-legislation can no longer provide the basis for realizing democratic norms. The dominance of the self-legislation conception becomes regressive rather than progressive when it is confronted by the emergence of complex interdependences and various increasing common forms of vulnerability, which becomes particularly difficult to link the fate of each with the fate of all. The model of self-legislation is no longer a matter of citizens ultimately sharing their fates with others, since only some members of the polity are subject to vulnerability and mutual responsibility. Indeed, the great advance of the tradition from Rousseau to Kant was to have an ideal of equality, with equal distribution of benefits and burdens. But this idea of self-legislation fails to function in such a way as to be both author and subject of the laws. In its place we now have differences in vulnerability, which includes the likelihood of some to be exploited and dominated. Previously, common vulnerability often has created possibilities of advancing flourishing and shared fate. But this has proven unsustainable.

Certainly we must begin to articulate a basic understanding of self-determination for complex, pluralized, and globalized contexts comprised of multiple, overlapping constituencies of which many are extended in space and time. Given this conception of democracy, it must now conceptualize how such territorial constituencies become units of political organization. But this is now a matter of delegating power to higher and more complex units of decision-making, so that self-determination is a matter of principal-agent linkages. Any such unit, which is capable of producing communicative freedom and communicative power, could be useful to define the scope of self-determination within a system. These units may also have generative properties, in the sense that they make possible deliberative generation, revision and renewal of collective procedures and decisions. But because we do not give ourselves the laws, we do not notice how narrow the scope of self-determination has become, particularly how such laws and structures have become regressive and ultimately destructive of freedom.

While self-legislation may be appropriate in some smaller scale societies, it is not well-suited to accommodate the new forms of size, scale and complexity. Even more challenging is the problem of interdependence, where we now have our fates intertwined with other political jurisdictions and by being affected by regimes and structures over which we have no effective control. Perhaps one of the greatest risks of this sort of organization is that the self-legislation model leads naturally to regime structures that often make it easy to promote domination; at the same time, regimes modeled on self-legislation are increasingly unable to address and reduce forms of domination inherent in interdependence, and ultimately work so as to undermine the possibilities of self-determination. Here we might think, positively, of how self-determination requires democracy, that is: ways in which people can have forms of self-determination, and so that democracy can be thought of making it possible for individuals to be able to influence those interdependencies that are problematic, such as domination and other ways in which self-determination is undermined. For example, there is no longer a loyalty based on citi-

zenship, but rather a variety of de facto memberships, collective organizations, and networks of interdependencies. Furthermore, it is possible to imagine how people have to divide and distribute their political capacities so that they can underwrite and maximize forms of self-determination. Thus, democracy should be thought of in the plural, where democracy is comprised of multiple and overlapping constituencies, a creation of what I call the democratic minimum. The democratic minimum tries to solve the basic problem of overcoming democracy as self-legislation, the act of “a people giving itself the laws”, as Rousseau puts it.

The problem with self-legislation is that the contemporary circumstances of politics are intensifying unavoidable interdependence, and self-legislation becomes increasingly vulnerable to domination and exploitation within the democratic system. Democratic theory is thoroughly based on this response to vulnerability as articulated by Rousseau’s participatory democracy and by Kant’s conception of deliberation, both of which continue to have a great influence on self-legislation. However, the circumstances of size, scale, complexity and pluralism undermine the Kantian and Rousseauvian conceptions of forming democratic constituencies, which delegate powers to higher and more complex units of decision-making, based today on primarily principal-agent relationships. While these conceptions have lasted for centuries, they are no longer able to achieve basic norms of self-determination under the new circumstances of justice. The difficulty is that the self-legislation model cannot any longer be institutionalized through building constituencies that delegate decision-making powers to higher order bodies, primarily delegating decisions to agents who act on behalf of citizen-principals. The new circumstances of politics especially undermine democratic norms of self-determination. Furthermore, differentiation and interdependence disaggregate the various sites for collective decision-making, where collectivities cut across various levels of organization, where there are different ways in which forms of affectedness lead to what I call domination through non-voluntary inclusion. This means that for some, much of their fate is tied to various political jurisdictions, as well as other regimes and structures over which they have no control. Interdependencies challenge the very idea of effective forms of political organization, interdependency of political units cannot easily mobilize and organize on their own behalf. In any case, self-legislation has difficulty in addressing possibilities of domination. In this regard, it is clear. Given the problems of self-legislation, it is also clear that the self-legislation model leads to regimes that are sites of domination. This requires a basic shift away from self-legislation to self-determination, which then becomes the basic perspective for claims to democracy, particularly in the face of complex interdependencies, the mastery of which is a task for new forms of democracy, the aim of which in turn is to maximize something quite different: self-determination, where self-determination means at the very least that individuals are able to have a say over the ways in which various sorts of claims can influence their lives, even if self-determination does not require that all forms are entirely under our control, since many forms of self-determination are ones that may not require democracy as such. Rather, there are many ways in which individuals seek to gain influence. It is better that we think of self-determination in terms of individuals being able to exert influence by means of the various forms, including capacity and standing that will enable them to choose their constituencies that make it possible for them to maximize self-determination. Here I think the democratic minimum allows us to sustain a vision of democracy as having many different constituencies as a structural effect of just this kind of democratic minimum that makes it possible for people to remain

independent, particularly since it is also true that in most societies exerting influence in organizations and networks will have the effect of preserving self-determination as a good of democracy.

1. Beyond Self-Legislation

By arguing that self-legislation is no longer progressive, I do not mean to deny its normative power and historical significance as a practical conception of democracy. Rousseau provided perhaps the first and also clearest statement of this view. On this account, the law that we give ourselves collectively is the same law that we would each give to ourselves individually, assuring the basis for political equality and shared self-rule. Democracy is accordingly directly concerned with a particular ideal of equality, in that all are protected from arbitrary laws to the extent that each has an equal chance to influence collective decision-making. Indeed, self-legislation as a conception of equality is still present in both participatory theories of democracy as well as most forms of deliberative democracy. Furthermore, this particular idea of self-rule based on equality remains the core of social contract theory, although now self-rule has more often than not been replaced by agent-principal relations, now primarily realized in voting and representative forms of democracy. As much as this conception has long guided our practices of self-rule, it is actually unable to deal with the new forms of mutual vulnerability that it has fostered, the premise on which self-legislation was originally founded. Yet, at the same time, political equality is no longer possible to maintain self-rule and for this reason as the scope and variety of various territorial constituencies increases as directly deliberative democracy becomes a matter of independent self-rule.

Once the more directly deliberative features of self-legislation are in this way lost, a higher level of decision-making begins to predominate, in which citizens as principals depend on agents who are responsible for both the decision as well as the implementation of the decision. The cost to democracy is that self-legislation is no longer capable of realizing either political equality or self-determination. If these consequences are correct, citizens lack the legislative standing necessary to avoid forms of domination. Not only does such decision-making undermine self-rule, it does so at the cost of democratic equality. If these sorts of influences change the current circumstances of politics, the benefits of political equality are more and more difficult to maintain, precisely because self-legislation now lacks the capacity for democratic self-determination, particularly when self-legislation no longer informs our fundamental democratic practice. This means that self-determination must now take the place of self-legislation when it has lost its capacity to provide fundamental protections.

2. Self-Legislation and Self-Determination

The idea of self-legislation has historically served two main functions: it not only guides democratic practices even when these have been externalized into agency relations; at the same time it also informs our fundamental democratic practices, particularly at the level of implementation and institutionalization. However, it is increasingly clear that many of these practices can no longer be implemented unproblematically. Under current circum-

stances of size, scale, complexity and pluralism, none of which figures prominently in the practices of a self-legislating political community, what is needed, at the very least, is a full consideration of transnational democracy as providing the means to self-determination. However appealing forms of self-legislation remain in contexts of mutual vulnerability, its implementation needs to be reinterpreted and transformed, in order that new progressive democratic practices can emerge that include more novel forms of democracy among the current set of practices. But the proper judgement of such possibilities requires that any alternative to self-legislation must closely monitor changes in the circumstances of politics. Crucially, we must now begin to modify Rawls' Humean idea of the circumstances of justice.

Under the current circumstances of justice, any good theory of democracy must above all else be able to uncover the progressive possibilities in the present, possibilities which may provide the basis of a better normative ideal of democracy. John Dewey (1988: 199) suggests one such democratic alternative to self-legislation, precisely because self-legislation can no longer identify "those conditions under which the inchoate public may function democratically". Dewey argues that we have come to identify democracy too closely with self-legislation, so that it has lost the capacity to be a progressive force for change. Transnational politics is not about the futile task of creating self-legislation at higher levels of aggregation, but rather demands a new progressive, democratic politics of self-determination. Forms of a democracy of self-determination are now progressive just in case they aim to realize the basic feasible democratic norms capable of facing many different challenges, because of larger numbers of people affected by political decisions as well as the emergence of constituencies so diverse and variable that it is difficult to organize self-legislation so as to overcome the increasing vulnerability of democracy. The same is true for temporal influence, since many decisions may have large effects on the self-determination of future generations. Such decision-making is aggregative, in ways that make differential affectedness more and more common, even as diverse constituencies make it difficult to organize decisions so as to achieve democratic nondomination and self-determination. Some form of self-determination is thus necessary to establish the fair value of rights across borders. But first, we need to examine the pathologies of self-legislation under such circumstances of justice.

These current circumstances of politics raise other normative problems for standard democratic decision-making. Many forms of decision-making are now no longer centralized, but rather dispersed and differentiated in ways that often make it such that they cannot be located within any single polity, a disunity that is a strong limitation of the very idea of self-legislation. Collective decision-making, if it is made at all, is increasingly made across very different circumstances than those within a single state or polity. While some collective decision-making remains territorial, many, if not most, collective decisions are no longer made within states, and if they are, they are dispersed across a variety of levels of organization and in a variety of different locations and political systems. Due to multiple forms of interdependence, governments now outsource many different types of decisions to disaggregated sites for collective decision-making, now operating at multiple levels and in very different institutional settings that employ a wide array of institutions and media. At these sites, the fate of individuals is a feature of the world. It is also true that such decisions are intertwined with other political jurisdictions. This is a consequence of such disaggregation because of multiple forms of interdependence, making the fate of disparate peoples intertwined, even as many such decisions are made in processes

that leave little or no citizen input, an important way in which disaggregation works in both positive and negative consequences that are not under direct control of agents or principals.

As the scale and complexity of these interactions grow, it becomes more difficult for citizens to organize into constituencies in order to exercise influence over collective outcomes directly, even within their own polity. This is true even when these constituencies are originally based on self-legislation; they are increasingly organized around freedom as self-determination. This problem is especially acute, since global interactions, interdependence and decision-making themselves increase the potential for domination, given that there is little relationship between the transnational scope of interdependence and the capacities of decisional units of current forms of political organization. In this case self-legislation becomes unable to address the emerging forms of domination, in particular domination through non-voluntary inclusion in institutions, which no longer generate democratic self-determination.

In the next section, I turn to the weaknesses of the present regime of freedom from domination. The current implementation of self-determination and self-legislation are insufficient for political freedom under the current circumstances of justice. The lack here is a failure of self-legislation and not self-determination, since it fails to find an appropriate basis for the regulation of liberty. While it is possible that attempts at self-determination may lead to self-determination and thus develop new forms of collective self-determination. In this case, people are subjects and authors of the law as they join with others who do not have full standing in the political community in which they jointly exercise their self-determining capacities. In this case, they do not lack self-legislation but freedom as self-determination. In this way, it is possible to modify Rawls' idea of the "circumstances of justice". Indeed, here Dewey is correct that any alternative to self-legislation under new conditions which we need now to elaborate, as John Dewey did, bears the question of how we can develop "those conditions under which a deliberative public may function democratically". Or to put it another way, the forms of democracy are progressive just in case that they aim to realize the basic feasible democratic norms of self-determination in the face of many different challenges to democracy, including future generations. Other changes to self-determination include interdependencies, size, and complexity. Indeed, many forms of decision-making are now dispersed and differentiated in ways that cannot be located in a single polity.

3. Democracy, Self-Determination and Nondomination

In order to escape the dilemmas of self-legislation, it is now necessary to rethink the idea of "the self" in self-legislation and self-determination. Under the new circumstances of politics, it is no longer "the People" who exercise final control over collective decisions. If this change in the circumstances of politics is necessary, then self-determination rather than self-legislation has at this historical juncture greater salience. Indeed, self-determination is part of the republican ideal of justice based on shared freedom from domination. The relevant affectedness of persons concerns freedom from domination and in so doing achieves a variety of crosscutting forms of membership in multiple constituencies and networks in place of the single ideal of self-legislation. Under the current circumstances of politics, some forms of interdependency may well lead to the loss of self-determina-

tion, especially with regard to increased susceptibility to domination. However, in many cases affectedness supports rather than undermines self-determination and democracy, so that there are forms of republicanism that can develop a direct means to sharing in social status of equality.¹ At the same time, some forms of affectedness can operate to enhance rather than to undermine self-determination. In cases of problematic interdependency, however, access to a variety of institutions and networks that operate democratically can in this way begin to find the means for dealing with the many-sided consequences of interdependence. This indicates that self-determination is in fact promoted by open forms of membership that activate various powers and capabilities in situations in which affectedness is collectively experienced negatively by many. Moreover, overcoming such negative affectedness requires equity or corrective justice across constituencies. By extending membership according to current forms of relatedness, they are able to form and reform those constituencies that are able to address the whole variety of those affected by problematic interdependencies that produce domination. This also includes promoting self-determination by membership and shared ends that activate powers and capacities both individually and collectively.

Rather than looking for nondomination simply as the pooled self-determination across states, such regulatory powers are often provided by jointly shared constitutional issues. Thus, multiple and overlapping constituencies and networks provide a better basis for a new democratic minimum in an interdependent world. Nor can we assume that democracy is based on some specific collective site or institution for decision-making. Instead of concentrating powers in one institution, democracy disaggregates them in order to provide citizens with the means by which they are able to maximize available possibilities for self-determination. Given that these circumstances of politics are shared by many across the globe, overlapping memberships and constituencies are required in order that they achieve mutually self-reinforcing nondomination.

Seen in this way, shared democratic practice now has the explicitly avowed goal of providing the means by which properly governed constituencies are able to minimize domination. It can be realized in many different institutions and at many different levels including formal international institutions and nongovernmental organizations. Current transnational publics do not always understand themselves as contributing to the overall democratization of the international system as publics. In the absence of responsive institutions, most transnational associations take contestation to be their task rather than popular control as their fundamental political purpose. Nonetheless, many transnational networks and movements seek to resist domination, usually by attaining some degree of shared influence over interdependencies and decisions. For our purposes, it is not so much networks as such that are important, but the ways in which such forms of contestation potentially transform those affected in publics. While contestation over and against large-scale international organizations such as multinational corporations is necessary, publics can do more as initiators of democratization as self-determination. In this role, they are able to shift authority away from states and their agents who govern them back to the principals themselves who are again capable of exercising popular control and accountability. This task is admittedly made more difficult by the ways in which transnational publics are formed, often without the benefit of a unifying forum in which they might be

1 Dewey (1988: 319) argues that “the old saying that the cure for the ills of democracy is more democracy” is apt only if it aims at what is genuinely novel.

thought to constitute themselves as expressing their democratic will. But this is a pipedream of self-legislation that is sufficient for self-determination. The central point here is that transnational democracy must operate in such a way as to allow citizens the powers, standing and capacity to exercise influence so that it becomes possible for publics to steer problematic interdependencies toward shared, collective ends.

Democracy should not merely allow citizens to exercise influence as members of multiple and overlapping constituencies; it should make it possible that differently situated persons (*qua* individuals) have the freedom necessary to promote both, by their equal standing and powers, political agency and sufficient self-determination. Given the potential for domination inherent in asymmetric interdependence (as well as the potential for mutual recognition), what sort of democratic institutions and practices could promote nondomination? Here we need to think in terms of levels of democratic influence so as to be able to address a variety of constituencies comprised of different principals who share the common aim of self-determination. This sort of self-determination is not determined once and for all, but rather through ongoing democratic experimentalism, the task of which is to explore the democratic possibilities within an overlapping and empowered social space created by emerging constituencies all of whom have interests in responding to the new circumstances of politics. These circumstances also influence how we understand the various possibilities to achieve self-determination. Self-determination is a republican good: it is possible not because some are free *qua* citizens, but that they may widen their available freedom when they share interests across transnational constituencies. Such forms of freedom are not possible on the self-legislation model, to the extent that self-legislation is increasingly unable to control most decisions directly except collectively and seek to exercise its powers so as to exercise influence over problematic interdependencies.

4. Self-Determination and the Sources of Generativity

As applied to present-day democracies, a crucial challenge to the idea of the will of the people is that standard conceptions of self-legislation do not have sufficient institutional complexity to challenge emerging and often nondemocratic decision-making regimes. Arguably, then, a necessary move in rehabilitating the idea of the will of the people in modern times is to conceive of it not as located somewhere. By the same token, the will of the people cannot be defined in abstraction from such actual institutions and their operations (as some attempt to do when they think of it in terms of various forms of aggregation). Because of the indirect character of the popular legitimation of authority, citizens must be able to influence the authority exercised within such institutions, at least in those cases in which they are the object of arbitrary rule that undermines self-determination. But, as I have argued, in most cases we should understand “we the people” as pluralized and diverse constituencies, with openness to variable forms of domination through interdependence. In cases of interdependence, transnational constituencies require that people not only have significant multiple memberships, but also that they have the opportunity to participate in deliberation about various functionally defined decision-making processes that cut across institutional memberships. Indeed, under these conditions there must be institutions, which can act so as to extend the capability and standing of individuals to address institutions that are directly concerned with addressing the potential for increasing

levels of domination. Self-determination is, as Pettit (1996) once put it, not merely a form of power, but also of antipower, the power that only shared freedom makes possible. Under the current circumstances of politics, some forms of interdependence may well lead to the loss of self-determination and susceptibility to domination and loss of lack of standing needed to have access to various institutions and networks that operate democratically. Self-determination in such circumstances requires open forms of membership that activate powers and capabilities that are able to address those problematic interdependencies that produce domination. The key issue is to identify the sources of powers not only in states, rather, democracy is in this view simply whatever provides citizens with the means by which they are able to increase their capacity for self-determination, the basis for a global democratic minimum.

How might this kind of dynamic and collective process work to lessen domination and maximize self-determination? There seems no denying that numerous innovations have over the long historical term made democracy a better means to achieve the ends of justice than its past realizations. At the same time, there is good evidence to cast doubt on Jane Addams' adage, that the only "cure for the ills of democracy is more democracy" (Addams 1902: 8). While endorsing this hopeful stance, Dewey (1988: 325) immediately introduces a proviso: it can remedy its ills only by becoming a democracy that is genuinely "different in kind". Otherwise, democracy seems to face a vicious circularity diagnosed by Iris Marion Young (2002:35): "for democracy to promote justice, it must already be just". Call this the "democratic circle". While injustice may never be said to disappear, the circle can become virtuous through the "democratic minimum", the achievement of equal normative statuses sufficient for citizens to exercise their creative powers to reshape democracy according to the demands of justice. The account of this conception of democracy that I offer here is *deliberative*, one that depends on the relationship between deliberation, accountability and the capacity of citizens to introduce novel demands and claims in response to unjust circumstances. Democracy is on this understanding 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*, to the extent that it consists in procedures and practices that make it possible to achieve the minimum powers and conditions necessary for self-determination as well as a means to nondomination. This understanding of rights as normative statuses and powers provides the conceptual basis for addressing nonideal situations in which interdependencies undermine self-determination and the current form of the global democratic minimum conceived of in an institutionally distributed fashion.

The purpose of the conception of the democratic minimum is then to describe the necessary, but not sufficient conditions for democratic arrangements to become a means to realize justice under appropriate nonideal conditions. Even if these conditions are realized, a democracy will not necessarily be just in all its dealings. It may not even be just in all domains in which citizens are obligated, and it may not be just in relation to those noncitizens affected by its decisions whom they dominate. To the extent that the minimum is a matter of degree, it can be specified along a number of dimensions and by a variety of procedures. But once this minimum is met under extant circumstances, a democracy cannot become more just without becoming more democratic at the same time, and vice versa. The democratic minimum is thus required for existing institutions to be sufficiently reflexive. If they are, then they have become sources of *generative* of justice even as they promote fundamental political equality across multiple and overlapping peoples

within and across polities – democracies that recognize the political rights of the citizens of other democracies, and thus all the citizens, and assure a whole variety of minima of self-determination. These would apply to various locations, modes and avenues for the exercise of influence over decisions. Just as citizens within a polity may disagree with one another as to whether or not they are violating the democratic minimum, so, too, will many citizen constituencies within a variety of different polities.

The issue of constituency in both cases is one of shared normative statuses and powers: that is, whether or not someone has the normative power to make a claim about which others will genuinely deliberate. Given this understanding of the democratic minimum, we can interpret rights as assuring conditions of nondomination as necessary for political agency. Mark Warren (2010: 53) properly identifies the importance of rights in that they are “*generative* of a particular kind of politics”, that is, a politics based on the powers of citizens qua self-determining groups and individuals; they do so by minimizing domination and securing self-determination. Thus, the democratic minimum creates a virtuous circle, leading to greater justice and the capacity of individuals to expand status and create conditions under which publics are able to form and re-form as new demoi emerge. Constitutions have a similar role in securing statuses and transforming decision-making so as to create a regularized basis for nondomination as the guiding principle of political order. But the democratic minimum and its institutionalization depend on the ongoing development of experimental institutions that are able to reflexively realize the transformation of political life across borders. Here is an instance of a possible difference principle for nondomination: no increases in freedom overall (say by gains in institutional efficacy) that do not also at the same time decrease the extent and intensity of domination. Many international institutions fail to meet this standard and may increase domination while increasing their own efficacy and efficiency. Transnational status is generative and creates equality across borders, creating new possibilities and forms of democratic decision-making consistent with the new circumstances of politics.

Furthermore, the possibility of a constitutional order regularizes the appropriate openness to revision and deliberation that makes it a fundamental requirement of democracy, whether with respect to governance or government. The power of amendment alone is not sufficient for the democratic minimum. But what is distinctive about a constitutional order is the use of political rights to create the possibility of “reordering the order itself” (Sabel 1997: 159). As James Tully (2002:217) points out, this reflexive capacity must go all the way down (even if not all at once): “if citizens are to be free, then the procedures by which they deliberate, the reasons they accept as public reasons and the practices of governance they are permitted to test by these democratic means must not be imposed from the outside but must themselves be open to deliberation and amendment”. At the very least, constitutions are devices for achieving nondomination: a constitution gives citizens normative powers over normative powers, so that deploying a constitution significantly expands and regularizes rights and duties, including the power to change the assignment of rights and duties.

For these reasons, constitutions need not be effective only within states, and it is clear that the transnational entities such as the European Union could also benefit from having constitutional dimensions for its political process, in particular to the degree that rights are articulated enough so as to provide an effective means to make moral claims. Here we should look more closely at the ways in which exclusions in the rights regime might be operative at the transnational level, and thus require institutions that create the space for the

free and equal capacity for individual political agency. How might this work? The robust realization of various powers and statuses has made the member states in the European Union more rather than less democratic. This is because the realization is neither functionally specific nor hierarchical. For example, the existence of EU-level courts has broadly impacted the legal recognition of immigrants' rights, by giving them the normative power to appeal directly to the European Human Rights Court. Indeed, the European Convention on Human Rights already entitles foreigners without nationality in any EU member state to appeal to the European Human Rights Court and the EU Court of Justice for the ongoing juridical recognition of their rights, creating adjudicative institutions that build upon the constitutional traditions of member states, even as they are extended to noncitizens.²

In addition to the normative powers contained in the legal status of citizenship (EU or otherwise), the multiplication of institutions whose task it is to preserve the conditions of nondomination makes such powers and statuses more robust. EU-level institutions can thus "serve to make these states more democratic".³ The extension of human rights in the EU even to noncitizens without naturalization shows the advantages of multiply realizing human rights in differentiated institutions, even as these powers are a source of further contestation against them by citizens. In the case of human rights in the EU, their realization at multiple levels enhances the power of citizens to initiate deliberation by giving each institution a quasi-open agenda.

The European Union also provides examples of how to institutionalize a deliberative process non-hierarchically as a solution to the problem of multiple units. Once we abandon the assumption that there must be a unified global public sphere connected to a single set of state-like authority structures, the easier it is to see how the democratic character of transnational deliberation could become a means to self-determination. As Charles Sabel has argued, a "directly deliberative" design in many ways incorporates epistemic innovations and increased capabilities of economic organizations, in the same way as the regulatory institutions of the New Deal followed the innovative patterns of industrial organization in the centralized mass production they attempted to administer and regulate (Dorf/Sabel 1998: 292). Roughly, such a form of nested and collaborative decision-making uses highly dispersed collaborative processes of jointly defining problems and setting goals that was already typical in many large firms with dispersed sites of production. Here we can turn to specific proposals made by democratic experimentalist conceptions of deliberative processes that enhance complex and multilevel order. The feature of the OMC, for example, is quite different from simple delegation.

Thus, while these publics are highly dispersed and distributed, various levels of deliberation permit public testing and correction, even if they do not hierarchically override decisions at lower levels. As Dahl (1983: 103) puts it, "the criteria of the democratic process presuppose the rightfulness of the unit itself". The democratic minimum suggests equal input, so long as these kinds of processes do not depend on boundaries that are entirely contingent on past circumstances.⁴

2 Joseph Weiler (1998: 719) points to the case of *Gayusuz versus Austria* that went to the European Court of Human Rights and led to the extension of social security benefits to third country nationals.

3 On the democratizing role of the EU with respect to human rights, see Bowman (2006). On the rights of immigrants to political participation in the EU on republican grounds, see Honohan (2002: 238–239).

4 Such a historical approach is defended by Allan Buchanan (2004); this argument could be developed further with a different historical account of the democratic minimum; as it stands, it only partially fulfills the necessary conditions for making a multi-unit polity democratic enough to be a means to justice.

The reference to these sometimes local and bounded criteria that settle units that make judgments helps us to avoid indeterminate consequentialist arguments about aiming at the greatest overall justice in the long term. The point is rather to promote justice where possible through the democratic minimum. Practices that cut across borders expand the scope of participation that is not tied directly to the citizenship in a specific demos; instead standing is expanded and freed from the requirement of specific citizenship as ensuring status. This kind of expansion of standing in the EU is not necessarily based on preexisting citizenship, but may emerge across peoples and borders. Thus, the transnational statuses of participants in such practices provide them with a generative form of self-determination and create equality across borders, new possibilities and democratic media for decision-making.

Conclusion: Democratic Experimentalism, Justice and Political Equality

Given that the circumstances of politics have changed, what are the feasible options for inclusive and generative democracy? The new circumstances of politics have wide ramifications, since they spell the end of the usefulness of self-legislation as the way to incorporate self-determination. It is not just the circumstances of politics that have changed, but these circumstances in fact go deeper and fundamentally alter “the circumstances of justice”. These ever-changing circumstances also play an important role in many collective decisions, especially concerning issues of the inclusion of people across borders affected by various non-voluntary forms of interdependence. In these cases, there must be ways to create the rights and standing of people that is not directly the result of citizenship within a state. In fact, it is the case that under the current circumstances of politics self-legislation is unable to deal with the now common problems of size, scale, complexity and pluralism; when it does so, it often does so in ways that undermine democracy, given the ways in which the current conceptions are unable to deal with new forms of constituencies. Self-legislation now stands in the way of realizing more robust democratic norms of self-determination at different levels of scale and thus across borders. If this analysis is correct, then we have entered a new phase of democratic experimentalism, that is, a process of democratically reshaping the new circumstances of politics.

If we look at changes in democratic practices, we can see at least three trends that have to do with the new circumstances of politics and justice. The first trend is economic and neo-liberal, based on the openness of borders to the world market. This understanding seems to depend on judgments at a large scale, based on unavoidably indeterminate consequentialist arguments about producing the greatest overall well-being over the long term. This is certainly one possible experiment, but it is not a democratic one. It heightens rather than lessens the possibilities of exploitation and domination, nor does it promote much in the way of self-determination. Such circumstances of justice require democratic processes that limit domination and secure statuses and powers for all those affected.

The second possibility is based on closed political communities rather than open markets. It is based on a narrow form of the self-legislation model. Under this form of the model, the people are the authors and subjects of the law. Should it be thought to apply to the narrower circumstances of politics, its emphasis on common vulnerability and human

dignity make it deeply appealing. But like the open economic model, this model leads to a fundamental narrowing of the initial conception of democracy. Instead of openness, it produces a closed order based on ideas of citizenship, in which one enters at birth and exits only at death, to use Rawls' injunction.⁵ While this approach may exercise benevolence towards needy strangers around the world (as Miller proposes), it does so at the price of the possibility of a shared democracy, global or otherwise. But this conception of democracy is simply too closed to address the new circumstances of politics, which cannot survive as such a closed conception and internal commitment to a narrow account of nondomination among citizens. Democracy is understood as a means to justice, but for a particular kind of community.⁶ However perfectionist its conception of the common good is, it cannot avoid the domination of those outside its borders as inherent in such a closed conception of the good. The current circumstances of justice only heighten the likelihood that such an order is dominating as inclusive from within and exclusive from without. Such a democratic polity does not promote the democratic minimum.

Transnational democracy alone provides a basis on which we can reconceive democracy in a complex, pluralized and globalized context. Crucial to this conception is the republican core of nondomination that is concerned not only with the nondomination of individuals, but also with domination that is the result of collective decisions. As Onora O'Neill also suggests, the fact of interdependence raises important issues with regard to nondomination. When considering affectedness, the fact that democratic citizens are authors and subjects of their own laws does not necessarily reduce their potential for domination. Here the problem is that this conception of affectedness is really better conceived as an issue that democracy ought to promote self-determination in the face of forms of interdependence that undermines this freedom. Under these circumstances, the democratic minimum is hardly minimal, since individuals will on this account also have the powers to exercise influence with others over problematic interdependencies. The democratic minimum is thus not just a set of specific rights, but rather the normative basis on which multiple actors in overlapping polities can exercise self-determination. It is that minimum of powers that provides just such necessary conditions needed for democratization, that is, for all those who are affected to be able to form and change the terms of their common life. The democratic minimum is not directly a matter of equal citizenship, but rather applies to everyone equally in any situation with the potential for domination. It is certainly a democratic achievement, since not every polity on its own will be able to provide that basis for enabling fundamental transnational equality based on nondomination.

Despite the limits of the European Union, one important dimension of the EU is the way it makes possible interactions between publics and institutions that facilitate influence over dispersed decision-making processes now for multiple and overlapping demoi. But the new circumstances of politics require more than interaction with institutions, now that interdependence has become more and more pervasive and potentially dominating. While the democratic minimum serves to disperse powers of self-determination across levels, the form of self-rule that it requires should not establish such freedoms at the cost of new inequalities. The global democratic minimum must be able to extend an equal right to self-determination to all whose affectedness undermines such freedom and provide the basis for overcoming domination. With this emphasis on nondomination, cosmo-

5 See John Rawls (2005: 12).

6 For one such attempt, see David Miller (2003).

politan powers and rights create conditions for nondomination and provide the proper aim of a generative and inclusive form of an open democracy, including a self-determining democracy.

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