Developing a Theory of Democracy for the European Union

By
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The number of books and articles expounding upon the problem of whether or not the European Union (EU) presents a "Democratic Deficit" and if so whether and how this may be overcome, has become nearly too numerous to count.[1] It is a characteristic of many of the contributions that they postulate the

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1. *See, e.g.,* A. Peters, *European Democracy after the 2003 Convention, in* 41 COMMON MARKET LAW REVIEW 37 (2004); M. Aziz, The Chinese Whispers of Constitution-Making in the EU (Nov. 2004) (Paper presented at CIDEL Workshop, London); B. KOHLER-KOCH ET. AL., EUROPÄISCHE INTEGRATION – EUROPÄISCHES REGIEREN (2003); E. Rumler-Korinek, KANN DIE EUROPÄISCHE UNION DEMOKRATISCH AUSGESTALTET WERDEN? *in* EuR 327 (2003); Ch. Lord, *Assessing Democracy in a Contested Polity, in* 39 JCMS 641 (2001); L. SIEDENTOP, DEMOCRACY IN EUROPE (2001); A. PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 657 (2001); P. C. SCHMITTER, HOW TO DEMOCRATIZE THE EUROPEAN UNION . . . AND WHY BOTHER? (2000); F. Decker, *Demokratie und Demokratisierung jenseits des Nationalstaats: Das Beispiel der Europäischen Union,* 10 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 585 (2000); B. Kohler-Koch, *Regieren in der Europäischen Union. Auf der Suche nach demokratischer Legitimität, in* B 6 AUS POLITIK UND ZEITGESCHICHTE 30 (2000); J. Coultrap, *From Parliamentarism to Pluralism. Models of Democracy and the European Union's "Democratic Deficit,"* 11 J. THEORETICAL POL. 107 (1999); F. Brosius-Gersdorf, *Die doppelte Legitimationsbasis der Europäischen Union,* EUR 146 (1999); J.H.H. WEILER, THE CONSTITUTION OF EUROPE (1999); N. MACCORMICK, QUESTIONING SOVEREIGNTY. LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH (1999); H.-P. FOLZ, DEMOKRATIE UND INTEGRATION (1999); J.H.H. WEILER, THE CONSTITUTION OF EUROPE. "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999); A. Benz, *Ansatzpunkte für ein europafähiges Demokratiekonzept, in* REGIEREN IN ENTGRENZTEN RÄUMEN 345 (1998); DEMOCRACY AND THE EUROPEAN UNION (A. Follesdal & P. Koslowski eds., 1998); D. BEETHAM & C. LORD, LEGITIMACY AND THE EUROPEAN UNION (1998); C. LORD, DEMOCRACY IN THE EUROPEAN UNION (1998); H. ABROMEIT, DEMOCRACY IN EUROPE (1998); M. KAUFMANN, EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP (1997); K. Doehring, *Demokratiedefizit in der Europäischen Union?,* DVBl. 19 (1997); E. Grande, *Demokratische Legitimation und europäische Integration,* 3 LEVIATHAN 339 (1996); M. NEWMAN, DEMOCRACY, SOVEREIGNTY AND THE EUROPEAN UNION (1996); P. Zürn, *Über den Staat und die Demokratie im europäischen Mehrebenensystem,* 37 POLITISCHE VIERTELJAHRESSCHRIFT 27 (1996); DEMOCRACY AND CONSTITUTIONAL CULTURE IN THE UNION OF EUROPE (R. Bellamy et. al. eds., 1995); W. KLUTH, DIE DEMOKRATISCHE LEGITIMATION DER EU (1995); S. Oeter, *Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der EU,* ZaöRV 659 (1995); D. Grimm, *Braucht Europa eine Verfassung, in* JURISTENZEITUNG 581 (1995); A. Randelzhofer, *Zum behaupteten Demokratiedefizit in der Europäischen Gemeinschaft, in* DER STAATENVERBUND DER EUROPÄISCHEN UNION 39 (P. Hommelhof & P. Kirchof eds., 1994); C.-D. Classen, *Europäische Integration und demokratische Legitimation,* 119 AÖR 238 (1994); F. Ossenbühl, *Maastricht und des Grundgesetz · – eine verfassungsrechtliche Wende,* DVBl. 629, 634 (1993); I. Pernice, *Maastricht, Staat und Demokratie, in* DIE VERWALTUNG 449 (1993); P. Häberle, *Verfassungsrechtliche Fragen im Prozeß der europäischen Einigung,* EuGRZ 429 (1992); P. M.

normative validity and applicability of a certain model of democracy. This model then serves as the standard against which the democratic character of the EU—mainly with regard to its institutional structure but also its constitutional ideals or the social and psychological conditions prevalent among Europeans— is measured. On the basis of such an approach, it is easy to come to the conclusion that the EU has a "deficit in democracy"[2] and thus to note that its constitutional order is "defective."[3] This kind of approach is furthermore facilitated when, as in the discussion pertaining to the "democratic deficit," idealized concepts of democracy, which go even beyond the aspirations of democratic theory within the nation states, are juxtaposed against the EU. Such analyses frequently lead to the conclusion, if not the demand, that the EU ought to acquire the attributes and characteristics of a nation-state democracy—be it by transforming the decision-making system into a parliamentary democracy,[4] by creating a "European people,"[5] a "European identity" or via other steps—in order to gain democratic "dignity." Of course, in formulating such conclusions or demands many authors are at least in part aware of the difficulties the EU faces in implementing these suggestions and proposals. Therefore the notion of a "dilemma of democracy"[6] has entered the discourse, a notion which intends to convey that the EU expresses structural characteristics which may either hinder a more ambitious democratization or render it altogether impossible.[7]

Yet while there has been much said on the shortcomings of the EU as measured against conventional models of nation-state democracy, the degree to which the process of European integration may itself lead to a modernization,

Huber, *Die Rolle des Demokratieprinzips im europäischen Integrationsprozeß, in* STAATSWISSENSCHAFTEN UND STAATSPRAXIS 293 (1992); H. Steinberger, *Der Verfassungsstaat als Glied einer europäischen Gemeinschaft,* 50 VVDSTRL 9 (1991); G. Ress, *Über die Notwendigkeit der parlamentarischen Legitimierung der Rechtsetzung der Europäischen Gemeinschaften, in* GEDÄCHTNISSCHRIFT FÜR GECK 625 (1989).

2. W. Merkel, *"Eingebettete" und defekte Demokratien: Theorie und Empirie, in* DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 43 (2003).

3. *Cf.* H. ABROMEIT, DEMOCRACY IN EUROPE. LEGITIMIZING POLITICS IN A NON-STATE-ENTITY (1998); ERIK O. ERIKSEN & J. E. FOSSUM, DEMOCRACY IN THE EUROPEAN UNION (2000); A. Héritier, *Elements of Democratic Legitimation in Europe: An Alternative Perspective,* 6 J. EUR. PUB. POL'Y 269 (1999).

4. *See* S. Oeter, *Föderalimus, in* EUROPÄISCHES VERFASSUNGSRECHT 59, 93 (A. von Bogdandy ed., 2003).

5. TH. SCHMITZ, DAS EUROPÄISCHE VOLK UND SEINE ROLLE BEI EINER VERFASSUNGSGEBUNG IN DER EUROPÄISCHEN UNION, *in* EUROPARECHT 217 (2003). *But see* A. AUGUSTIN, DAS VOLK DER EUROPÄISCHEN UNION. ZU INHALT UND KRITIK EINES NORMATIVEN BEGRIFFS (2000).

6. P. Graf Kielmansegg, *Integration und Demokratie, in* EUROPÄISCHE INTEGRATION (Markus Jachtenfuchs & Beate Kohler-Koch eds.), 2. AUFL. 49, 53 (2003); W. Steffani, *Das Demokratie-Dilemma der EU, in* DEMOKRATIE IN EUROPA: ZUR ROLLE DER PARLAMENTE 33 (U. Thaysen ed., 1995); *see also* M. Höreth, *No way out for the beast,* 6 J. EUR. PUB. POL'Y 258 (1999); M. HÖRETH, DIE EUROPÄISCHE UNION IM LEGITIMATIONSTRILEMMA (1999).

7. *See* Ph. C. Schmitter, *Is it really possible to democratize the Euro-Polity?, in* DEMOCRACY AND THE EUROPEAN UNION 13, 32 (A. Follesdal & P. Koslowski eds., 1997); PH. C. SCHMITTER, *supra* note 1; Adrienne Héretier, *Elements of democratic legitimation in Europe: An alternative perspective,* 6 J. EUR. PUB. POL'Y 269, 278 (1999); P. Craig, *Democracy and Rule-Making within the EC: An Empirical and Normative Assessment,* 3 EUR. L.J. 105 (1997).

supra-nationalization or "Europeanization" of democratic theory has for a long time not received much attention in juridical and constitutional discussions.[8] This is astonishing. Democratic theory is not static; theoretical models of democracy react to political and constitutional impulses, functional necessities, political interests, and the expediencies of political reality. New impulses and developments are frequently, if not mostly, the result of developments initiated by functional or political developments. There exists a close relationship between theories of democracy and the bodies by which they are implemented that is characterized by interactions and cross-effects requiring the observation of each side in strict and equal conjunction with that of the corresponding other side.

In light of this interdependence, the progress of European integration prompts us with good reason to ask how far the EU corresponds to normative models of democracy; it prompts us further to pose the question to what extent the advancing process of integration, until today mainly driven by functional considerations and political interests, has influenced the current state of democratic theory. Democratization of the EU and Europeanization of democratic theory—these are not alternatives but rather imply the emergence of a process of interaction, which may veer at times more in one and at other times more in the other direction.

The formulation of the content of a normative principle of European democracy (understood as a legally binding norm, incorporated into the EU law as a judicially enforceable principle)[9] will therefore unfold as a dialectic process in which traditional conceptions of the democratic legitimacy of public power, insights into the institutional, historical and socio-economic particularities of the EU, and—last but not least—considerations regarding the functional necessities and imperatives of supranational institution-building enter into a fertile process of interchange. While one should not expect this process to lead to the emergence of a European principle of democracy which would have shed all reference to and similarity with nation-state concepts of democracy, one equally should not expect that democracy within the EU will be the equivalent of a nation-state democracy.

It should be noted that this paper is not intended to contribute yet another aspect or position to an increasingly complex and heterogeneous debate.

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8. There have been important contributions, however, from DEIRDRE M. CURTIN, POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY (1997); H. ABROMEIT, WOZU BRAUCHT MAN DEMOKRATIE? DIE POSTNATIONALE HERAUSFORDERUNG DER DEMOKRATIETHEORIE (2002); Rainer Schmalz-Bruns, *Demokratisierung der Europäischen Union—oder: Europäisierung der Demokratie?* in WELTSTAAT ODER STAATENWELT? 260 (M. Lutz-Bachmann & J. Bohman eds., 2002); Ph. C. Schmitter, *Wie könnte eine "postliberale" Demokratie aussehen? Skizzenhafte Vermutungen und Vorschläge,* in DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 152 (C. Offe ed., 2003).

9. It is now acknowledged that there is a legal principle of democracy enshrined in the founding treaties; the Court of Justice has relied on this principle in several decisions. In the interpretation and application of this legal principle, ideas and theoretical concepts of democracy play a decisive role.

Instead, it will attempt to give an overview of the current debate while seeking to show its many facets and the dynamic developments they represent. It thus focuses on one aspect of the current debate about the constitutionalization of the EU ("European Constitutionalism").[10] Part I provides an overview of major historical developments in the debate regarding democratization of the EU. Part II reviews some of the important variations on the idea of democracy. Part III examines the extent to which traditional democratic theory has been successfully applied to the EU. Part IV considers the strains which the unique characteristics of a supranational, European governing body place on democratic concepts and evaluates the ways in which these may shape the development of democratic theory.

I.
THE THREE PHASES OF DISCUSSION WITH RESPECT TO DEMOCRACY IN
EUROPEAN INTEGRATION

The debate regarding the "democratization of the EU" originated, not surprisingly, in the early years of European integration. In the subsequent decades, three rather distinct though largely concurrent phases within that debate can be identified and differentiated. The central question of this paper, however—namely, to what extent the emergence and development of the EU as a source of public power has influenced normative aspects of democratic theory—naturally only emerged at a more recent point in time.[11]

The first phase of discussion about the question of democracy in Europe can be characterized by its approach to democratization of the European

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10.   See, e.g., P. Craig, *Constitutions, Constitutionalism, and the European Union*, 7(2) EUR. L. J. 125 (2001); G. Amato, *La Convenzione Europea. Primi approdi e dilemmi aperti*, 22 QUADERNI COSTITUZIONALI n.3 (2002); D. BLANCHARD, LA CONSTITUTIONNALISATION DE L'UNION EUROPÉENNE (2001); P. Cassese, *La Costituzione europea: elogio della precarietà*, 22 QUADERNI COSTITUZIONALI n.3 (2002); R. DEHOUSSE, UNE CONSTITUTION POUR L'EUROPE? (2002); L.M. DÍEZ-PICAZO GIMÉNEZ, CONSTITUCIONALISMO DE LA UNIÓN EUROPEA (2002); LYNN DOBSON & ANDREAS FØLLESDAL, POLITICAL THEORY AND THE EUROPEAN UNION (2004); C. Dorau & P. Jacobi, *The debate over a "European Constitution:" Is it Solely a German Concern?*, 6 EUR. PUB. L. n.3 (September, 2000); DEVELOPING A CONSTITUTION FOR EUROPE (Erik O. Eriksen et al. eds., 2004); J. Habermas, *Why Europe needs a Constitution*, NEW LEFT REV. n.11 (September-October, 2001); C. JOERGES ET AL., "WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY?" RESPONSES TO J. FISCHER (2000); J. Kokott & A. Rüth, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate answers to the Laeken question?* 40 COMMON MARKET L. REV. 1315-45 (2003); K. Lenaerts & M. Desomer, *Bricks for a Constitutional Treaty of the European Union: values, objectives and measures*, EUR. L. REV. (August, 2002); I. Pernice & F.C. Mayer, *De la constitution composée de l'Europe*, 36 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN (octobre-décembre, 2000); J.C. Piris, Does the European Union have a constitution? Does it need one?, (Harvard Jean Monnet Working Paper 5/00) (2000); M. Poiares Maduro, *Europa: el momento constituyente*, REVISTA DE OCCIDENTE 1 (January, 2002); J. Schwarze, *La naissance d'un ordre constitutionnel européen. L'interaction du droit constitutionnel national et européen* (2001); RETHINKING EUROPEAN CONSTITUTIONALISM (J.H.H. Weiler & M. Wind, eds., 2000); J.H.H. Weiler, *A Constitution for Europe? Some hard choices*, 40 J. COMMON MARKET STUD. 563-80 (2002).

11.   See S. Oeter, *Souveränität und Demokratie als Probleme in der Verfassungsentwicklung der Europäischen Union*, 55 ZAÖRV 659 (1995).

Communities as a means of advancing European integration. In this first phase, which can be dated roughly speaking from the fifties to the seventies, the securing of democratic legitimacy was not considered to be precarious. The European Communities themselves were regarded as international organizations; their legitimacy rested on the will and consent of the Member States, which had not only ratified the founding treaties, but also controlled the political process within the EC. Proposals for the incorporation of democratic institutions and mechanisms into the decision-making process of the EC were based on the assumption that the process of integration might be advanced by such modifications, bringing the EC closer to its final destination as a European Federal State. It was believed, for example, that by upgrading the European Parliament, the process of European integration would accelerate towards a federation. The institutionalization of parliamentary democracy was to serve as a lever of integration. From this perspective, the introduction of the direct vote for the European Parliament in 1976 was regarded as a tremendous success of integration.

These early suggestions differed profoundly from the discussion that surfaced in the late eighties and early nineties. During that period, the goal was not to advance the entire process of "democratization" by strengthening the European Parliament. Instead, the debates of that era were motivated by concerns about a growing gap between the accelerating integration process, measured in terms of powers and competencies, and the more static nature of the legitimizing substructures. While the EC gained strength and influence and pushed that of the Member States backwards, its decision-making process maintained an imbalance in favor of technocratic and bureaucratic institutions. The EC continued to turn its back on its citizens. Surely, the traces of this discussion lead back to the early years of integration; at the negotiations of the ECSC Treaty of 1951, the German negotiators suggested that the supranational decision-making High Authority ought to be democratically controlled by a body directly responsible to the electorate. While an "assembly" was indeed installed, French resistance and indifference on the part of the Benelux states did not permit a transfer of genuine competencies to this body. Upon the entry into effect of the EC Founding Treaties, discussions about the effectuation of democratic control and the nature of the responsibilities of the emerging supranational power continued unabated. When the Common Agricultural Policy was put on a solid footing in 1970, with significant budgetary means, the demand for sufficient parliamentary control and the creation of a right of co-determination resurfaced. Despite such arguments, however, most observers took the view that, on the basis of limited competencies and the de facto applicability of the Member States' veto right, no genuine deficit of democratic control could be observed.

The real turning point in these debates occurred in the context of the Single European Act, which caused not only a significant expansion of the competencies of the EU, but also lead to the destruction of the notion that the EC was merely an international organization legitimized indirectly through the

democratic processes of its Member States. Due to the transition to the majority principle, Member States lost their ability to block decisions that they were unwilling to support; they became subjected to a supranational power that could be exerted against their will. The significance of this change remained widely unnoticed at first. The Single Market program, "Europe 1992," which was the material dimension of the Single European Act, continued to be portrayed as a non-political enterprise that was so amply justified on the basis of economic and social welfare considerations that it could not reasonably be subjected to political debate or even challenge. This portrayal, which was in line with former justifications of EC actions, was broadly accepted by the public at large. The profound shifts in the nature of the newly created competencies as well as regulatory effects remained unnoticed to a rather large extent until the early nineties.[12] Only the renewed and even more accelerated deepening of European integration instituted by the Treaty of Maastricht stirred up public interest and led to a growing concern regarding questions of democratic accountability and control of the EU.

Since then, discussions about a European principle of democracy— frequently closely tied to the discussion about the constitutionalization of the EU and the question of European "Good Governance"[13]—have not ceased. If the discussion of the early nineties had one particular characteristic, it was the fact that traditional elements and concepts of nation-state constitutionalism and democratic theory were applied to the EU and served as the theoretical background of critique and normative postulations. It is certainly not surprising that in a situation where new forms of public power such as those of the EU are emerging, traditional conceptions of legitimate public power serve initially as a reference point and normative standard. Indeed, the ease with which the terms and concepts of nation-state democratic theory can be transplanted to the EU makes analogies between the two fairly inevitable. By the same token, the complex process of adapting democratic theory to the challenges and normative requirements of new forms of public power will be much more gradual; solutions and new standards of legitimacy can only emerge over the course of time.

Thus, it was only in the second half of the nineties that the discussion entered its third phase. By then, the EU had been transformed from a rather technical organization with a clearly defined mandate (establishment of a Single Market, Customs Union, and Common Agricultural Policy) to a genuine bearer of political public power, operating on the basis of political considerations that encompassed value conflicts and other distributive implications. It was

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12. S. Weatherill, *Is Constitutional Finality Feasable or Desirable? On the Cases for European Constitutionalism and a European Constitution*, ConWEB No. 7/2002, 16 *at* http://les1.man.ac.uk/conweb.

13. On the meaning of Good Governance and the relationship to democracy, see Vincent Della Sala, *Constitutionalising Governance: Democratic Dead End or Dead on Democracy?* ConWEB No. 6/2001 *at* http://les1.man.ac.uk/conweb.

acknowledged that the EU had reached a point in which its legitimation could no longer rest on the fact that the Member States had assented to the founding treaties and had a say in the decision-making process. Increasingly, observers agreed that a model that had been developed to control and legitimize forms of international cooperation between sovereign states no longer satisfied the requirements of democratic theory, and should thus be seen as an unsuitable and deficient means of holding a supranational public power with state-like clout accountable. This conclusion would have become inevitable even if the Member States had retained their veto power in all areas and spheres of decision-making. Even then, they would only have been able to block, not determine, supranational decisions; they would still have lacked proactive power in those areas in which the EU had exclusionary powers or had already adopted prevailing EU law. Such a deficit is even more obvious in a situation where the principle of majority decision-making applies and decisions against the will of the institutions of the Member States are possible. In light of such considerations, the decision of the German Constitutional Court on the Maastricht Treaty[14] is not necessarily wrong,[15] but it appears oddly beside the point. In this decision, the German Court reconstructs the structure of legitimacy of the EU almost solely by reference to the legislative assent of the German parliamentary bodies to the treaty and by reference to the decision-making powers of German representatives in the Council of Ministers. Other "levers" of legitimacy, such as the role of the directly elected European Parliament, are mentioned but remain in the view of the German court rather

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14.   89 BVerfGE 155.

15.   Discussion of the decision by Joseph H.H. Weiler, Der Staat "über alles:" Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts (Jean Monnet Working Papers No. 7) (1995); Albert Bleckmann & Stefan Ulrich Pieper, *Maastricht, die grundgesetzliche Ordnung und die "Superrevisionsinstanz."* Die *Maastricht-Entscheidung des Bundesverfassungsgerich*ts, RIW 969 (1993); H.-J. Cremer, *Das Demokratieprinzip auf nationaler und europäischer Ebene im Lichte des Maastricht-Urteils*, EuR 21 (1995); Jochen A. Frowein, *Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, 54 ZAöRV 1 (1994); Volkmar Götz, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, JZ 1081 (1993); Ulrich Häde, *Das Bundesverfassungsgericht und der Vertrag von Maastricht—Anmerkungen zum Urteil des Zweiten Senats* BB 2457 (Dec. 10, 1993); Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"*, 31 CMLR 235 (1994); Hans-Peter Ipsen, *Zehn Glossen zum Maastricht-Urteil*, EuR 1 (1994); Juliane Kokott, *Deutschland im Rahmen der Europäischen Union—Zum Vertrag von Maastricht*, 119 AöR 207 (1993); Doris König, *Das Urteil des Bundesverfassungsgerichts zum Vertrag von Maastricht—ein Stolperstein auf dem Weg in die europäische Integration?*, 54 ZAöRV 17 (1994); Carl Otto Lenz, *Der Vertrag von Maastricht nach dem Urteil des Bundesverfassungsgerichts*, NJW 3038 (1993); Karl M. Meessen, *Maastricht nach Karlsruhe*, NJW 549 (1994); Meinhard Schröder, *Das Bundesverfassungsgericht als Hüter des Staates im Prozeß der europäischen Integration—Bemerkungen zum Maastricht-Urteil*, DVBl. 316 (1994); Jürgen Schwarze, *Europapolitik unter deutschem Verfassungsvorbehalt. Anmerkungen zum Maastricht-Urteil des BverfG vom 12.10.1993*, NJ 1 (1994), Ernst Steindorff, *Das Maastricht-Urteil zwischen Grundgesetz und europäischer Integration*, EWS 341 (1993); Rudolf Streinz, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, EuZW 329 (1994); Christian Tomuschat, *Die Europäische Union unter Aufsicht des Bundesverfassungsgerichts*, EuGRZ 489 (1993); Albrecht Weber, *Die Wirtschafts—und Währungsunion nach dem Urteil des Bundesverfassungsgerichts*, JZ 53 (1994); Joachim Wieland, *Germany in the European Union—The Maastricht Decision of the Bundesverfassungsgericht*, 5 EJIL 259 (1994).

insignificant.

At the same time, more and more observers realized that not much is to be gained by a straightforward and unmodified transfer of the concepts, models and ideas of democratic theory in the nation state context. As a result, the discussion regarding the repercussions of European integration on theoretical conceptualizations of democracy finally began in earnest in the second half of the nineties.

II.

VARIATIONS ON THE IDEA OF DEMOCRACY

Even though there may be little doubt on an abstract level as to the interactive relationship between normative democratic theory and the development of public power, the difficulties that arise when attempting the description and analysis of these interactions in a concrete historical setting are formidable. This is largely due to the fact that the idea of democracy—beyond a solid core—demonstrates a great spectrum of characteristics and variations.[16] As simple as Lincoln's statement of "government of the people, by the people, and for the people" may sound, the possible interpretations of this idea are quite diverse. If one moves beyond the solidly established, unquestioned core of the principle, the idea of democracy proves to be diverse, iridescent and fragmented. A wide spectrum of normative notions and institutional models of enactment opens up between Schumpeter's idea of an elite democracy and the current popular concept of a deliberative democracy.[17] Thus, every attempt to examine the influence of European integration on the concrete normative substance of democratic ideas will lead to great heterogeneity and multifaceted dichotomies.[18] At this point, it suffices to sketch out four variations of the idea:

A. Form of Public Power or Way of Life

Democracy may be understood as an institutionalized form of public power; it might as well be regarded as a way of life. Whoever claims the task of determining what exactly is meant by democracy, will first come upon the

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16. Overview of various theories of democracy by: R. A. DAHL, DEMOCRACY IN THE UNITED STATES, PROMISE AND PERFORMANCE, 1996; G. SARTORI, DEMOKRATIETHEORIE, 1992; A. LIJPHART, PATTERNS OF DEMOCRACY, 1999; D. Held, *Models of Democracy*, 2. AUFL. 1996; G. Schmidt, *Demokratietheorien*, 3. AUFL. 2000.

17. *See generally* J. DRYZEK, DISCURSIVE DEMOCRACY 1990; DELIBERATIVE DEMOCRACY, (J. Elster ed., 1998); DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (J. Bohman & W. Rehg eds., 1997); J. Bohman, *Survey Article: The Coming of Age of Deliberative Democracy*, 6 J. POL. PHIL. 400-25 (1998). For a discussion specific to the EU, see DEMOCRACY IN THE EUROPEAN UNION: INTEGRATION THROUGH DELIBERATION? (E.O. Eriksen & J.E. Fossum eds., 2000); C. Closa & J.E. Fossum, *Deliberative constitutional politics in the EU*, ARENA Report (2004); J. Cohen & C.F. Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L. J. 313-42 (1997).

18. Rainer Schmalz-Bruns, *Demokratisierung der Europäischen Union—oder: Europäisierung der Demokratie?* in WELTSTAAT ODER STAATENWELT? 260, 265 (M. Lutz-Bachmann & J. Bohman eds.).

approach that democracy is to be understood as a set of normative standards that provide for the institutionalization of public power in a way that accords with perceptions of what constitutes a legitimate exertion of public power. This approach can be considered to be the ruling approach in legal and political sciences, certainly in Germany.

However, juxtaposed against these approaches are notions—and these remain valid—according to which the idea of democracy is primarily if not exclusively conceived as a just and good way of life. The most well-known elaboration of this latter theory—the idea of a republican democracy, dating back to Aristotle and more recently called for by Hannah Arendt—understands democracy as an order or structure that enables the citizens, politically active and concerned for the welfare of their collective society, to find in it their social role and personal fulfillment. This republican idea contemplates that the citizen will find a fulfilling role in society only when he is actively involved in the political process. Democracy, from this perspective, may be construed as offering a normative standard for the evaluation of the behavior of individuals, and therefore of the interactions between private individuals. It provides such behavior its normative content and direction. Such concepts of democracy thus far have not gained much significance in the legal discussion about the democratization of the EU. Recently, some commentators have taken the view that the EU should identify itself with normative conceptions of a particular good, namely the Christian religion. The implications for the role of the citizens, however, have not been elaborated. These advances ought to be treated carefully. There are good reasons to differentiate between the normative standards that have been developed for the assessment and valuation of just and right public governance, on the one hand, and those standards that seek to orient the behavior of private persons and define their roles in society on the other hand.

B. Democracy as an Aggregate Process or as a Deliberation

Democracy may be understood—along the lines of the traditional liberal tradition—as a method by which concrete preferences and the interests of private persons may be identified and balanced appropriately. Viewed from this perspective, democratic institutions provide for the aggregation and settlement of the unchanging positions of private persons. This understanding—characterizing many contributions in the discussion about European democracy—results in a model of democracy that has at its core mechanisms for the aggregation of interests. Thus, democracy is meant to be an instrument with which individuals may state their will. From this perspective, any constitution is held to set up institutions and processes that identify and reciprocate, balance and correct these expressions of interests. For the traditional liberal position, independent and impartially acting holders of public office, as well as the process of majority decision-making, are at the core of any institutional makeup, having proven themselves as an effective means of identifying and negotiating

various interests. Seen from this point of view, governmental institutions cannot do more than reproduce a pre-existing and static public good.

Against this traditional liberal position, the theory of deliberative democracy has recently been formulated. Most of the supporters of this theory take the position that the preferences of individuals are not fixed, but are rather formed in light of concrete socio-economic situations and problems; they are thus contingent and variable. According to these theories, democratic theory must aspire to be more than a mechanism for reproducing and calculating the existing interests of individuals in such a way that a collective good emerges. Rather, democracy emerges from the process of stimulating and organizing deliberations of the citizen, thus attaining just and right decisions by rational arguments between the individuals concerned. Democracy is seen as a process of argumentation, leading to just and mutually agreeable positions which can be taken as representing the common good. The process of deliberative argumentation is seen not only as a means of discovering and reproducing existing interests and positions, but also as a means of enabling concerned individuals to develop and take up a rational position.[19] Democracy—and the process of democratic creation of mutual understanding—is thus ascribed an "epistemic function."[20] In a reflexive and at the same time balancing process, so the expectation goes, a situation is finally approached in which the correct decision will be recognized and approved by all. The majority decision itself proves not to be a genuinely democratic rule of decision-making, but rather a necessary tool, or a break-out rule, needed for reasons of effectiveness for which in an ideal world there would be no need. The process of deliberation, however, only suffices with respect to the ideal, and thus only leads to the right decision if it corresponds to certain basic demands and criteria. These include not merely opportunities for the free and equal participation of all concerned persons to count in the deliberative process, but also certain demands for fair treatment.

The idea of deliberative democracy relies not only upon the fact, indisputable from the point of view of social psychology, that people are able to and continually do change their preferences and stance within the argumentative process. The idea also reflects the fact that in the pluralistic modern society the existence of a substantial common good, identifiable and recognizable by the representative holders of public office, seems to be receding. The idea of representative governance, understood as the realization of a preexisting substantial common good or social welfare, is replaced by the idea that holders of public office are liable to develop positions of common good in a process of deliberative governance. This change in perception leads to the question of how the idea of deliberative governance should be institutionally conceptualized so that the imperatives of effectiveness and efficiency of governance will not suffer. There cannot be, from an ideal point of view, any doubt that a

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19. *Cf.* U. K. PREUß, *Die Bedeutung kognitiver und moralischer Lernfähigkeit für die Demokratie, in* DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 259 (C. Offe ed., 2003).

20. Schmalz-Bruns, *supra* note 18, at 266.

deliberative reconceptualization of decision-making would reconsider the role of representative holders of public office, stressing the importance of deliberative consultation and argumentation leading to a mutually agreed upon and rational decision. The question of which constitutional setting would be appropriate in order to advance, maintain and order such deliberative process is, however, as unclear as the question of what form the synapses between the institutions of public governance and the sphere of the civil society should take.

C. Democracy between Collective Self-governance and Individual Self-Determination

Lodged within the idea of democracy is an old and tense relationship between the idea of collective self-governance and that of individual self-determination. This is particularly noticeable in German scholarly contributions to the debate on European democracy. Many of those contributions rely on the notion that democracy must first and foremost be understood as the idea of collective self-governance of a democratic subject. According to this school of thought, the collective in a democracy governs itself. It is well-known that in the history of political ideas very diverse expectations were developed as to what holds the collective together: nationality, ethnicity, and common political principles, to name but a few. Differences exist, however, as to the question of how the "miracle of the fusion of individual wills into the collective will"[21] is construed and explained. In addition, ideas differ with regard to the parameters that determine the role of the individual, both ideally and in the practice of decision-making. In their strongest form, these positions assume an irreconcilable gap or divide between the collective actor, the people, and the individual. It is a consequence of this perspective that democratic self-governance of the people and the fundamentally protected actions of the individual are seen not as expressions of the same underlying principle (the autonomy of the individual), but rather as standing next to one another if not in opposition.

The counter-position to such notions is of much less significance in German legal debates: democracy understood as the realization of the idea of individual self-determination within the setting of collective governance. From this perspective, *democratic sovereignty* is understood as an expression of the self-determination of those governed.[22] When conceived of as individual self-determination within a collective, democracy demonstrates a normative superiority as opposed to every other well-known concept of legitimacy. In a democracy, the holders of public office comprehend their powers and competencies as fiduciary trusts, to be used in light of the interests and the will of those being governed. Democratic governance does not serve the realization

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21. NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 366 (2000) ("Wunder der Verschmelzung des Individualwillens zum Gemeinwillen").
22. Hermann Heller, *Die Souveränität, in* GESAMMELTE SCHRIFTEN 96, 98 (1971).

of an ideology, a promise of salvation or even the realization of a "Volkswillen," or "will of the people." The goal is also not seen as striving for a better world for the future—perhaps even against the will of those concerned. Democratic governance is demonstrated by the acceptance of those governed; in their diversity and plurality they must find themselves reflected in the decisions of the holders of public office. While non-democratic concepts of public power revolve around the idea that certain notions of truth, justice or benevolence are to be realized—and if called for even imposed upon those governed—there is a lack of such a guiding principle in democratic governance. Democratic rule is therefore the normatively most demanding of all well-known sovereign rules. Niklas Luhmann has advanced the argument that the idea of "democratic" sovereignty will become a "self-opposing" concept, due to the questioning of any differences between the rulers and those ruled.[23] This argument is hardly practicable; the transfer of public power to accountable and controlled holders of public office is unavoidable and moreover reasonable in order to solve collective problems. However, the idea puts public power under constant pressure with respect to legitimacy. It is in this light that Rainer Schmalz-Bruns speaks of the "parasitic effect" associated with democratic legitimacy.[24]

D. Models of Democratic Legitimacy

Democratic governance can be equated with legitimate governance. Legitimacy may be comprehended in the empirical sense as the recognition of the subjects to sovereign rule; normatively speaking, public power is legitimized when and if it corresponds to an accepted idea of justified governance. There are direct interactions between empirical and normative legitimation. Stable public power will not exist if there are sustained developments in differing directions between empirical and normative legitimacy.

Both the empirical expectations of the subjects of public power and the normative theory of justified governance demonstrate a direct reference to the actual consequences of exercised power: legitimacy depends on the ability of the institutions of public power to further the collective well-being of individuals. Institutional provisions that secure the production of common goods, or are conducive to the collective well-being, thus participate in the evaluation or assessment of democratic legitimacy. While some observers focus mainly on and uphold the importance of the voting system and the position of the Parliament ("electoral democracy"), others maintain that only models of complex democracy are reasonable and appropriate.

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23. NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 357 (2000) ("Die durch die Verfassung rechtlich zugelassene, ja vorgeschriebene Demokratie wird zum Parasiten—zum Parasiten, der an der Differenz von Herrschenden und Beherrschten ansetzt, sich von hier in das System hineinfrißt und sich schließlich selbst zum herrenlosen Herren erklärt [. . .]. Mit der Formel, Demokratie' wird Herrschaft als Selbstwiderspruch inszeniert, also wenn nicht negiert, so doch delegitimiert.").

24. Schmalz-Bruns, supra note 18, at 265 (discussing the "parasitärer Effekt").

In the social sciences, several models of "complex democracy" are currently under discussion. The most well-known model takes into account both input and output legitimacy—a model that was first presented by Fritz Scharpf in 1970, and was later applied to the EU.[25] The term "input-legitimation" or "input-legitimacy" refers to the question of whether and to what extent the decision-making processes of the EU open up for those concerned perceivable chances or opportunities for political participation and control over value allocations. "Output-legitimacy," by contrast, asks whether and to what extent the decisions of the EU prove to be effective with regard to factors such as problem adequacy, efficiency, consensus creation and the ability of implementation.

Recently, the perception has gained ground that this "input/output" model needs to be enriched by several factors. In particular, it has become apparent that the distribution of competencies in a multi-level system of governance has direct relevance to the choice of an appropriate theoretical democratic model. Which model promises the highest degree of democratic legitimacy will depend on the sort and scale of the allocation of the competences between the different levels of governance. The greater the political weight and importance of the competencies that are allocated on the higher level, the more precarious will be the models that aim at the production of legitimacy through indirect channels of lower level participation. Similarly, the more substantial the allocated competencies are in terms of political content, the less room should be given to the element of technocratic-functionalistic governance, distanced from the exercise of individual autonomy. In the past several years it has become apparent that the choice of an adequate model of democratic legitimization is also dependent upon the structure of the political community; the rules of democratic decision-making must reflect the homogeneity or heterogeneity of a society, the scope of solidarity, and the existence of value consensus. Even the density and character of the political community must be taken into consideration.[26]

III.
THE TRADITIONAL THEORY OF DEMOCRACY: CONCLUSIONS FOR THE DEMOCRATIZATION OF THE EU

In the discussions regarding the interaction between the idea of democracy and the democratization of the EU, the initial question arose regarding which assets, elements and parts of the traditional nation-state models of democracy could be used most fruitfully in the context of European integration. From the point of view of constitutional theory, it was beyond doubt that the emerging

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25. FRITZ W. SCHARPF, DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG, 1970. For an application to European governance, see FRITZ W. SCHARPF, REGIEREN IN EUROPA. EFFEKTIV UND DEMOKRATISCH? (1999) [GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC].

26. N. MacCormick, *Democracy, Solidarity and Citizenship in the Context of the European Union*, 16 L. & PHIL. 331 (1997).

supranational EU power (which had, between the middle of the second half of the twentieth century and the nineties, assumed a mature form of acceptable and distinct, albeit not sovereign, public power) had to answer to the normative demands of democratic theory. This would have been true even in the event of a reversal in the depth or scope of EU competencies or that of the application of EU primary law (in particular that of the fundamental freedoms).[27]

There existed and continues to exist complete agreement that supranational power has to answer to and legitimize itself under the criteria required by the concept of democratic self-determination. The uneasiness felt by many people looking at the EU and at the emergence of new forms of international governance on the global international level[28] renders apparent that the call for the development of normative standards of supranational democracy must not be considered to be an abstract normative postulate or a mute academic debate: supranational governance will only gain socio-psychological acceptance within the population when it corresponds to the demands of democratic governance.

A. Conceptual and Institutional Analogies

It has already been mentioned that concepts and models of nation-state democratic theory carry such a weight and are of such importance (due to the preponderance of the nation-state form of public power) that they tend to be seen as the quasi "natural" standards of democratic legitimacy in early discussions surrounding the handling of the deficit of democracy. Thus, within the German debate, the question was raised whether the EU had "a people" at all. This question had to be answered negatively not only in reference to the common usage of language, but also due to the insight that Europeans were not bound together by the kind of political identity characteristic of nation-states. Consequently, there is a formulation of the EU Treaty, in which the "peoples of Europe" are to be joined in the EU. The idea of a "will of the European people" that has played such a significant role in nation-state theories of democracy and also in the jurisprudence of the German Constitutional Court on questions of democracy could not simply be transferred to the EU. It is impossible therefore to recognize the European Parliament as the "representative of the European people." Some observers thus came to the conclusion that any attempt to democratize the EU would be futile as long as a European people do not exist.

At the same time, the institutional model of the nation-state theory of democracy was nevertheless used. Thus, the model of parliamentary democracy played and continues to play a significant role in the discussion—at times affiliated and associated with separate fragments of other provenance, such as

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27.   C. Calliess, *Optionen der Demokratisierung der Europäischen Union, in* P. M. Huber et al., Demokratie in Europa (unpublished manuscript) (2003).
28.   *See, e.g.,* H. Brunkhorst, *Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism,* 31 Millenium 675-90 (2002); M. Zürn, *Democratic Governance Beyond the Nation State: The EU and other International Institutions,* 6 EUR. J. INT'L RELATIONS 183 (2000).

the model of a directly elected head of government. It is evident that any recourse to such models would confirm that the EU suffers from serious democratic defects; at the same time, such models can be used relatively easily as the basis for proposals on how to solve the existing deficits.

Thus, one recurring and politically important position stipulates that the European Parliament should have the central function in the legislative and budgetary process and should assume the position of an equal, if not primary actor. This point of view stipulates that the European Parliament ought to gain the right to initiate legislation in legislative and budgetary matters. Furthermore, this position maintains that the process of co-decision must be extended to include all fields of action. Others foresee a development in which the European Parliament might overrule by qualified majority the voice of the second chamber, in which representatives of the Member States are assembled. One resulting consequence of this view would be that the European Parliament would be assigned the final decision-making power in all matters pertaining to the budget.

In addition, it is evident that a model of parliamentary democracy would necessitate institutional modifications that would give the European Parliament decisive power in the selection of the head of a European government. According to this concept the leader of the government, the President of the Commission, would have to be elected by the European Parliament, but could at the same time be decommissioned by a vote of no confidence. This model leaves plenty of room regarding the essential question whether the rest of the members of the government should be responsible to direct parliamentary assent or vote of confidence, as evidenced in the constitutions of the German states. If this model were to be adopted, the second chamber, representing the Member States, could well be deprived of influence in the nomination and election of the members of the government.

Apart from these ideas, various other institutional proposals have been made. However, many of these are not analyzed either with regard to their relative institutional effectiveness and efficiency or in regard to their compatibility with other institutional elements of the European constitution. Even so, some of those proposals have gained widespread attention.[29] Just recently, a lively debate emerged with respect to the introduction of plebiscite elements. Many expect that the realization of such proposals will strengthen the

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29. For example: the strengthening of the principle of majority; a rebalancing of the distribution of powers; the creation of a court on issues of subsidiarity or an implementation of a Commissioner on fundamental rights; a restructuring of the membership in the European Parliament; expansion of the European rights of the citizen; the creation of a European referendum; a Europeanization of the competency to the right of citizenship; the strengthening and extension of the transparency; and so on. *See, e.g.,* E. Stein, *International Integration and Democracy: No Love at First Sight,* 95 AM. J. INT'L L. 489, 522 nn.184, 187-91 (2001); G. Lübbe-Wolff, *Europäisches und nationales Vefassungsrecht,* 60 VVDSTRL 246, 278 (2000); C. SOBOTTA, TRANSPARENZ IN DEN RECHTSETZUNGSVERFAHREN DER EUROPÄISCHEN UNION (2001). For a discussion on the duty to lay down the justification of normative acts, see T. MÜLLER-IBOLD, DIE BEGRÜNDUNGSPFLICHT IM EUROPÄISCHEN GEMEINSCHAFTSRECHT UND DEUTSCHEN RECHT (1990).

democratic legitimacy of the EU. Proposals of this sort are rather easily made, albeit frequently without further consideration of their actual implications;[30] indeed, it would not be difficult to produce more than a dozen additional proposals. Yet the problems with such proposals are apparent. As pointed out recently by Heidrun Abromeit, many proposals have institutional implications that are dependent on the surrounding institutional environment, especially the conditions and the framework of the society upon which they are founded.[31] This leads to the general difficulty produced by the transfer of elements from models of nation-state democratic theory to the EU. It is relatively simple, even for the legal scholar, to formulate institutional demands. Implementing such an institutional proposal in the unique situation of the EU is much more difficult to carry out. For example, while some observers have promoted the creation of a European party system, arguing in favor of a subsidization of European parties, the question of whether Europe even has the preconditions that are necessary for European parties to prosper and make sense is extremely difficult to answer. Another example is found in proposals to promote and strengthen the identity of European citizens; such proposals necessarily require consideration of the very particular socio-economic environments within the EU and the fragmented political identities of the Europeans. In the realm of normatively charged discussions without concrete reference to empirical facts,[32] it is difficult to find an empirically supported yet normatively feasible middle path.

B. Fundamental Normative Principles

On a second level, the discussion circles around positions that call for adherence to the basic normative principles that lie at the core of any theory of democracy: self-determination, equality, and accountability. As a theory of public power as "fiduciary trust" ("*treuhändische Herrschaft*"), and irrespective of the differences among various forms of democratic theory stemming from disparate conceptions of human nature, all democratic theory shares a common normative core.

When democratic public power is defined as an expression of self-determination by those ruled, then it must respect the will of *all* those ruled. Normatively speaking, all those ruled are to be given a voice in *the same manner*. Any theory of democracy additionally posits that those ruled must be able to develop their own will *freely*; democracy without the fundamental protection of human rights is therefore unthinkable. The essential and indispensable minimum of any democratic order is the acknowledgement of all citizens as free and equal. Without such a recognition and acknowledgement, one might not even call a political order a democracy. Finally, it is beyond

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30. *See* Weatherill, *supra* note 12, at 18.

31. H. ABROMEIT, DEMOCRACY IN EUROPE (1998).

32. *See, e.g.,* M. Greven, *Sind Demokratien reformierbar? Bedarf, Bedingungen und normative Orientierungen für eine Demokratiereform,* in DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 72, 81 (C. Offe ed., 2003).

doubt that the postulate of democratic legitimacy must cover every form and area in the practice and exercise of public power; the existence of residual areas, in which non-democratic ideologies might continue to exist, ought to be excluded.

An evaluation of current EU structures in light of these fundamental normative principles reveals several areas of concern. It is obvious, for example, that tensions exist between the principle of equality of all citizens and the current system of voting rights in the European Parliament; the distribution of parliamentary seats among the Member States does not correspond to the relative size of their populations.[33] In the distribution of voting rights, the EC-Treaty also expresses strong concern for the equality of Member States. Constitutional history and constitutional theory clearly prove that in the realization of democratic legitimacy both the principle of equal proportional weight of individual voices and the principle of sovereign equality of all Member States count. Both must be squared and aligned. It would also be important to overcome the currently strong influence of a technocratic bureaucracy within the law making process.[34] In addition, many observers call for increased transparency in the creation and implementation of EU law; in this context it can be argued that both the decision-making process as such, but also the deliberative process within institutions such as the Council, do not demonstrate the necessary transparency.

While these criticisms of the EU are significant, it is difficult to arrive at clear solutions in light of the normative vagueness of democratic theory. Frequently, there are limitations of feasibility and practicability. Additionally, various colliding goals and aims exist. This same difficulty arises with respect to concerns over accountability and control.[35] Much could be said for the assumption that non-accountability and weak mechanisms of control may perhaps pose the greatest risk to democratic legitimacy in today's EU.[36] Some remedies have been taken. For instance, the newly created Treaty on a Constitution for Europe aims at creating more accountability. Yet compared to the situation within the Member States, decision-making "in Brussels" remains astonishingly unaccountable, not least due to the complexity created by the linkages between the different levels of government in Europe.

There have even been discussions as to whether additional institutions at the EU level should be implemented: for example, a chamber for representatives of the national parliaments. Many national parliamentarians complain about their lack of voice in the legislative process or in other decision-making

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33. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) Art. 190 [hereinafter EC Treaty].

34. A. Moravscsik, *Warum die Europäische Union die Exekutive stärkt: Innenpolitik und internationale Kooperation, in* PROJEKT EUROPA IM ÜBERGANG 211(D. Wolf ed., 1997).

35. C. Offe, *Introduction* to DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 16 (C. Offe ed., 2003).

36. Greven, *supra* note 32, at 82.; *See also* V. Mehde, *Responsibility and Accountability in the European Commission*, 40 CMRL 423 (2003).

processes of the EU. There are likewise proposals to strengthen the role of the national parliaments within the decision-making process on issues of European integration, especially with regard to the definition of the position a Member State government will occupy within the framework of the European decision-making process. Indeed, it is hard to stay on top of the numerous proposals focusing on the development of the EU architecture.[37] It can be doubted, however, whether additional gain of input and voice always outweighs the loss of accountability and control.

C. Functional Conditions of Democratic Governance

On a third level, the current discussion circles around the fact that many underlying conditions necessary to the functioning of democratic self-determination have thus far been unfulfilled on a European level. Three conditions in particular are of special importance.

First, democracy, defined as self-determination within a collective, requires the existence of a basic consensus among the citizens concerned; namely, that certain material values and specific rules of procedure are taken for granted and remain outside the political process. The consensus defines this as the so-called "non-controversial sector." This sector is primarily characterized by solidarity and trust:

The need for trust arises under circumstances of mutual dependence where the regular co-operation by each depends on their conscious or unreflected expectation of the regular cooperation of others—the "confidence of the future regularity of their conduct," as David Hume put it. Widespread mistrust—the suspicion that others will exploit one's cooperation rather than reciprocate, can prevent or unravel complex rule—governed practices of co-operation.[38]

One errs, however, if one equates this postulation (as is frequently done especially within the German debate) with the exigency of "homogeneity" among all citizens involved. The functioning of democracy does not depend—beyond an absolute minimum—on common cultural or moral norms. It is not necessary that the members of a group share a common conception of the "good life," or in other words, that they subscribe to similar moral and normative standards.[39] Democratic institutions can be adjusted to accommodate a highly heterogeneous population. Federalism is one option to cope with such a

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37. *See, e.g.,* J. Shaw, *Process, Responsibility and Inclusion in EU Constitutionalism: A Contribution to the Debate on a Constitutional Architecture,* 9 EUR. L.J. 45 (2003) (reviewing debates over the proper EU "constitutional architecture").

38. A. Follesdal, *Union Citizenship: Unpacking the Beast of Burden,* 20 L. & PHIL. 313, 315 (2001).

39. The idea of the "good life" dates back to Aristotle and is often equated with an individual's personal sense of morality. As it is used here, however, the term has a somewhat broader meaning. In this article, the idea of the "good life" is used to circumscribe the normative standards which a person adheres and to which that person conforms her conduct. An individual's conception of the "good life" may be contrasted with principles of justice, which are assumed to be universally shared.

situation, for example; in a socially or politically fragmented setting, in which political identities are still coined by their role as Member State citizen, less power might be transferred to the upper level of governance than in a politically homogenous setting. In addition, the rules of procedure, such as the right to veto or elements of direct democracy, must ensure that one part of the group is not in the position to continually overrule the interests or the will of a minority. From the liberal point of view, there is no need for the establishment of a comprehensive ("thick") European political identity among individuals living in the EU. A deficit of European identity is no matter of concern, as long as the policy and the decisions of the EU take into account the fragmentations and divisions within the electorate. This in turn limits the necessity of the EU to ask for solidarity among its citizens.

Second, there is agreement that democratic self-determination in a collective requires a priori the existence of an area of communication,[40] in which citizens may discuss questions of politics freely.[41] While some observers assume that these deliberations will cause the transformation of the will of all ("volonté de tous") into a general will ("volonté générale"), others remain much more reticent and see them as providing an indispensable communicative background for representative decision-making. Any holder of a public office depends on the production of information and needs orientation as to the articulation and justification of interests and opinions. Others posit the existence of an area of communication as the foundation of a deliberative process. Even those who do not idealize the possibilities of communication among citizens and between citizens and the holders of public office, and who recognize the existing deficits within the nation-state arena, would agree on the existence of particular deficits at the European level. They would also agree that any attempt to overcome these causes specific difficulties of implementation and realization. Although there are today some forums of horizontal communication within the European citizenry, and the EU institutions aim at the establishment of a transnational area of communication, these forums comprise mainly particular elites and are limited to certain themes. They are also inhibited by language diversity.[42]

Finally, there is also agreement that legitimate democracy requires the existence of a civil society, whose actors—groups, associations and political parties—act as the voice and representatives of individual interests and

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40. H.-J. TRENZ, ZUR KONSTITUTON POLITISCHER ÖFFENTLICHKEIT IN DER EUROPÄISCHEN UNION (2002).

41. BÜRGERSCHAFT, ÖFFENTLICHKEIT UND DEMOKRATIE IN EUROPA, (Ansgar Klein et al. eds., 2003); K. EDER & H.J. TRENZ, *The Making of an European Public Space, in* LINKING EU AND NATIONAL GOVERNANCE, (B. Kohler-Kach ed., 2003).

42. On the thesis of "Öffentlichkeitsdefizit"or "publicity deficit," see Jürgen Gerhards, *Westeuropäische Integration und die Schwierigkeiten der Entstehung einer europäischen Öffentlichkeit*, 22 ZEITSCHRIFT FÜR SOZIOLOGIE 96 (1993) (discussed by Maurizio Bach, *Beiträge der Soziologie zur Analyse der europäischen Integration. Eine. Übersicht über theoretische Konzepte, in* W. Loth/W. Wessels (Ed.), THEORIEN EUROPÄISCHER INTEGRATION 159 (W. Loth & W. Wessels eds., 2001)).

positions.[43] Without the coordination and representation provided for by such actors, the exchange of opinions in the communicative area would remain meaningless and arbitrary; it would be impossible to assess the relevance and weight of individual interests and positions. Without these actors there would also be nobody who could effectively ask for accountability. At the same time, anyone would agree that while such actors act on the European stage today, they have not yet achieved the stature of their counterparts within the nation-state setting. In the genuine political domain, tremendous deficits continue to exist as to the existence of pan-European political parties, and attempts of the EU to promote such parties, by either financial or other means, have been unsuccessful so far.

However, the fact remains that social structures are neither static nor "self-determining," but rather develop as the product of institutional incentives. Thus, actors of civil society on a European level have already emerged, and will continue to emerge at such a time and at such places where possibilities of influence and contribution open up.

IV.
EUROPEANIZATION AS A CHALLENGE TO DEMOCRATIC THEORY

The diffuse uncertainty that many observers have sensed and continue to sense at the sight of the emerging instances of supranational governance should be attributed, in part, to the fact that there is frequently little clarity regarding the matter, scope and procedure of such governance: who claims to know exactly which competencies the EU has in the domain of Police and Judicial Cooperation in Criminal Matters, or by use of which procedure decisions of the environment of the EU are enacted? With regard to this uncertainty, a second factor seems to be equally important; even an observer who is not familiar with the subtleties of constitutional theory realizes that the formulation of adequate normative standards determining the legitimacy of democratic supranational governance raises difficulties. This can be attributed to several factors. To any democratic theorist, it is self-evident that democratic legitimacy is dependent on the context in which a model is applied. Even if a certain model fits within a particular nation-state constellation, this does not imply that it is transferable to a completely different social context. If the U.S. system were to be imposed on Switzerland, for example, the democratic profit resulting from this imposition would not be considered significant. The simple transfer of a democratic model successful in the nation-state context to the EU—albeit frequently observable— is therefore rather naive. Even for those who are not as familiar with the

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43. On the role of civil society in democracy, see N.R. Rosenblum, *Civil Societies: Liberalism and the Moral Uses of Pluralism*, 61 SOC. RES. 539 (1994); L. Diamond, *Rethinking Civil Society. Toward Democratic Consolidation*, 4 J. DEMOCRACY (1995); B. Barber, *Three Challenges to Reinventing Democracy*, in P. HIRST & P. KHILNANI, REINVENTING DEMOCRACY 151(1996); *see also* TOWARDS A GLOBAL CIVIL SOCIETY (M. Walzer ed., 1995); D. ARCHIBUGI & D. HELD, COSMOPOLITAN DEMOCRACY (1995).

subtleties of democratic theory, it should be readily apparent that such a step might not make sense and may even be counterproductive. Attempts at securing and protecting democratic legitimacy in the EU will only be successful when the applied democratic model takes account of the federal context in which the EU operates, and reflects the diversity of cultural and moral perspectives within the EU as well as the nascent political identity of the Europeans. The difficulties are aggravated by the fact that, thus far, it has been impossible to determine the constitutional character and the political finality of the EU.

Furthermore the question must be raised, whether the democratic legitimation of supranational governance necessitates the development of new models of democratic legitimacy distinct from the set of models developed within the nation-state context. A supranational public power has been created with the EU. The EU cannot be defined as a classic state (at least at present)[44], but rather as a para- or pre-state entity, which is widely considered to be an entity continually fluctuating between the form of an international organization and that of a state. The fact that there is no closed and homogeneous model of nation-state democratic theory is thus not the only difficulty confronting efforts to solve the problems of democratic legitimacy within the EU by taking recourse to and applying the nation-state theory of democracy. Simple transposition of models developed within the nation-state context could also fail to raise the important question of whether supranational governance requires new forms and models of democratic input, process and accountability. Certainly, it is not the basic normative stipulations and functional goals of democratic theory that must be formulated anew: these basic goals are so deeply enshrined in our political culture that a renewal or reformulation is not even in sight. However, the development of new institutional systems is much more important in this matter, reflecting the imperatives of democratic legitimacy within the framework of a federal multi-level system of governance.

Finally, it must be remembered that any meaningful concept of democracy, in order to satisfy the fundamental claim of self-determination, must identify both the role of the individual in the political community and the appropriate relationship between the holder of public power and the individual. In its understanding of democratic theory, then, the EU decides on the issue of how to conceptualize and materialize the relationship between the Union and her citizens. Yet this understanding also has significant repercussions on the further development of the EU as an entity between an international organization and a state. Thus, the particular conception of democratic theory employed by the EU will be influenced not only by principles of self-determination, but by strategic political considerations as well. Talking about democratic theory within the context of the EU, without revealing the underlying strategic implications, misses the point.

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44. *See* M. Nettesheim, *Die konsoziative Föderation von Europäischer Union und Mitgliedstaaten*, 5 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 507 (2002).

The history of democratic theory was and continues to be a history of the search for institutions that guarantee that the claim and the normative duty of the public power to be an expression of the self-determination of those ruled is truly fulfilled. It is apparent that this search is a never-ending one, and that the history of democratic theory will not end with European integration. In part, this open-endedness results from the fact that any theory of democracy reflects our views of a humane and fully accountable exercise of public power, which in turn is predicated on our notion of what it means to be human. In a pluralistic world, it is evident that there will be differing expectations as to what demands a just and benevolent public power must meet. As diverse as the portraits of just governance are within a pluralistic society at any given time, equally so are the different expectations regarding how and what democracy should be. Further, the functional dependency of democratic models on their socio-economic environment requires a constant adaptation and adjustment of democratic models; other factors, such as socio-psychological, historical, and ideological environments[45] are also of relevance. Any institutional model might honor democratic claims in one or even several aspects, but may at the same time prove completely inadequate in others.

Yet not every form of public power and not every form of governance is legitimate. Democratic theory must not give up its normative requirements with respect to European integration. Some observers, however, seem to be of the opinion that European integration is legitimate and good *per se*; they seem to welcome any institutional development as an important step in the creation of a "post-national" and "post-modern" theory of democracy.[46] This approach cannot be welcomed. On the other hand, democratic theory must not overlook the fact that the EU, stimulated by ambitious goals and driven by functional necessities, has become an institution entrusted with public power, whose existence and success demonstrate a vast amount of "output" legitimacy. Democratic theorists ought to examine the structures and institutions of the EU in light of their claim to secure individual self-determination within a collective. The development of a theory of supranational democracy, and thus of the crystallization of the European principle of democracy, must be set within a dialectical process in which traditional expectations regarding democratic legitimacy of public power and insights as to the characteristics of the EU and the underlying functional imperatives of supranational integration evolve together in an interactive process.

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45. Whoever sustains the idea of a homogenous and closely understood will of the people that must be aroused to life by democratic authority and expressed correspondingly, will come to completely differing institutional conclusions than someone who relegates such ideas to the domain of senseless fiction. Whosoever is of the opinion that undisturbed deliberation of representative delegates leads to a decision serving the common welfare, will arrive at different institutional consequences than someone who emphasizes the significance of the interested cititzen at participating in a procedure.

46. *See, e.g.*, D. Chalmers, *The Reconstitution of Europe's Public Spheres*, 9 ELR 127 (2003).

A. The Amorphous and Dynamic Character of the EU

In light of these considerations, democratic theory must face the question of where to open up and where to acclimatize, in order to capture and accompany the normative process of integration—even in light of the assumption that the process as such is legitimate. It must expound in which areas the institutional order of the EU has developed features that are better able to redeem the normative entitlement of political democratic self-determination than those derived from the context of the nation-state. In doing so, however, democratic theory faces the difficulty of coping with the amorphous structure of the EU. An even greater difficulty arises from the fact that the EU is itself developing rapidly and situated in a rapidly developing context. As has already been mentioned, not too long ago the perception dominated that the EU was in a stage of development between state and international organization.[47] This assessment was based mainly on the fact that the EU has been assigned only thematically limited competencies. Furthermore, it was impossible to refer to the EU as a political actor, an organization responsible for the realization of an open and as of yet undefined idea of common values. Instead, the EU was a technocratic partnership of convenience that was bound by a predefined teleology and was mainly committed to liberalization and harmonization. Moreover, it was possible to point out that the sovereignty in the federal union of the EU and the Member States remained with the latter.

In particular, it appeared that the EU would move in a direction that would result in the adoption of a final form that was different and distinct from the traditional features of a state. For a while, the development of the EU was not understood as the emergence of a territorially defined public power, founded upon its citizens united in a political community, but rather as the emergence of a functionally defined, problem-oriented bearer of public power that developed functionally satisfying solutions to problems arising among Member States. This model, based on the notion of functional (instead of territorial) rule and the idea of flexibility, was appropriately denoted "functional sovereignty," in opposition to the classical concepts of territorial or personal sovereignty. Many expected, and partially hoped, that the EU would develop into a post-national public power, in which political community was no longer founded upon the idea of a common ethnicity.[48] Many observers have adamantly and powerfully emphasized that the EU is not developing into a state and that traditional categories of the state may not be transferred to the EU.[49] However, all too

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47. *See, e.g.,* R.M. Lepsius, *Die Europäische Union als Herrschaftsverband eigener Prägung, in* WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? 203 (C. Joerges et al. eds., 2002).

48. *See, e.g.,* E. Eriksen & J. Fossum, The EU in Motion. From poly-centric governance to poly-cephalous government in the European Union, (Nov. 2004) (paper presented at CIDEL Workshop London); J. E. Fossum, *The European Union In Search of an Identity,* 2 EUR. J. POL. THEORY 319-40 (2003).

49. There are at least four options (Federal State; intergovernmental cooperation, economic community, network governance), which are currently discussed.

frequently the model of "functional sovereignty," as opposed to statehood, dissolves in vague abstractions. To quote Jo Shaw's reference to the emergence of post-national European power:

> Hence a dialogic and procedural conceptualization of constitutionalism in the EU is . . . fundamental precisely to conceiving of the EU's constitutionalism as post national. This is not meant to indicate that the EU is 'after' the nation state, in either legal or political terms, but precisely to capture the 'open-ended, indeterminate, discursive, sui generis and contested' nature of the project. [50]

This is worrisome; the danger exists that important constitutional accomplishments of the modern era will be gambled away into post-modern arbitrariness. Furthermore, this emphasis on avoiding traditional concepts of statehood surprises and disappoints equally, since the proposals submitted by many of the post-modern constitutional theoreticians are already known from nation-state democratic theory. It is inevitable to conclude that a genuinely new concept of supranational democracy that does not limit itself to the transfer and adjustment of concepts that were developed in a national context to the supranational level has as yet not been developed.

In the meantime, however, a new development can be observed. The EU is in the process of increasingly losing characteristics in the constitutional process that could be taken as non- or post-statehood. The EU finds itself purposely en route to statehood. Not only is it in the process of adopting a constitution, albeit in the form of an international treaty, but some authors are targeting the creation of a European identity, based upon a rich and culturally significant idea of "European." Furthermore, it becomes ever more apparent that the idea of functional sovereignty can no longer be sustained; the territorial anchorage of the European public power emerges ever more clearly (even in areas such as competition law). Damian Chalmers notes his disappointment in such developments with the following statement:[51]

> Europe is something multiple, transformative, but also, insofar as it is always applied to very material settings, something very practical. It is precisely when this has been lost sight of, and the European idea has tried to model itself upon a more monolithic model that apes that of the Nation State that it comes across as on the one hand shallow and insincere, the world of European anthems and flags, in its attempts to be something that historically it is not, and, on the other hand, as exclusionary and repressive in that it seeks to impose a single set of meanings and singular definitions of 'Us' and 'Them.'

Does that mean that the notion of the EU proceeding in the direction of post-nationalism and post-statism beyond the realm of the current theory of national constitutionalism is not applicable after all? The discussions in the European Convention regarding the constitution, limited as they are to the balancing of conflicting interests and the transferal of elements of national constitutionalism, are at any rate sobering. There was no apparent sign of the

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50. Shaw, *supra* note 37, at 9.
51. D. Chalmers, *The Reconstitution of Europe's Public Spheres*, 9 ELR 127, 174 (2003).

competing notion of post-national constitutionalism in the debates of the European Constitutional Convention.[52]

B. The Contribution of the European Judiciary

The scholar of constitutional law is accustomed to hope for inspiration and direction not only from academic discussions or the statements of legal philosophers but also from the organs of the constitutional judiciary, which play an important role in questions of doctrinal development as well as the formation of constitutional theory. Without the direction, imagination and courage of the German Constitutional Court, for example, the theory and doctrine of German Basic Law would not have been able to develop its present richness and structural maturity. Thus, the jurisprudence of the European judiciary too must be analyzed to determine whether or not it is fundamentally based on innovative notions of democratic theory.[53] The European judiciary would certainly be in a good legal position to develop such an innovative understanding today.

Until the early nineties, there were significant disagreements regarding whether the treaty foundations of the European Community included a normative principle of democracy at all. On the one hand, it is well known that the European Court of Justice (ECJ) had postulated in various decisions that the treaties included—albeit in an implicit manner—a commitment to the principle of democracy.[54] This led the ECJ to conclusions in particular regarding the role of the European Parliament in the legislative process and the competencies of the Parliament with respect to the administrative implementation and enforcement of EU law. However, apart from these rather abstract and purely institutional advancements, and aside from the fact that the ECJ has from the early seventies on developed a challenging and—from the point of view of democratic theory—important jurisprudence on fundamental rights, the principle of democracy did not play a significant role in the jurisprudence of the ECJ.

Nevertheless, the EU is explicitly "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."[55] This normative orientation is also enshrined in the preamble to the treaty. However, the normative importance of the provision has remained until recently rather insignificant. The specific characteristics of the Union's constitutional democracy are found in the specific, institutional provisions of the treaty— whether with respect to the Union's citizenship, the significance of European

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52. *But cf.* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & M. Wind eds., 2003); N. Walker, *Constitutionalism, in* UNDERSTANDING DEMOCRATIC POLITICS 47 (R. Axtmann ed., 2003); C. Closa, *The Convention Method and the Transformation of EU Constitutional Politics, in* DEVELOPING A EUROPEAN CONSTITUTION (E.O. Erikssen, et al. eds., 2004).
53. F. Mancini & D. T. Keeling, *Democracy and the European Court of Justice,* 57 MOD. L. REV. 175 (1994).
54. K. Doehring, *Demokratiedefizit in der Europäischen Union?,* DVBL. 19 (1997).
55. TREATY ON EUROPEAN UNION, Dec. 24, 2002, O.J. (C 325) art. 6.

political parties, the role of the European Parliament in the process of law making, or parliamentary control of the Commission. Consequently, the number of cases in which the general principle has relevance has remained rather small.

Even in cases, however, in which Article 6 of The Treaty on European Union could have played a role, the European judiciary has—notwithstanding its at least partially grandiose statements about the role of democracy in the EU— not developed a sense of the challenge and the interpretive possibilities of the principle of democracy, nor has it developed an independent or sustainable conception of European democracy. A conspicuous example of this is the decision of the Court of First Instance of April 10, 2003, in which the Court had to decide a lawsuit of the French representative of the European Parliament, Jean Marie Le Pen.[56] Le Pen was sentenced by a French Criminal Court, and French law set forth that this conviction led to the deprivation of any parliamentary eligibility. Once this matter was communicated to the President of the European Parliament, the EP waited six months until Le Pen had exhausted his legal recourse under French law. Finally, the President of the EP "acknowledged" the deprivation of Le Pen's eligibility and determined that the French decision had led to the loss of the parliamentary seat of Le Pen. Le Pen filed a lawsuit against this decision at the EU Court of First Instance. Le Pen lost his case due to the fact that the decision of the EP was assumed to have no legal significance. The European judiciary did not recognize, or at least did not acknowledge, the democratic dimensions and potentials of the case; it refrained from discussing the question of whether the EP should be given the power to scrutinize or even overrule Member State decisions leading to the deprivation of a mandate of a Member of the European Parliament. The decision of the Court reflects an understanding of European democracy—in placing the competency of allocating and withdrawing the Parliamentary mandate into the hands of the Member States—which considers the representatives of the European Parliament as representatives of the Member States and not representatives of a European electorate. The reserve of the Court is all the more lamentable, since the Act concerning election of the representatives of the Assembly by direct universal suffrage of August 10, 1976 did indeed leave enough interpretative room for the development of substantive European guidelines for national decisions aiming at the withdrawal of European parliamentary mandates. It would also have provided the option of developing procedural standards for an examination of such Member State measures by the EP. In light of this decision, there is much to be said for the assumption that, even within the circle of European Judges, a complete and comprehensive understanding of European democracy has not been developed.[57]

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56. *See generally* M. Nettesheim, *Zum Status der Mitglieder des Europäischen Parlaments. Anmerkung zu EuG, 10.4.2003 - Rs. T-353/00 Le Pen .I.* Europäisches Parlament, Juristenzeitung, 950-55 (2003).

57. This ascertainment also pertains to the European Commission. The perplexity of the Commission with respect to "governance" is reflected in the White Book on European Governance

C. Elements and Perspectives of a Theory of Supranational Democracy

It is thus more profitable and stimulating to look towards the lively discussions between constitutional scholars, political scientists, and philosophers. Here, between the airy demand for "post-national" democracy and concrete institutional proposals, the most interesting and important elements and perspectives regarding a theory of supranational democracy are beginning to crystallize. There are four areas of particular importance where democratic theory has already "adjusted" itself to the realities of a successful exercise of supranational power.[58]

1. The Role of the Citizen

Perhaps the most important and surely the most extensive discussion of the past several years concerned the question of which type of political community the EU ought to be based on and which type, correspondingly, it ought to sustain.[59] Whoever is interested in the workings of European democracy has to admit, as mentioned above, that the citizens of the EU do not conceive themselves as citizens of a European nation.[60] Furthermore, significant doubts exist as to how far Europeans are united by a common political identity; in other words, it is still uncertain whether European citizens form a political community at all.[61]

The discussion in the past several years has demonstrated that European history, European culture, and especially the European understanding of values contain enough similarities to offer the potential for the foundation of a political community of Europeans. It is equally well known that political identity must not be taken as an unchangeable and predetermined "inscription" into one's self,[62] but rather as a social construct whose formation is in the hands of both the individual and society.[63] Given the constructed character of social identity,

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(European Commission - Europäische Kommission, "European Governance" of 25.07.2001, COM (2001) 428), that was justly criticized and furthermore never reached the intended prominence. The technocratic approach adopted by the Commission led to disappointment and to estrangement among academics. *See, e.g,* WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? (C. Joerges et al. eds., 2002).

   58. It is possible to differentiate between normative principles, legitimate conceptions, institutional models, and constituent models.

   59. *See* Rainer M. Lepsius, *Nationalstaat oder Nationalitätenstaat als Modell für die Weiterentwicklung der Europäischen Gemeinschaft, in* STAATSWERDUNG EUROPAS? OPTIONEN FÜR EINE EUROPISCHE UNION 19 (R. Wildenmann ed., 1991).

   60. C. Gusy, *Die Nation in der supranationalen Gemeinschaft* 53 EUROPA ETHNICA 7 (1996); Grimm, *supra* note 1, at 587.

   61. *See, e.g.,* M. Nettesheim, *Identity and Democratic Legitimacy in the EU, in* STUDI SULLA COSTITUZIONE EUROPEA. PERCORSI E IPOTESI, 89-104 (Alberto Lucarelli & Andrea Patroni eds., 2004); M. Nettesheim, *Die politische Gemeinschaft der Europäer, in* VERFASSUNG IM DISKURS DER WELT. LIBER AMICORUM FÜR PETER HÄBERLE 193-206 (A. Blankenagel et al. eds., 2004).

   62. This is the position taken by the so called "essentialists." *See, e.g.,* ANTHONY D. SMITH, THE ETHNIC REVIVAL IN THE MODERN WORLD (1981).

   63. B. ANDERSON, IMMAGINED COMMUNITIES (1991); E.J. HOBSBAWM, NATIONEN UND NATIONALISMUS (1991); E. GELLNER, NATIONS AND NATIONALISM (1983). *See also* Bach, *supra*

one might concede that political institutions should have the possibility and—
however limited by fundamental rights—the freedom of exerting some influence
on this process of identity formation. Since the displacement of religion as the
primary form of the construction of identity in Europe, the political system has
become the central focus of the cultivation of a political identity. As it is
generally known, the European nation-state has successfully produced histories
and other narratives which might serve as the basis of identity building. At the
same time, it uses such means as compulsory public schools, the military draft
and the unification of the administration, as well as the politics of the welfare
state, in order to reinforce these narratives. From this perspective the
expectation does not seem unrealistic that the EU could manage to create a
genuinely supranational "European" identity, perhaps in an even normatively
enriched and "improved" substance.[64] If the EU takes precedence in the
formation of a European identity, an unavoidable side effect would however be
the homogenization and standardization of the different European cultures.[65]

Any scholar will concede, however, that this will only happen as the result
of a difficult, lengthy and—especially regarding the danger of indoctrination—
not unproblematic process. No one doubts that the mechanisms used by nation-
states in forming the identity of their own citizens are not at the disposal of the
EU at the present time, nor may they be available in the future.[66] Apart from
educational policies, liberal modern public powers, respecting the freedom of
the individuals, have only limited scope anyway. Nonetheless, there are those
who wish to see in the recently maturing interest of the EU in social policy a
profound impetus for the integration of European citizens.[67] Indeed, the
constitutional treaty seems to be drafted with such an aspiration in mind.[68]

Needless to say, the nature of the principle that ought to comprise the
foundation of a European identity-forming policy is at present at the center of
much scholarly debate.[69] At issue are questions such as the kind of political
community that ought to form the foundation of the EU. What type of identity
should Europeans develop? The practical implications are obvious. For

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note 42, at 161 ("The creation of collective identity presumes an objective and meaningful system of
orientation that allows the self-description of a unity, the distinction from others and the enabling of
symbolic identification.").

64. E. Bakke, Towards a European Identity? (Arena Working Paper Nr. 10/1995).

65. *Cf.* RICHARD MÜNCH, DAS PROJEKT EUROPA 15 (1993).

66. *See* Lars-Erik Cederman, *Nationalism and Bounded Integration*, 7 EJIR 139, 152 (2001);
see also N.W. Barber, *Citizenship, Nationalism and the European Union*, 27 EUR. L. REV. 241
(2002).

67. On the role of the draft of the constitution, see A. von Bogdandy, *Europäische
Verfassung und europäische Identität*, JZ 53 (2004).

68. A. von Bogdandy, *Europäische Verfassung und europäische Identität*, JZ 53 (2004).

69. For a good overview, see Cederman, *supra* note 65, at 146; I. Ward, *Beyond
Constitutionalism: The Search for a European Political Imagination*, 7 EUR. L. J. 24 (2001);
DANIELE ARCHIBUGI ET AL., RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN
COSMOPOLITAN DEMOCRACY (1998); Anton Leist, *Nation und Patriotismus in Zeiten der
Globalisierung, in* POLITISCHE PHILOSOPHIE DER INTERNATIONALEN BEZIEHUNGEN 365 (C.
Chwaszca & W. Kersting eds., 1998).

example, such a discussion is directly relevant to the issue of Turkey's membership, given its cultural, historical and religious traditions. These questions are also applicable to the EU policy towards citizens of third states. Furthermore, the EU has to address such questions when formulating its Single Market policies, which need to keep in mind regional and cultural particularities.

On one side of the debate are those who conceive of the political community of Europeans as a "thick" cultural community, based on a particular notion of the "*beata vita.*" [70] This view holds that specific ("European") ways of life possess an inherent value, which needs to be recognized and protected. They argue that the EU, as a legitimate supranational power, depends on the existence of a political community whose social and political integration in turn rests upon the adherence of its members to a common value system. Under this view, the EU political community depends on social unity, which emerges whenever there is a consensus between the moral orientation of the subject and that of the collective. A political community therefore can only be conceived of as a "thick"—that is, deeply culturally integrated—community. Otherwise, social unity, democratic self-governance and solidarity are inconceivable. A political community's ethos, in this view, necessarily rests upon a particular pre-political ethical community, which may be generated by tradition, common history, and a shared notion of the "good life." Should the political community constitute itself via the common substantive ethos, then the duties of its members toward each other outweigh normatively all other principles of justice. Patriotism and solidarity become the highest political virtues. The EU would, accordingly, be legitimated if and when its actions could be seen as the expression of a collective identity; when, in other words, Europeans may see it as an expression of their "own self." Recently, the most eminent European Law scholar, Joseph Weiler, has argued in favor of a stronger role of the Christian religion with the EU.[71]

According to this point of view, to bring forth a "European Nation," the EU must convey this specifically European ethos through cultural and educational measures, such as a harmonization of the syllabi in primary and secondary education over the next several decades. It must construct a historical community which the individuals can transform into the focus of their loyalty and reverence. This construct must imbue a sense of community. It is noteworthy that in the European social, cultural and scientific communities, many at times brilliant (if at times in their constructive effect not yet fully elaborated) efforts have recently been made to construct such a substantive European identity in light of European history, culture and religion. The

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70. *See, e.g.*, P. Kirchof, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, EUROPARECHT BEIH. 11 (1991); E.-W. Böckenförde, *Die Nation - Identität in Differenz*, in IDENTITÄT IM WANDEL 129 (K. Michalski ed., 1995); E.-W. Böckenförde, *Grundlagen europäischer Solidarität*, 20 FRANKFURTER ALLGEMEINE ZEITUNG (June, 2003); T. Schmitz, *Das europäische Volk und seine Rolle bei einer Verfassungsgebung in der Europäischen Union*, EUROPARECHT 217 (2003).
71. J.H.H. WEILER, UN'EUROPA CRISTIANA (2003).

religious roots of European culture, in this view, have to be respected and can become the roots and a focal point of the community of Europeans. Those who hold this opinion oppose Turkey's EU membership simply because they cannot imagine its seamless and tension-free integration. The proposed adoption of references to the religious, cultural and historical roots of Europe in a Constitutional document is a further consequence of this view.[72]

The opposing side in the debate is represented by those who argue that the European political community ought to be based on universal principles of justice alone, in particular the principles of freedom, equality, neutrality, and *neminem laedere* ("do no harm to others").[73] This viewpoint does not deny that "anthropos zoon politikon estin," or in other words, that humans are contextual individuals. One scholar, for instance, notes that: "Our sense of identity arises from our experience of belonging within significant communities such as families, schools, workplace communities, religious groups, political associations, sports clubs—and also nations, conceived as cultural communities endowed with political relevance."[74] However, advocates of this position argue that issues such as the "good life" may not play any role in European policy and jurisprudence. One must differentiate between a social or cultural identity and a political identity. Integration must occur only via the mutual assurance of fundamental rights and principles of due process. Political identity is based on the mutual acknowledgement of citizens as fellow citizens, against whom one has to justify one's own demands and interests rationally, and who have likewise the right to have their own rationally justified demands heard. According to this normative ideal, Europe's citizens should see themselves as members of a political community, which has constituted itself because it is beholden to these universal principles. This is the root of the European sense of community. It is therefore a political community, open to each and every one willing and prepared to accept and acknowledge these principles. As long as this acceptance is in place, the citizens' attitudes towards the "good life" are irrelevant. It has to be the aim of such a political community to form members who accept each other with tolerance whenever personal issues, such as cultural and religious preferences, are concerned. This community may be characterized by

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72. The treaty establishing a Constitution for Europe, O.J. (C 310) (December 16, 2004), shows reluctance to identify with a certain idea of the "good life." It includes a reference to "the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law," but it does not mention the Christian religion.

73. *See* Z.B. J. HABERMAS, FAKTIZITÄT UND GELTUNG 643 (1992); J. HABERMAS, DIE EINBEZIEHUNG DES ANDEREN 185 (1998); M. Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union*, 45 AJCL 505, 524 (1997); U.K. Preuss, *The Relevance of the Concept of Citizenship for the Political and Constitutional Development of the EU, in* EUROPEAN CITIZENSHIP, MULTICULTURALISM, AND THE STATE 11, 22 (F. Requejo ed., 1998).

74. N. MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 186 (1999).

considerable heterogeneity.[75]

In light of the cultural and social differences between its citizens, the EU would most probably fail in an attempt to foster political cohesiveness through the formulation of a stringent and "thick" idea of the "good life." In so doing, it seems impossible that the EU could gain acceptance among its citizens, who are themselves all members of heterogeneous and pluralistic societies, in which each person may construct her own way of life freely. To the contrary, the EU owes its success to the fact that it has abstained from cultural value judgments. It would be a mistake to abdicate this neutrality. Efforts on the part of EU organs or private organizations towards a common ethos tend to be rather abstract or to descend into mere sloganeering. Of course, it is possible to recall certain historical or cultural facts, but it remains highly dubious whether these may become crystallizing points or catalysts for a common European identity. Similar criticism may be raised in response to Juergen Habermas' and Jacque Derrida's recent attempt to delineate a European identity against outsiders (in this case, the U.S. policy vis-à-vis Iraq and its market-oriented social construct).[76] The authors' emphasis on the different concepts of the "good life" does not suffice as the foundation of a separate and durable political identity.

A weakening of mechanical, predisposed, or geographically defined identity-forming mechanisms is a sign of modernity. Identity is more and more organically defined through individual decisions. Identity formation is thus made dynamic and individualized. Thus, not only are modern societies more heterogeneous than ever before; it is also important to note that individuals increasingly define themselves through self-created and self-maintained social networks. It does not appear very fruitful to long for the idea of a rich culturally constructed Europe, when it must be noted at the same time that an open network society is gaining currency, in which each and every single person is creating his or her own associations and commitments. The EU ought therefore to recognize this tendency and guarantee openness and inclusion.

Solidarity and mutual support do not only grow in the context of a "thick" cultural community; they may also result from a political community of citizens who share common ideas of justice, freedom, and equality. As one scholar notes:

> This account is based on individuals' sense of justice and mutuality, expressing respect for others, rather than a sense of community or 'thick' identity, or empathy. Liberal contractualism, as several other theories, assumes that institutions can socialize individuals into a "sense of justice." Individuals can come to see themselves as free and equal participants in a joint European scheme of co-operation that requires the compliance of a large proportion of the population.[77]

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75. With regard to the role of the constitution in the process of identity formation, see J. Lacroix, *For a European Constitutional Patriotism*, 50 POL. STUD. 944 (2002).

76. J. Habermas & J. Derrida, *Nach dem Krieg: Die Wiedergeburt Europas*, 31 FRANKFURTER ALLGEMEINE ZEITUNG (May 2003).

77. A. Follesdal, *supra* note 35, at 313.

For those supporters of this perspective it is beyond doubt:

> . . .that every citizen in the new century must learn to become a 'cosmopolitan citizen:' that is a person who is able to arbitrate between national traditions, fate of *communities*, and alternative lifestyles. Citizenship in a democratic form of the state of the future should be able to play a growing negotiating role: a role, that combines dialogue with the traditions and discourses of others in pursuit of the goal, to expand the horizons of the proper fundamental structure of significance from prejudice.[78]

This perspective envisions a political community that is open for everyone who is willing to acknowledge the validity of these principles. As long as such principles are respected and accepted, the personal values and convictions of citizens are irrelevant. According to this view, the goal would be to create a political community in which each member is tolerant of the cultural and religious views of other members.[79] Such a community may display a considerable degree of heterogeneity. For the individual, this view implies that the traditional and mechanical collective identity will weaken in the process of European integration. Although individual identity remains somewhat predetermined by birth, the formation and construction of the constituent parts of one's identity, particularly through relationship networks, will increase in significance.[80]

Thus, under this view a European identity should be cultivated that is founded upon freedom and equal opportunity, as well as a commitment to ensuring that all citizens meet their basic needs. It would be a duty of the EU to protect the foundations of this "open networking society," whose social dimension lies in its openness. Equal opportunity and inclusion, as well as the establishment of a "protective network,"[81] would form the underlying foundation of this identity. It would be missing the point, however, to equate this form of polity with the product of the so-called "social welfare state"[82] targeted at an all-embracing welfare reallocation. [83]

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78.   D. Held, *Das kosmopolitische Projekt, in* WELTSTAAT ODER STAATENWELT 115 (M. Lutz-Bachmann & J. Bohman eds., 2002).
79.   For a discussion of EU citizenship, see M. Nettesheim, *Die Unionsbürgerschaft im Verfassugnsentwurf – Verfassung des Ideals einer politischen Gemeinschaft der Europäer?*, 26 INTEGRATION 428 (2003); J. Shaw, *The Problem of Membership in European Union Citizenship, in* Z. BANKOWSKI & A. SCOTT, THE EUROPEAN UNION AND ITS ORDER: THE LEGAL THEORY OF EUROPEAN INTEGRATION 65 (2000); G. de Búrca, *Report on the further Development of Citizenship in the European Union, in* DER BÜRGER IN DER UNION. REFERATE FÜR DEN 1. EUROPÄISCHEN JURISTENTAG 39 (2001).
80.   Richard Münch, *Demokratie ohne Demos. Europäische Integration als Prozess des Institutionen- und Kulturwandels, in* THEORIEN EUROPÄISCHER INTEGRATION 177, 189 (Wilfried Loth & Wolfgang Wessels eds., 2001).
81.   *Id.* at 194 (citing J. RAWLS, A THEORY OF JUSTICE (1971)).
82.   On the application of the idea of a "social contract" to the EU, see H. Abromeit, *Volkssouveränität in komplexen Gesellschaften, in* DAS RECHT DER REPUBLIK 25 (Hauke Brunkhorst & Peter Niesen eds., 1999); Heidrun Abromeit & Tanja Hitzel-Cassagnes, *Constitutional Chance and Contractual Revision: Principles and Procedures*, 5 EUR. L.J. 23 (1999). For an abstract discussion of this idea, see JULIAN NIDA-RÜMELIN, DEMOKRATIE ALS KOOPERATION (1999).
83.   H. Brunkhorst, *Ist die Solidarität der Bürgergesellschaft globalisierbar? in*

It is not astonishing that existing EU law is already deeply imprinted by the universal principles which offer themselves as a basis for a European identity. One such example would be the increase in freedom that now unites Europeans as a result of the fundamental freedoms of the Common Market. In the same context belongs the freedom of movement within the EU, now guaranteed by Article 18 of the EC Treaty. Equal treatment has been assured through the anti-discrimination law of Article 12,[84] and through many supplementary directives with anti-discriminatory content. Equality is the foundational principle regarding regional and structural aid; the solidarity embedded in these policies aims at implementing equality. Furthermore, the emerging and developing responsibility of the EU for external and internal security of its citizens seeks to enforce the *neminem laedere* principle.[85]

2. The Transition to a Complex Model of Democracy

In many circles, European political scholars currently discuss the development of new models of democracy. It is conspicuous; however, that almost no one is to be found who defends those popular conceptions of democracy that are of such importance in Germany and in the U.S., respectively. I refer specifically to the idea of equating democracy with sovereignty of a people, understood as a holistic entity, which is important and influential in Germany, and to the claim of equating democracy with the rule of the majority that is popular in the U.S. All influential contributions rely on a complex model of democracy. These positions are based on the assumption that democracy must not only concern itself with the input-side. Although there exist considerable differences between those who adhere to this view, such positions have in common the assumption that legitimacy is produced both by input (for example, the possibilities of the individual to participate)[86] and by output (for example, efficiency, advancement of the public good, justice). They assume that it is not the people who serve as a reference point for participatory mechanisms and a focal point of any definition of public good, but instead the individual. Transparency and control form, according to this view, are important aspects of democratic sovereignty. In the federal setting of the EU and the Member States, questions of distribution and limitation of competencies also assume an important role in the production of democratic legitimacy.

The significance of this position will only be understood if it is contrasted with the prevailing view among German constitutional scholars and the concept of democracy applied by the German Constitutional Court. This approach has been developed by the German Constitutional Court (Bundesverfassungsgericht)

GLOBALISIERUNG UND DEMOKRATIE 274 (H. Brunkhorst & M. Kettner eds., 2000).

84. EC TREATY, art. 12.

85. The *neminem laedere* principle may be stated as "Do not cause foreseeable harm."

86. *See generally* B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984).

in its decisions on foreigners' right to vote[87] and on workers' representation.[88] The view takes as a starting point of democratic legitimization the German citizens, whose *will* ought to be reflected and reproduced in *any decision of the organs of the state*.[89] The model implies that any bearer of a public office must trace back her appointment directly or indirectly to the "will" of the people. The same applies to any substantive decision of the holders of public office and the distribution of competencies between the governmental institutions. The model asks for processes, through which the "will" of the people is introduced into each and every aspect of public power; in the words of the German Constitutional Court, the "chain of legitimacy"[90] must not be broken. The Court also distinguishes between personal legitimacy, substantive legitimacy, and functional legitimacy, and requires that the interaction of "personal," "substantive" and "functional" legitimization must ensure a sufficiently close linkage to the will of the people.[91]

This model is applied by both the Constitutional Court and members of academia not only with regard to domestic constitutional issues, but also to the reconstruction of democratic legitimacy in the EU. There is a "hard-core" position according to which any act of the EU must be seen as an act to be attributed to the German people. This leaves little room for majority decisions, and excludes the possibility of any reevaluation and redefinition of the legitimizing function of the European Parliament. In light of this position, the European Parliament is to be regarded as a "nobody" in the process of democratic legitimization. The strengthening of the decision-making power of the European Parliament would indeed lead to a de-democratization of the EU. In the view of the moderate faction, among which the German Constitutional Court ranks,[92] the legitimation of EU public power can either be effectuated through Member State "channels" or through direct democratic control by the European electorate. The concentration on the "input" dimension is, however, the characteristic facet of these positions as well. It is evident, though, that a model of democratic legitimacy of supranational power that supports itself solely on the input-side (the will of the people) is not very useful in the context

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87.   83 BVerfGE 37.

88.   93 BVerfGE 37.

89.   For an elaboration of this view, see E. W. Böckenförde, *Demokratie als Verfassungsprinzip, in* 1 HANDBUCH DES STAATSRECHTS § 22 (J. Isensee and P. Kirchhof eds., 1987); E. TH. EMDE, DIE DEMOKRATISCHE LEGITIMATION DER FUNKTIONALEN SELBSTVERWALTUNG 386 (1991); H. DREIER, HIERARCHISCHE VERWALTUNG IM DEMOKRATISCHEN STAAT, TÜBINGEN (1991).

90.   For a critique of this approach, see J.H.H. Weiler, *"Der Staat über alles"*, 44 JÖR 91 (1996); B.-O. BRYDE, 5 DIE BUNDESREPUBLIKANISCHE VOLKSDEMOKRATIE ALS IRRWEG DER DEMOKRATIETHEORIE, STAATSWISSENSCHAFTEN UND STAATSPRAXIS 305 (1994) ("Legitimationskettenfetischismus"); R. Lhotta, *Der Staat als Wille und Vorstellung: Die etatistische Renaissance nach Maastricht und ihre Bedeutung für das Verhältnis von Staat und Bundesstaat* 36 DER STAAT 189 (1997).

91.   For a critique of this position, see A. von Bogdandy, *Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung*, KRITV 284 (2000).

92.   *See* 89 BVerfGE 155.

of European democracy.

Within the field of theories of complex democracy, there exists a wide range of elaborations. It is not possible here to commence a discussion of the relative usefulness and suitability of these different models; the usefulness of these models cannot to be discussed in an abstract manner. Rather the effectiveness of any particular model of complex democracy may only be determined in light of a specific context. One remark, however, is possible: modern democracies must not be comprehended as closed regimes, but are constructed by the combination of various "building blocks." Their ability to function, and more importantly their legitimacy as a form of public power, depends on the allocation of various "building blocks" and their consolidation into one regime. The various parts of the regime are in close interrelation with one another. They may serve the goal of advancing the public good, but are not necessary conducive to such a goal. It is sometimes overseen in the discussion about the modernization of democratic institutions that the connection of different "building blocks" into one regime may be counter-effective. The interaction between the parts of a democratic regime must be viewed in consideration of its total effects. Only then may it be possible to determine with sufficient security whether the complete system does not only restrain the sources of power always prone to abuse, but also provides decisions that satisfy the demands for sufficient effectiveness and legitimacy. Furthermore, it is clear that the empirical and normative views on the question of which model is most effective in a given situation change with the times.

Almost forty years ago, Fritz Scharpf developed his model of democratic legitimacy, differentiating between input and output. Today, this model is in need of reformulation and adjustment. According to my view, there is no need to juxtapose input and output. Instead, the ultimate goal of any model of legitimate democratic power ought to be the advancement of the public good— understood as a normative concept regarding justice and fairness within a political community. The realization of this goal lies in the hands of institutions, the legitimization of which depends on input, procedure and control. Any efficient model of democracy will need to put all three elements in a proper relationship. In other words, this model differentiates between the direct participatory role of the individual, the arrangement of the process of public decision-making, and the control mechanisms that are ascribed both to the individual and other organs. In the European debate, it is the latter aspect of control that has not yet received adequate recognition of its important role in the establishment of democratic legitimacy. The combination of these three elements allows for the development of models which ensure that public power is exercised in accordance with the postulates of self-determination of the individual within the collective and responsiveness of public sovereignty to the individual. In this respect, this model of democracy extends far beyond the

"empirical theory of democracy" developed by Schumpeter.[93]   This understanding of democracy may not be reduced to considerations of procedure,[94] nor might it be equated with the considerations of a philosophy of pure reason.[95]

3. European Democracy between Technocratic Governance of the Elite and Deliberative Discursiveness

In the current discussion about democratic legitimacy, there are widely varying views about the relative weight to be attributed to the various elements of the model of democratic legitimacy just outlined. Initially, a "realistic" conception of the integration process dominated, comprehending European integration as an enterprise of cooperating states. After the extension and the broadening of the EU's powers, along with its increased capacity for independent decision-making power as a result of the principles of direct effect and supremacy of EU law and the acceptance of the principle of majority voting, this earlier, "real-political" notion lost its explanatory power. A new conception of European integration emerged—the idea that the supranational institutions were charged with the functional and apolitical task of realizing the goals formulated in the founding treaties. According to this point of view, it is the Member States that define the tasks and responsibilities of the EU institutions; the European institutions then realize them in an apolitical and technocratic manner. In large parts of the political and academic discussion about the legitimization of the EU, the notion of efficient, neutral and technocratic expertise plays an important role.[96] The attempt, according to this perspective, to solve transnational problems through professional experts may thus be normatively welcomed.[97] From this viewpoint, the functional distancing of European holders of public office from the political processes in their Member States and their release into technocratic independence is necessary and justified. According to Giandomenico Majone, "the democratic deficit, in the literal sense, is democratically justified."[98]

On the basis of the Schumpeterian theory of democracy, others also doubt whether a strengthening of the participatory rights of European citizens would indeed contribute to the effectiveness and legitimacy of European governance. Those observers stress the importance of independent decision-making on the part of an elite group of European politicians and bureaucrats as more efficient given the complexity of the tasks to be mastered. Adrienne Heritier, for

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93.   J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942).

94.   *See* Abromeit, *supra* note 1, at 176 (2002).

95.   As, for example, in the most elaborate versions of the theory of deliberative democracy.

96.   For an elaboration on this point, see FRITZ W. SCHARPF, REGIEREN IN EUROPA. EFFEKTIV UND DEMOKRATISCH? (1999).

97.   *Cf.* F. W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL'Y 29 (1997).

98.   G. Majone, *The Regulatory State and its Legitimacy Problems*, 22 W. EUR. POL. 1, 21 (1999).

example, expresses a skeptical view of the idea of democratic participation: "Measuring the empirical elements described above against both the procedural and substantive model of national democracy may miss the mark."[99] Some scholars have openly questioned whether the time is ripe in light of the experiences of European governance for democratic theory to make a turnaround and reconsider the importance of independent and apolitical governance by experts. For example, Phillippe von Parijs raises the question: "Granted that we need a more powerful union for the reasons just mentioned, do we also need a more democratic Union?"[100] These authors stand for an influential and widely accepted view, according to which the quality of the supranational problems to be solved, and the expectations of the citizens in terms of effectiveness and efficiency of problem solving as well as the actual effectiveness of supranational governance, all lead to one conclusion: instead of focusing on the input and control dimension of a model of democracy, one should rather strengthen the output capacities of supranational governance. This is noticeable, for example, in the increasingly important discussion about the desirability and feasibility of a European social welfare system.[101] The ability to solve problems is seen by many observers as an achievement of European integration[102]—especially if compared to the structures of the nation-state and their inability to act in situations of political blockades.

While the previously discussed approaches dominated the discussion in the nineties, the situation has changed recently. At present, the discussion has actually arrived at a point that justifies the use of the term "turnaround." In light of the fact that the EU today commands political power in areas of value conflicts and of colliding goals and interests, trust in the "expertise" and knowledge of independent experts and the quality of their decisions might be deceiving, perhaps even irresponsible. Significant as the knowledge of experts in a particular field of expertise may be with respect to the question of how conflicts regarding aims or values may be resolved, they do not enjoy an advantage or special capabilities over and above genuine political decision-making mechanisms, which must apply in such cases as well. The attempt to solve political problems through recourse to independent expertise leads to corrosion, perhaps even a derision of the normative ideals of the idea of self-determination.[103]

Recently the question has gained increasing significance as to how the

99.   Adrienne Heritier, *Elements of democratic legitimation in Europe: An alternative perspective*, 6 J. EUR. PUB. POL'Y 269, 279 (1999).

100.   P. von Parijs, *Should the European Union become More Democratic?, in* DEMOCRACY AND THE EUROPEAN UNION 292 (Andreas Follesdal & Peter Koslowski eds., 1997).

101.   For a discussion about the idea of a European "public good," see M. Heintzen, *Die Legitimation des Europäischen Parlaments*, ZEUS 377, 381 (2000); *see also* EC Commission, White Paper on European Governance, SEC (2000) 1547/7 final (Oct. 11, 2000).

102.   *See* WIE PROBLEMLÖSUNGSFÄHIG IST DIE EUROPÄISCHE UNION? REGIEREN IM EUROPÄISCHEN MEHREBENENSYSTEM (E. Grande & M. Jachtenfuchs eds., 2000).

103.   *But see* Schmalz-Bruns, *supra* note 18, at 265.

stipulations of the theory of deliberative democracy—understood as a philosophical idea ensuring the rightness of political decisions—could be integrated into the model of supranational democracy. Two challenges have attracted attention here. On the one hand, it would be necessary to establish and protect a free and permanent discourse among free and equal citizens, the existence of which forms the center of the theory of deliberative democracy. One of the prerequisites of this discourse is the mutual recognition of all citizens as free and equal.[104] Another is the demand that members of the political community are aware of "their mutual dependence, their vulnerability and their obligation to regard the solution of their problems in light of the implications for their neighbors."[105] Yet another prerequisite would be to translate into law the elaborate conditions of reciprocity within the public debate formulated by the theory of deliberative democracy. Principles of procedure must be formulated that justify and substantiate the expectation of rational, acceptable results. Interests and reasons can only be furthered and enforced if they have been subjected to a critical examination in a public forum in which they have been proven mutually acceptable to all participants.[106] This open discourse, in which reason will only prevail when it may be generalized, must be protected by foundational rights guaranteeing freedom and equality. The parties concerned must forego the application of power and the establishment of inequality. The subsidies of the welfare state are assumed to play a significant role.[107]

Equally important is the question of how the idea of deliberative democracy might be implemented in supranational decision-making institutions, so that the efficiency of supranational governance is maintained but at the same time the expectation of rational and fair decisional outcomes is realized. It would be necessary to develop proposals as to how the process of supranational decision-making and the process of deliberative deliberation within the citizenry should be intertwined. This is difficult for constitutional theory, since two clearly conflicting principles must be balanced. In addition, one ought to remain conscious of the fact that debate among holders of public office does not always represent an expression of deliberative democracy. This observation is provoked by a current trend to label each form of communication and each advisory task as deliberative. For example, there is little doubt that the procedure of comitology,[108] through which officials of the European

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104.   Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 321 (1997); RAINER FORST, KONTEXTE DER GERECHTIGKEIT, 1997.

105.   F. W. SCHARPF, REGIEREN IN EUROPA. EFFEKTIV UND DEMOKRATISCH? 181 (1999).

106.   Deliberative practice is assumed to have an "epistemic fuction." *See* David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority, in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 173 (James Bohman & William Rehg eds., 1997).

107.   O. Depenheuer, *Setzt Demokratie Wohlstand voraus?, in* DER STAAT 329 (1994).

108.   *See generally* C. Joerges & N. Neyer, *From Intergovernmental Bargaining to Deliberative Political processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273-99 (1997); EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (C. Joerges & E. Vos eds., 1999).

Commission and Member States officials are brought together, does not display the openness and discursiveness required by the idea of deliberative democracy.[109] Doubts also exist as to the question of whether the negotiation of the draft constitutional treaty by the European Convention in the time between spring of 2002 and June 2003 would have fulfilled these requirements.[110] In light of the fact that the debates in the Convention turned frequently into open or disguised negotiations about the fulfillment of conflicting interests, and on the basis of the fact that the governing bodies of the Convention have heavily structured and influenced the deliberations, the method of the Convention may be seen as a rough approximation at best to the idea of deliberative decision-making.

4. *Institutional and Procedural Aspects*

It has been noted above that any model of democracy builds on a combination of different "building blocks" or elements. The question must thus be raised how far the process of European integration has produced elements, which would enrich and broaden democratic theory. It is difficult to come to a conclusion here, since the institutional structure of the EU can obviously be seen from varying perspectives. Frequently, the EU is perceived as an entity characterized by polycentricity, fragmentation and institutional heterogeneity unknown on the national level. As a consequence, the EU is considered to demonstrate attributes of institutional complexity that render her a singular type of public governance. This contention, however, seems to rely on an idealized view of the nation-state institutional orders; it seems to compare this idealized picture with the real features of the EU. The complexity of the institutional structures of a federal state such as the Federal Republic of Germany, in which over 1,000 administrative offices work together, does not fall behind the complexity of the institutional structure of the EU. In a nation-state system of governance, the functional differentiation and specialization is certainly not smaller than within the EU. From the institutional point of view, the EU demonstrates a real particularity in the combination of a body reflecting the idea of a classic international cooperation of states (the Council) with an independent authority, a Court of Justice and a parliamentary assembly. Not the individual elements, but the combination of these is innovative. The currently debated institutional modifications, such as the setting up of a parliamentary two-chamber system or a stronger reliance on independent administrative agencies, are reproductions of nation-state developments. Currently, there is no development that could lead to institutional changes on the scale of a qualitative

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109. *Cf.* C. Joerges & J. Neyer, *Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector*, 4 J. EUR. PUB. POL'Y 609 (1997).

110. Daniel Göler & Hartmut Marhold, *Die Konventsmethode*, 26 INTEGRATION 317 (2003): Andreas Maurer, *Die Methode des Konvents— ein Modell deliberativer Demokratie?* 26 INTEGRATION 130 (2003); C Closa, *Improving EU Constitutional Politics? A Preliminary Assessment of the Convention*, ConWEB No. 1/2003, *at* http://les1.man.ac.uk/conweb.

leap.

Surely, the EU decision-making system demonstrates peculiarities that are not found on a national level. For example, the open conflict between the European Court of Justice and some national constitutional courts as to the question of whether EU law takes precedent even over national constitutional law has a dimension touching upon the question of democratic self-determination and control. It is against this background that the decision of the German Constitutional Court in the banana saga is particularly significant.[111] In this case, the highest German Court repeated its willingness to accept the supremacy claim of EU law in principle, but reserved its right to declare EU law inapplicable in Germany if it does not correspond to the fundamental criteria formulated in Article 23 of the German Constitution.[112] While the European Court of Justice relies on a hierarchical reconstruction of the relationship of EU law and national law, the German Court's reasoning is based on the idea of a balance of power between EU and national authority. Equally significant is the discussion about the role of European fundamental rights within the legal orders of Member States. Additionally, European integration must be looked at as a process of enhancing and strengthening democratic input, in the sense that individuals are secured a right to be heard with respect to problems that are beyond the reach of their nation-state power.[113] There is also debate regarding the nature of the EU treaties that were until now based upon the idea of contract between a political community of joint citizens.

Irrespective of the above, the conclusion is inevitable that the process of European integration has thus far not led to an institutional or procedural development that would have to be considered as an innovative and lasting contribution to democratic theory. The novel constitution of well-known institutional elements is not able to provide this thrust, since democratic theory already comprehends a multitude of options in light of the wide variance of Member State settings. Multi-level governance, as found in the federation of the EU and the nation-states,[114] has been a well-known aspect of democratic theory for a long time.[115] Political networks and negotiating systems, considered by many the symbol of political decision-making on the EU level, exist in the nation-state context in several ways. As in the nation-state context, in the EU it is necessary to capture these systems within a legal framework that ensures that the idea of self-determination by all individuals in the collective is not

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111.   102 BverfGE 147 (June 6, 2000).

112.   *See* Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas*, ConWEB No. 3/2003, p. 21-23, *at* http://les1.man.ac.uk/conweb.

113.   *See* S. Weatherill, *supra* note 12, at 26.

114.   *See* M. Nettesheim, *Die konsoziative Föderation von Europäischer Union und Mitgliedstaaten*, 5 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 507-39 (2002).

115.   *See* Schmalz-Bruns, *supra* note 18, at 260-307; *see also* D. Thürer, *"Citizenship" und Demokratieprinzip: Föderative Ausgestaltungen im innerstaatlichen, europäischen und globalen Rechtskreis, in* GLOBALISIERUNG UND DEMOKRATIE 177 (H. Brunkhorst & M. Kettner eds., 2000).

undermined.[116]   The   recently   advanced   suggestion   of   conceiving "disaggregation as a functional equivalent of democracy"[117] endangers the idea of democracy.   Constitutional pluralism[118] must not be equated with post-modern irreverence.   The creation of a legal framework for political networks and negotiating systems within the EU is not only necessitated by considerations of transparency; it is also required for purposes of equal participation and control.   It is therefore necessary to strengthen the powers of institutions such as the European Parliament,[119] which represents all members of the political community,[120] and to ensure that the Parliament is in the position to steer and control the specialized authorities, the increasingly important public-private partnerships, and other forums of decision-making.[121]   This does not raise problems specific to European integration, however; it is no indication of a "Europeanization" of democratic theory.

Furthermore, it is evident that, within such a heterogeneous environment as the EU,[122] democratic legitimacy will only exist if it is ensured that no single group dominates minorities by majority rule.   This concern for the rights of minorities not only underscores the importance of a federal construction of the EU[123] and of associative forms of democracy,[124] but also calls for the institution of a "concordance democracy" in order to ensure that latent conflicts between parts of the segmented political community do not erupt into the open.[125]   The   creation   of   veto   positions   (whether   by   plebiscitary

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116.   For reference to possible models, see A. Benz, *Compounded Representation in EU Multi-Level Governance, in* LINKING EU AND NATIONAL GOVERNANCE 82 (Beate Kohler-Koch ed., 2003).

117.   James Rosenau, *Governance and Democracy in a Globalizing World, in* REIMAGINING POLITICAL COMMUNITY 28, 40 (D. Archibugi et al. eds., 1998).

118.   N. Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002).

119.   M. Heintzen, *supra* note 99, at 377.

120.   For options for the future development of the European Parliament see J. Coultrap, *From Parliamentarism to Pluralism,* 11 J. THEORETICAL POL. 107 (1999) (discussing options for the future development of the European Parliament); *see also* P. Hix, *Elections, Parties and Institutional Design: A Comparative Prospective on European Union Democracy,* 21 W. EUR. POL. 19 (1998).

121.   On the idea of soft forms for linking the heterarchical and hierarchical systems of decision-making, see Artur Benz & Burkhard Eberlein, *The Europeanization of Regional Policies: Patterns of MultiLevel Governance,* 6 J. EUR. PUB. POL'Y 329, 333 (1999) ("[T]hey enable actors to circumvent the rigidities of formal decision-making; they can mobilize the power of policy ideas; they can give expertise-based policy entrepreneurs a better chance of overcoming conflicts; and finally, they allow the introduction of competition between arenas as a way of encouraging innovation.").

122.   *Cf.* H. Abromeit, *Volkssouveränität in komplexen Gesellschaften, in* DAS RECHT DER REPUBLIK 22 (Hauke Brunkhorst & Peter Niesen eds., 1999) (es gehe darum, Verfahren zu ersinnen, die auch einem komplexen, segmentierten, unterschiedlich betroffenen .... Demos erlauben, souverän zu sein.").

123.   M. Burgess, FEDERALISM AND EUROPEAN UNION: BUILDING OF EUROPE 1950-2000 (2001); D. MACKAY, DESIGNING EUROPE: COMPARATIVE LESSONS FROM THE FEDERAL EXPERIENCE (2001); THE FEDERAL VISION, (K. Nicolaidis & R. Howse eds., 2001).

124.   *See* P. HIRST, ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE (1994); R. Eising, *Assoziative Demokratie in der Europäischen Union? in* VERBÄNDE UND DEMOKRATIE IN DEUTSCHLAND 293 (B. Wessels & A. Zimmer eds., 2000).

125.   For a detailed discussion, see D. Grimm, *Läßt sich die Verhandlungsdemokratie*

mechanisms,[126] by the strict application of the idea of subsidiarity, or by an interweaving of the levels of governance) would ensure that minorities cannot be dominated by majorities. These are, however, again not problems exclusive to European integration. The same is true with regard to the problem of how to restrain economic imperatives, which might at some point become strong enough to endanger democratic self-determination. Likewise, the concern to prevent blockades and abuse is not only a European concern.

This overview illustrates that, in the current discussion, the primary concern is to reassemble well-known elements of nation-state democratic governance into a new, functionally-appropriate architecture.[127] At the same time, the process of European integration has not yet produced an institutional perspective that would lead to advancements of democratic theory.[128] This need not be the end result and, indeed, should not be the end result; rather, it seems likely that the process of European integration will have a long-term impact even from an institutional perspective. This impact will develop rather minutely, and the novelties and successes will only become apparent in retrospect. The process of European integration should also lead to a discussion of truly new approaches to democracy, such as the idea of an economicalization of democracy[129] or the idea of undoing territorial structures of democracy.[130] However, as of yet, no recognizable consequences for democratic theory have evolved.

VI.
CONCLUSION

It has already been frequently emphasized that the idea of democracy, beyond its solid core, manifests a variety of characteristics. In light of this observation, any attempt to answer the question of how the process of European integration will affect democratic theory seems presumptuous, or at least rather burdened with difficulty. There are, however, clear signs to be observed of the impact of European integration within the discourse of democratic theory. These manifestations become even more apparent when the discussion

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konstitutionalisieren? in DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 193 (C. Offe ed., 2003).

126.   *See* H. Abromeit, WOZU BRAUCHT MAN DEMOKRATIE? (2002); *But see* R. Schmalz-Bruns, *Deliberativer Supranationalismus: Demokratisches Regieren jenseits des Nationalstaats, in* 6 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN (1999).

127.   *See generally* Shaw, *supra* note 37 (examining the debate over EU Constitutional architecture).

128.   On the idea of experimental democracy, see DEMOKRATISCHER EXPERIMENTALISMUS (H. Brunkhorst ed., 1998).

129.   For examples of new approaches, see Schmitter, *supra* note 8.

130.   *See* REGIEREN IN ENTGRENZTEN RÄUMEN, POLITISCHE VIERTELJAHRESSCHRIFT (B. Kohler-Koch ed., 1998); I. Maus, *Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie, in* M. LUTZ-BACHMANN & J. BOHMAN, WELTSTAAT ODER STAATENWELT 226, 228. With respect to the philosophy of international relations, see J. Ruggie, *Territoriality and Beyond: Problematising Modernity in International Relations*, 47 INT'L ORG. 139 (1993).

concerning "global governance"[131] is also taken into consideration. However, the impact of European integration is still small. Until now, the emerging process of European integration has not left much more than negligible traces in constitutional theory; nor have the debates on the normativity of supranational democracy been able to significantly influence the constitutional development of the EU. The constitutional system of the EU ambles slowly—as if weighted down by lack of fantasy and inspiration—towards parliamentary democracy. Politically influential opposing positions do no more than to complement this model with elements of a presidential democracy or with forms of direct democracy. Even the constitutional treaty drafted by the Convention does not change anything substantial in this regard. The institutional foundations of the EU will remain intact; the changes are limited to those necessary to secure the ability of its organs to function in light of the upcoming expansion.

In the end, the traditional experience that the status and normativity of democratic theory manifests itself also as a product of political expedience is reproduced and confirmed at the European level. The political process is advanced by interests and ideas, actors and institutions; the results are not always predictable and are rather infrequently determined by considerations of political philosophy or constitutional theory. Satisfactory results affect the theory. Still, as a result of these realities, it is clear that the process of European integration will not only revolutionize the legal and economic orders of the Member States, but that, in the long run, it will inevitably have a profound influence on democratic theory as well. Some are pessimistic in light of this perspective and fear a turn for the worse, perhaps even the "end of democracy."[132] This is a valid concern; the risk should not be ignored entirely that democratic theory will succumb to the emergence of a European public power which no longer deserves to be called a democracy.[133] Politicians and scholars are called upon to combat the regression of democratic theory into a purely descriptive theory under which the term "democratic" is stripped of its normative content altogether and affixed as a stamp of approval to whatever form of governance is most politically expedient.

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131. D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT'L L. 596 (1999); *see also* WELTSTAAT ODER STAATENWELT (M. Lutz-Bachmann & J. Bohman eds., 2002).

132. For a skeptical view of the process of integration, see U. Haltern, *Gestalt und Finalität*, *in* EUROPÄISCHES VERFASSUNGSRECHT 803 (A. von Bogdandy ed., 2003).

133. P. Allott, *European Governance and the Re-Branding of Democracy*, 27 EUR. L. REV. 60 (2002).