Journal of Global Ethics

Review essay

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REVIEW ESSAY

James W. Nickel and James Bohman review Carol Gould's *Globalizing Democracy and Human Rights*, and Carol Gould responds.

Gould on Democracy and Human Rights

Globalizing Democracy and Human Rights
CAROL GOULD
Cambridge, Cambridge University Press, 2004

In *Globalizing Democracy and Human Rights*, Carol Gould offers a political philosophy based on a principle of 'equal positive freedom'. Gould's view has three broad normative dimensions:

1. A commitment to 'negative liberty' or 'absence of constraint on people's choices' (p. 34). '[T]he guarantee of civil liberties and political rights is central in the view I propose' (Gould 1989, p. 41).
2. A *strong* egalitarian commitment as seen in the commitment to *equality* of basic liberties and rights (p. 72), the emphasis on equal *positive* freedom where that means access to the social and material conditions of developing and using a capacity for choice, the emphatic rejection of racism and sexism, the demand for 'recognition . . . of each other's freedom' (p. 34), and the commitment to economic and social rights worldwide.
3. A *radical* commitment to the extension of democratic practices to economic life and international politics. Gould describes this commitment as 'normatively quite demanding' because it takes democracy 'to require equal rights of deliberation and participation and, optimally, equally effective rights rather than purely nominal ones' (p. 36; see also p. 163).

Gould's theory gives a prominent role to international human rights. There are lots of interesting topics in Gould's book to discuss, but I'll treat just three. One is to say a little about Gould's starting point: an ideal or norm of equal positive freedom. Next I'll make some remarks about how one gets from an abstract norm of equal positive freedom to specific rights and duties. The third topic is Gould's idea that the right of democratic participation applies to international organizations.

Equal Positive Freedom as a Starting Point

The root idea of Gould's political philosophy is *equal positive freedom*. Gould takes this norm to be *the* principle of justice. She explains it as asserting that 'there is an equal and valid claim—that is to say, a *right*—to the conditions of self-development on the part of each human being' (p. 34).

It is not uncommon for contemporary political philosophers to combine demands for freedom, opportunities and equality (e.g., Rawls 1971, Sen 2000, Raz 1987, and Van Parijs 1998). Gould's version has some distinctive features, however. These can be seen in its inclusion of themes and ideas drawn from Fichte, Marx and Hegel (social ontology, concrete universals); communitarianism (empathy and the ethics of care, group rights); feminism; international human rights law; and globalization theory. Most distinctive of all is Gould's advocacy of the extension of democracy to the workplace and to international organizations.

Gould's root idea seems to be a single principle, but in fact it contains three elements—equality, negative freedom and positive freedom or fair access to opportunities and resources—that will often pull in opposite directions. It might have been better to distinguish a negative freedom norm, an access to opportunities and resources norm, and a fairness/equality norm.

As a pluralist about fundamental values, I'm not sure that this single (or triple) principle provides all the resources needed by a theory of political justice. In particular, I think that a principle of humaneness requiring the avoidance of cruel and degrading treatment is needed for the justification of some human rights.

The Question of a Specificatory Framework

If one's starting point is something as abstract as 'equal positive freedom' a framework for working out the meaning of those three words is sure to be needed. The framework's first job is to structure the derivation of middle-level principles such as specific human rights and the requirements of democratic participation. After that, it can guide the elaboration of those middle-level principles and help in dealing with conflicts between them.

For illustration, this is the job done by Rawls' Original Position idea and the account of stages (Rawls 1971). The Original Position takes one from an abstract concern for fair access to primary goods to specific political principles such as the Difference Principle. And the theory of stages takes one from the two principles of justice to the Constitutional Stage, the Legislative Stage and the Application Stage.

Globalizing Democracy and Human Rights mostly deals with specification in an intuitive rather than a structured way. If this part of Gould's philosophy were more developed we would have better reason to believe that Gould's elaborations are the ones required by equal positive freedom—or at least among the best interpretations of that abstract idea. Gould generally attends to the questions that a specificatory structure would require to be answered, but not always. As we'll see, Gould sometimes gives insufficient attention to the requirements of justifying rights-related duties on others.

If one wants to go from equal positive freedom to a human right to due process in criminal punishment, for example, one needs to explain what it is about criminal punishment that makes due process rights necessary. First, one needs to show that there are *distinctive threats, abuses or problems* present in the application of criminal law. These are often known through experienced injustices or problems. Second, one needs to show that these threats, abuses or problems are *sufficiently important* to justify standing constitutional or international rights. If the experienced problems were the absence of public swimming pools or the failure of government to subsidize air conditioners we would probably say that these problems are not severe enough to justify constitutional or human rights. Discomfort does not get one into that realm. Here one would appeal to the root idea of equal positive freedom and try to decide how important swimming pools and air conditioning actually are to having equal positive freedom.

To aid in making decisions about importance, I have long advocated viewing human rights as *minimal* international standards, as ones that pertain to having a minimally good life (Nickel, 1987). In proposing that idea I was influenced by Henry Shue's (1980) suggestion that human rights provide a morality of the depths, not a morality of the heights. I think that the role of international human rights is to protect the conditions of a minimally good life for all.

Consider the justification of due process rights. If we can show that such rights are so useful in dealing with very serious problems in the operations of legal systems as to be indispensable to the protection of our fundamental interests, then we will have established that people have a *claim-to* due process in criminal investigations and trials. If such rights were not very useful in practice then we would not have a strong claim to them. One reason the claim-to due process (that is, the rationale for ensuring that people get due process in criminal matters) must be very strong is that it will play a key role in justifying imposing duties on judges, police and legislators. The generic individual interest in equal positive freedom must be very strong, and that interest must connect with due process rights via the great usefulness of such rights in avoiding unfairness and cruelty in criminal punishments.

Feinberg (1973) was surely right in thinking that establishing a valid claim-to due process is only half of the justification of such a right. After showing that there is a justified claim-to due process, one must justify duties on some party or parties to provide due process. This is what Feinberg called a *claim-against.* To justify a claim against, we need to: (1) nominate certain parties as the ones to have duties to provide due process; (2) show that it is justifiable to impose the necessary duties on those parties; and (3) show that they have the capacity to carry out those duties in a sustainable way.

Justifications for claims-against need to take feasibility and efficiency into account for four reasons. First, rights are expensive to implement and there are lots of them. Second, there are other goods of high priority that need to be served (infrastructure, economic development, scientific knowledge, culture). Third, we need to keep the economy running in order to pay for these rights and goods. Finally, some rights are fundamental freedoms—and those freedoms constrain how much law and government can impose on people. So does the operation of democratic institutions.

Joseph Raz (1994) suggests that if there is a direct individual interest in something, but not one that is strong enough to justify putting others under a duty, the usefulness of a right to that thing can provide additional (and possibly sufficient) grounds for putting others under a duty. Raz wrote:

> The right of free expression serves to protect the interest of those who have it and who may wish to use it to express their views. It also serves the interest of all those who have an interest in acquiring information from others. But here again the right serves the interests of those who are neither speakers nor listeners. Everyone who lives in a democracy is affected by the fact that this is a society enjoying a free exchange of information. One may go one step further. If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option. (Raz 1994, p. 39)

Raz also thinks that the limited direct contribution of civil liberties to one's own good helps explain why many people undervalue civil liberties: 'Many people judge [the value of civil and political rights] by their contribution to their well-being, and it is not much. Their real value is in their contribution to a common liberal culture' (Raz 1994, p. 40).

Raz underestimates the direct interest people have in civil and political rights, but the general point is well-taken. In justifications of human rights both direct and indirect beneficial effects on fundamental interests need to be considered. Indirect beneficial effects boost the priority of the direct individual claim.

Political Liberties and the Right to Democracy as Human Rights

Having sketched a possible framework for deriving specific human rights from equal positive freedom, let's now turn to an area in Gould's book where I think such a framework is helpful, namely in deciding the areas where democratic institutions are to be used. I'll first discuss the justification of political liberties and rights at the national level, and then say a little about extending such rights to international organizations.

Political Liberties and Democratic Rights at the National Level

Gould emphasizes that 'democratic participation is ... one of the human rights' (p. 183). I agree, but it is worth mentioning that democracy has actually been very controversial as a human right. Authoritarians have rejected it because it can destabilize functional regimes that may be hard to replace with ones that are equally good; representatives of hierarchical societies have rejected it because it licenses the political involvement of women, minorities and nonbelievers; and political scientists have claimed that it often inflames ethnic tensions. Beyond this, it is widely recognized that the effective use of democratic institutions is very difficult for low-income countries to achieve.

Before turning to the right to democracy, let's consider rights to political liberties. The International Covenant on Civil and Political Rights (United Nations 1966) addresses them in Articles 19, 21 and 22.

- Article 19 (2). Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.
- Article 21. The right of peaceful assembly shall be recognized
- Article 22. (1). Everyone shall have the right to freedom of association with others.

These are personal liberties covering but not limited to the political realm. They are individual rights, justified at least in part by their importance to the ability of individuals to have and lead lives of their own. They impose duties on governments to respect and protect these liberties, and those duties are plausible and feasible.

The political liberties will be more meaningful if there is a duty of governments to receive and consider petitions. The right to petition government, found in the First Amendment to the US Constitution, imposes a duty on government to receive and consider petitions from citizens, but it gives full discretion to government to decide what to do about such petitions. This modest political right is not found in contemporary human rights documents, but it was resurrected by Rawls in the *Law of Peoples* when he suggested that a minimal participatory requirement on non-liberal but decent peoples is that they run a system that allows complaints to be received and considered (Rawls 1999).

The International Covenant sets out the right to democracy at the national level in Article 25:

> Every citizen shall have the right and the opportunity ... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

This is not just a liberty right. It requires governments to conduct 'genuine periodic elections' that allow all citizens to participate. A right to democracy gives a positive dimension to the freedoms of political participation found in Articles 19, 21 and 22. It requires governments not just to tolerate political activity or to receive petitions from citizens, but to share power with them by allowing them to participate in general elections that will select leaders and policies.

To briefly apply the specificatory framework I sketched earlier to this right, note that the framework will require showing that:

- People everywhere have a very strong interest in living under and being free to participate in democratic institutions. (Showing this justifies the claim-to.)
- National governments everywhere are justifiably placed under an (exceptionless?) obligation to govern democratically, and most of them are capable of governing democratically. (Showing this justifies the claim-against.)

To justify the claim-to democracy Gould would appeal to the equal right to positive freedom. She says, quite generally, that 'the conception of equal rights to the conditions of freedom ... gives rise to a requirement of democratic decision making in contexts of common activity' (p. 196). Without democratic participation there is the possibility of domination. I'm prepared to allow that democratic participation in collective activities is a requirement of equal positive freedom, but on my view it needs to be shown that it is quite generally an important part, that it really does a lot for a people's interests in effective freedom. Here's where we can use Raz's idea. We can appeal to all of the social and cultural benefits of democracy to show that it does a lot to promote people's interests in effective freedom (and perhaps other important interests as well). These indirect benefits will boost the priority of the claim. If the claim-to democracy is very strong, that will make it easier to justify imposing duties of democratic governance on national governments.

Political Liberties and Democratic Rights at the Global Level

Gould considers ways of 'instituting democratic accountability in the supranational bodies that play an important role in steering the course of economic globalization (e.g., the International Monetary Fund and the World Trade Organization)' (p. 1) This is an interesting topic and Gould has a number of useful and sensible things to say about it.

Gould might have noted—although to my knowledge she did not—that individual political liberties to speak and publish and to peaceably assemble and protest are already applicable to supranational bodies. If there is a meeting of the WTO, activists have human rights permitting them to communicate, assemble, protest and attempt to be heard by the official participants. But these liberties do not put WTO officials and participants under duties to listen or to consider what the protesters have to say. The political liberties provide a way of trying to influence international institutions, but a very modest one.

A possible move here is to extend the *right to petition* to supranational organizations. That right would give people liberties and powers to make such petitions and would impose a duty on supranational organizations to receive and consider them. Such a right seems likely to be justifiable and may offer a feasible step in the direction of greater participation by ordinary people in supranational organizations.

A right to democratic participation in supranational organizations that is an international analogue of Article 25 would put supranational organizations under a duty to allow people in all countries to participate in the selection of the leaders of and representatives to these organizations. Much is unclear about how this might be done. Gould sensibly emphasizes that new forms of participation will be needed, and she holds that international democracy, like national democracy, should be constrained by human rights (p. 181).

Can a right to democratic participation in supranational organizations be justified? Gould thinks that the claim-to democracy can be easily established, since she holds that individual participants in any joint activity with shared goals have a right to

participate in shaping the activity and its goals. For her, the issue is not the claim-to, it is the content and feasibility of the claim-against. She raises the question of how worldwide democratic participation could be 'even remotely feasible with respect to global bodies for which there are not correlate political constituencies, practically speaking' (p. 163).

My own worry begins earlier, with the justification of the claim-to participation in supranational bodies. The fact that democratic participation has proved supportive of effective freedom at the national level by preventing domination and other evils gives us insufficient reason to believe that it can now serve the same role at the international level, given the institutions we currently have. Our interest in international political participation is not known to be a strong one, and that means we cannot be sure that our claim-to such participation has very high priority. And without a strong claim-to we cannot justify putting supranational organizations under a duty. Feasibility is not the only reason why we cannot justify a right to international political participation.

It might be objected that this puts us in a bind, since we cannot prove that we have a strong interest as individuals in international political participation without demonstrating practically that international political participation will substantially enhance individual positive freedom. But we have little chance of showing that unless people commit themselves to making international political participation work, and that requires that they believe they have a strong interest in doing so.

My response to this objection is that we should switch here to the language of value. New institutions can be developed, tried and refined because they have potential of strongly supporting important values. Effective freedom for all is an extremely important and attractive value that can inspire and motivate efforts to develop democratic institutions at the international level. When those efforts have begun to succeed we will have a better idea of whether human rights require such institutions.

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Rights, Democracy and Global Justice

Carol Gould's *Globalizing Democracy and Human Rights* belongs to the second wave of books on democracy in the age of globalization. In it, Gould not only further develops her own rich theory of democracy based on an ideal of equal positive freedom but also extends it to the global level. Like most theorists of global democracy today, Gould clearly rejects both a world state and a single overarching global political order, in favor of a plurality of types of democracy and a multiplicity of political communities and associations at different levels. Also, like many theorists of the second wave, Gould sees a democratic deficit at the international level and seeks to solve it by more democracy. Given that current democracies have worked together to produce the international system (such as it is), the question of Gould's book is this: how might global democracy promote the realization of human rights and the commitment to human rights through more democracy, where these human rights are understood to be grounded in a complex ideal of positive freedom?

The complex relationship between rights, democracy and human freedom is certainly one of the central issues of global justice. However, this way of posing the issue presupposes a different, perhaps more fundamental question: more of what *sort* of democracy? Given the circumstances of global politics, it is difficult to determine just what standard of democracy ought to be employed in various transnational and international contexts and even more difficult to determine whether or not democracy could be realized under current circumstances. At the very least, a double transformation of democracy beyond the state model is necessary, a transformation both of its institutional form and of the content of its existing normative ideal. First, global democracy must become an even better means than the state to realize human rights and freedom, especially now in the face of the socially destructive features of globalization. And, second, the scope of democracy must be extended and deepened, as the recognition of human rights to political participation transforms just who it is that is part of the *demos* and even what a *demos* could actually be. A plausible theory of global democracy cannot hold the current democratic ideal and its institutional structure constant.

I am very sympathetic with the pluralistic and transformative project that Gould undertakes in this book. Gould accurately diagnoses the failure of nerve in most cosmopolitan theories, and takes the debate some steps further with her careful consideration of the two main issues of global democratic theory: the proper relationships between democracy, human rights and global justice on the one hand, and the scope of the democratic community on the other. However, I will argue that the particular answers that she gives to these two questions, while compelling, do not fully meet the challenge of capturing the deeper structural transformation of democracy needed for it to be applied beyond and across borders. Indeed, I argue that what is required is not the philosophical grounding of a new and more demanding conception of democracy in independent conceptions of rights and positive freedom, but rather in the first instance a theory of *democratization*. This practical theory is based neither

on a particular democratic ideal nor on a theory that justifies the full range of human rights and freedom, but rather on a conception of the democratic minimum that would be sufficient to permit democracy to be a means to global justice, and would ensure that human rights struggles become a means to transforming democracy.

Such an account of democratization requires somewhat different answers to the main theoretical debates that are the basis of Gould's account: first, it requires rethinking the relation of democracy, rights and justice; and, second, it demands giving a different solution to the problem of the scope of the democratic principle. I shall deal with each of these issues in turn, starting with the relationship of human rights and democracy, and then turning to the issue of the right to democratic participation. My argument is transformationalist in Held's sense of the term (Held *et al.* 1999): insofar as it holds that the circumstances of politics in the age of globalization are sufficiently different so as to require not simply more democracy in order to promote justice, but a different kind of democracy, and not simply more pluralism, but a different and more democratic kind of pluralism.

Democracy and Human Rights: Constitutive or Independent?

Gould begins her book with a series of arguments concerning some of the most fundamental issues of democratic theory, particularly the philosophical justification of democracy in a substantive theory of rights and freedoms. The basic argument is concerned with two possible positions. The first argument takes justice to be prior to democracy. This claim entails that democracy must fulfill its requirements, and these requirements can be specified by an independent account of human rights. Using Gould's terminology, call this the 'independent standard account'. The second argument sees an ideal democratic procedure as itself defining the norms of justice, and thus could be called 'the democratic justice account'. Gould puts the problem with such a constitutive and not merely instrumental account of the relation of democracy and justice in this way: 'if democracy is understood as that procedure that most fully realizes justice (by recognizing equal rights of participation in decision making), how can it in turn need to be constrained by the requirements of justice?' (p. 13). Such obviously circular theories come in two varieties, which are not always clearly distinguished in this chapter. The first could be called 'fully democratic justice', as articulated by Iris Young (2002) among others. This account claims that justice just is what an ideal and fully democratic procedure would yield, thus making democracy constitutive of justice. The second is, following Gould, 'quasi-democratic justice', where the adjective 'quasi-democratic' refers to views like those held by Habermas or Cohen and Sabel, who argue that justice is not the outcome of a democratic procedure such as voting, but rather is a deliberative 'process of coming to an agreement' (p. 19) (Habermas 2001, Cohen & Sabel 2004). I think that the particular claims made in the deliberative theories of democracy described by Gould as objectionably 'quasi-democratic' are not directly concerned with justice but with legitimacy, where legitimacy is judged in terms of the acceptability of procedures rather than substantive outcomes. According to Gould, what is lacking in

both of the false conceptions of the relationship between democracy and justice is 'an external and independent normative criterion' that would settle the matter of when democracy is unjust. This is the central starting point of Gould's argument, since it shows the theoretical gap to be filled by her more substantive account in which a particular conception of rights and positive freedom provides just such a standard.

While this argument has the strength of pointing out a potential circularity in many conceptions of democracy, the charge is too general to tell against all 'quasi-democratic' conceptions. It especially misses the mark by ignoring the role of ideal proceduralism as it is typically employed in many quasi-democratic accounts. The claim made in most deliberative theories is not that some actual democratic procedure is *just*, but that it is *legitimate* only to the extent that it fully reflects the conditions specified in the ideal procedure. As David Estlund (1997) and others have pointed out, this gap between the ideal counterfactual conditions and any actual decision already allows for the requisite independence of ideal and actual conditions sufficient to avoid both circularity and pure proceduralism. The ideality of the procedure provides an independent standard by which to judge the legitimacy of any actual democratic procedure. Typically, such procedures embody substantive aspects of justice, such as freedom from domination and equal consideration. The problem with quasi-democratic views is not the claim that democracy is essentially related to justice, but that it is taken to be a means to achieve particular substantively just outcomes. This difficulty holds even if the protection of human rights is the specific just outcome that democracy is supposed to ensure. Given the variety of human rights defended by most theorists of positive liberty including Gould, it is equally apparent that the realization of these rights can be *too* independent a standard by which to assess the quality of democracy.

This difficulty can be shown, following Isaiah Berlin, by the possibility that non-democratic institutions may in fact often be a better means for achieving some of these same human rights, including economic rights and personal liberties. As Berlin (1969, p. 129) puts the point with respect to individual liberty: 'Just as a democracy may, in fact, deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom' (or whatever substantive freedoms one wishes to substitute). Judged by an appropriate external criterion of the realization of the human rights to these individual liberties or particular substantive social rights, this outcome would be just. Not only that: as defined independently of the democratic process itself, this argument would just as often provide a justification for the superiority of non-democratic institutions should they be shown to be more effective. I would argue that there is only one form of freedom that escapes this criticism: the freedom from domination, including the domination of the liberal despot or democratic sovereign. Since the independent standard proposed by Gould is the full realization of *all* human rights and positive freedoms, global democracy may often not be the best way to achieve the ends of justice. This dilemma can be avoided only if human rights are internally related to democracy, either constitutively or instrumentally.

Consider another example that shows how democracy and human rights can come apart. In Algeria and other places, interventions by non-democratic institutions such as the military are justified by arguing that they are saving democracy and various human rights from being overturned by the victory of theocratic parties. Yet in all such cases, these institutions turn out themselves to be tyrannous and dominating. In these cases, the external standard of justice has the danger of being *too* independent of democracy. But as it is justified in the Universal Declaration of the Rights of Man, democracy is thought of instrumentally as the best way to 'foster the full realization of all human rights',[1] where the important emphasis is on 'all human rights'. According to these documents, the best way to conceive the relation between democracy and justice is then between instrumental and constitutive rather than independent terms. Put the other way around, the full range of human rights is now seen to imply a 'democratic entitlement', a right to democracy, as well as a 'right to nationality' understood as a right to political membership as such that is the basis of all human rights law related to refugees and immigrants. If justice is defined in terms of human rights and these rights are constitutive of democracy, human rights justify democracy not as an independent standard but as a way of elucidating the aspects of the democratic ideal. By the same token, it is still wrong to assert with Iris Young that justice depends upon the ideal constitution of the *demos*, since rights are necessary conditions to achieve justice whether or not democratic institutions are ideally constituted. Indeed, it is difficult to square the dialectical relation of democratization and human rights that Gould defends in Chapter 9 of her book with the view that rights are independent standards. A form of democracy that is defective by these same standards may well be the means by which greater and deeper democracy can be achieved; conversely, a democracy that realizes many human rights may lack the institutional capacity to promote democratization.

These considerations suggest that the theory of global democracy ought to have a different practical orientation. Rather than seek the realization of the full range of human rights, it ought to be concerned with elucidating the conditions for democratization, or with the use of democracy to promote more or better democracy, thus lending support to Jane Addams' old adage that 'the cure for the ills of democracy is more democracy'. Many have charged this account with the circularity that comes with 'fully democratic' views, and in some cases the charge hits its target. But it is not so easy to show that this circularity must be in every case vicious, both with regard to the problem of creating the conditions for global justice, and especially when many of the paradigmatic cases of the injustice that globalization produces concern increased domination and the undermining of the normative status of citizens and human beings on which legitimate participation is based. Even when quoting Addams' saying for its hopeful pragmatic stance, John Dewey immediately adds an interesting proviso: it can remedy its ills only by becoming a democracy that is 'genuinely different in kind' (Dewey 1988, p. 325). It is on the basis of this different sort of democracy that we make judgments about the injustice of previous democratic practices, such as the slave-holding democracy of the United States before the Fourteenth Amendment and the more explicit recognition of racial diversity after it. Without such

a capacity for transformation, democracy may face another vicious circularity: 'for democracy to promote justice, it must already be just' (Young 2002, p. 35). Call this the 'democratic circle'. If we treat the democratic principle in a maximalist sense, as requiring the full realization of a variety of independently specified rights and freedoms, it will be difficult to make democracy a means to global justice. Ultimately, democracy promotes justice precisely because it enables citizens to *demand* to be treated justly, as free and equal persons, from within the democratic process by appealing to democratic norms. In this way, democratization is linked not to the ideality of procedures but to the minimal justice sufficient for reflexivity, where the more just arrangement that is the possible outcome of democratic transformation is the standard by which current democratic practice is judged by citizens who demand justice.

Next I turn to Gould's discussion of the scope of the democratic principle. This issue not only raises the question of global political inclusion, that is, of who has the right to participate in what decisions, inclusion in decision making raises a deeper issue for democratic theory applied to global contexts. Despite her acceptance of a plurality of forms of democracy, it is not clear either that Gould fully distances herself from the assumption of a single *demos* or successfully delimits the domain of global democracy.

From *Demos* to *Demoi*

The problem of global political inclusion seems to have a straightforward solution. If everyone has the right to political participation as one of their basic human rights, then it is clear that 'all those affected' by a decision should have the right to participate in making it. It would then be tempting to see all human beings as constituting a global *demos*, at least in central areas of decision making, in the age of global warming and global production processes. This cosmopolitan position is well articulated by Held and other political cosmopolitans. Gould shows that this answer is too simple, in that it runs straight up against one of the main paradoxes of democratic theory. While democracy 'presupposes a conception of the *demos*, or the collectivity that has the right to participate in decision making', Gould immediately concedes (to Dahl and others) that the scope of this *demos* and its boundaries cannot itself be settled democratically (p. 174).[2] For this reason we must once again appeal to one of two possible independent criteria: the first, that 'rights of democratic participation' arise in the context of 'joint activity;' and second, that rights should extend to 'all those affected'. Only the first seems to Gould to allow the delimitation necessary to constitute a *demos* of the appropriately limited sort. These limits need not be territorial. At the same time, the second can be justified in a specific domain: when concerns of human rights are at stake: 'people at a distance are to be regarded as affected by a decision if their human rights are affected, where these include economic and social, as well as civil and political rights' (p. 178). This implicit shift to an unlimited domain seems to ensure that everyone would have at least a pro tonto justification for inclusion in just about any decision under the circumstances of global politics,

especially since the right of political participation is itself a human right. At the very least this account leaves the domain of global democracy very large, while leaving room for local autonomy and self-determination.

Since rights of participation are not merely a matter of de facto membership and citizenship, a regress looms. To the extent that all people have human political rights, persons may legitimately claim that any interdependence with others creates at least a prima facie right to participate in decisions. Moreover, if the issue concerns the scope of political rights themselves, even if a person or group is not party to some legal dispute they have a material interest in its resolution. Since human rights are nearly always at stake in a variety of direct and indirect ways, rights bearers are able in principle to claim that they have the right to participate in almost any actual decision at all. Similarly, given the indefinite nature of many social activities tied to large-scale social institutions and processes, the set of significantly delimited joint activities seems to be rather small. The global and the local are often thoroughly interwoven, and are often dependent on new forms of global political authority operating in the background. Here we might think of the decisions of the WTO, the IMF and so on.

Neither criterion considered by Gould settles what I call the *demoi problem*. Indeed, global democracy is not some search for lost congruence between the politically organized space of the authors of the law and the non-political space of the subjects and addressees of those laws. In any given case of democratically legitimate decision making as decided by non-democratic means such as historical borders, nationality and so on, we might ask the following question as a matter of justice: why should any particular *demos* have the right to make a decision? Suppose there is a conflict: should we favor the larger and more inclusive *demos*? (see Dahl 1983, p. 96). In the case of borders and jurisdictions more generally, these issues are taken by Dahl to be simply parametric, leaving little room to develop a normative vocabulary capable of settling such questions. This explains the lack of fit between much of democratic theory and a transnational polity such as the European Union. While categories of modern democratic theory revolve around the state and 'typically presuppose the existence of a *demos*' (Weiler 1999, p. 268ff.), the transnational polity consists of *demoi*. As such, it raises new democratic possibilities and new dangers of domination.

There are many other related problems of institutional design in established democracies, to the extent that such institutions have over time promoted and entrenched conditions of ever-increasing pluralism, complexity and interdependence. Under these circumstances, it may also be the case, for example, that some members, qua citizens in one or more units, have lost the full range of their constituent power to initiate deliberation. It is widely recognized that democratic states may dominate one another in some particular respect, as is the case in various international financial institutions with weighted voting indexed to contribution; but political domination is also common within states as either a consequence of centralization or as the domination of one unit by another. Such political domination emerges wherever there are multiple units necessary for good governance. Yet the most common institutional designs are still guided by the principle that popular sovereignty requires control by a singular

demos. A good example of this problem is the legal powerlessness of cities as units and the troubling and persistent injustices that this fact causes for those who live in them. This example serves to illustrate the conditions under which a transnational democracy of democracies could promote conditions of justice across borders. As many have suspected, positive law does not necessarily help matters. Since the coercive aspect of law brings with it the potential for *juridification*, law brings with it the potential for domination as much as for integration under non-ideal democratic conditions. In a word, law does not always guarantee the legitimacy of those who exercise the power of the *demos* and thus creates the means by which a *demos* can become a potential dominator of other *demoi*. Even if cosmopolitans strip sovereignty of its territorial form through its multiple embodiment at various levels and in different centers of political power, 'subordination to the general framework' leaves open the possibility of legal domination, of the rule of law that is not sufficiently tied to the democratic tests of popular legitimacy to extend legitimacy directly to the general framework itself.

I cannot here further address this deep problem of the theory of global democracy, except to note that Dahl's approach cannot yield any satisfactory solution. Here I only note that there is an alternative republican and cosmopolitan tradition that recognizes the possibility of *demoi*. Historical forebears of this tradition can be found in the nearly forgotten federalist tradition of the Enlightenment that emerged from their rejection of the antiquated form of a centralized Empire. For many republicans (including Price, Diderot and Turgot, among many others), federalism had the suitable dispersion of power necessary to overcome the increasingly coercive domination of colonies by the center.[3] Given that the problem to be solved was domination, republicans rejected the idea that the size of the polity was the decisive consideration. Neither hypothetical nor real contractualism based on counterfactual agreement or actual consent serve to overcome the potential for domination built into sovereignty as hierarchical authority. Nor is decentralization as such the solution by itself. Rather, it is in virtue of being part of a larger, well-ordered republic that the lower units may effectively govern themselves and be responsive to minority demands. Gould's criticisms of Held's top-down cosmopolitan approach take the first steps in the right direction. However, her rejection of deliberative democracy limits the conceptual space both for a democracy that is based in interaction and institutionally mediated deliberation across democratic communities (each claiming local self-determination) and for an account of transnational democratization based on rights to participate in decision making not tied to the constitution of some higher *demos*. While her discussion of the constitution of human rights through cross-cultural dialogue seems to accept the importance of deliberation over the substance of human rights as standards, she draws back from the reasonable conclusion that in a democracy of *demoi* these standards are to be worked out through the common deliberation of those who will live by these rules. How would such a dialogue be organized institutionally?

This sort of interactive approach is the normative basis for an emphasis on deliberative institutions at the transnational level. In particular, Cohen and Sabel and

others have discussed interactions between publics and institutions that facilitate citizens' influence over dispersed but empowered decision making processes, such as the Open Method of Coordination (OMC) in the European Union (EU) (Cohen & Sabel 2004). As I discuss elsewhere, this process is directly deliberative, but not legislative; it does not aim at developing a uniform policy or law that can become the 'will of the *demos*', but rather organizes a process of deliberation among multiple *demoi* (see Bohman 2004). Above all, novel institutions such as the EU committees that coordinate the OMC can act as institutionalized intermediaries that facilitate interaction, communication and the exchange of information across sites and levels in a complex and iterated process of decision making. Even if the actual processes in the EU today are still in need of further democratization, they exhibit two core institutional features that civil society associations and cross-border communities lack: because they are deliberative and recursive, they can open the agenda and the normative framework that empowers the public to democratic influence and revision. They permit just the sorts of interaction among publics and institutions that, as Dewey puts it, 'break existing political forms', here by establishing robust connections across various European publics and levels of decision making. The OMC has also been applied to the human rights regime of the EU, thereby subjecting the rights policies of member states to testing and criticism. Indeed, an advantage of the multiple realizations of rights in the Europolity is that the European Convention of Human Rights already entitles foreigners without nationality in any EU Member State to appeal to the European Court of the Rights of Man and the EU Court of Justice for the juridical recognition of rights.[4] Such an approach would not replace judicial institutions, but rather would create avenues of regularized participatory and deliberative testing of rights policies in addition to initiating legal proceedings (see Bernard 2003). Such a process would then make member states more democratic and better at respecting human rights; in a word, it is a process of democratization.

Gould considers such institutional alternatives and rejects them, including Cohen and Sabel's arguments that processes such as the OMC in the EU represent a viable conception of the institutionalization of transnational democracy in the form of a directly deliberative polyarchy. I agree that as it stands Cohen and Sabel have not fully developed their account of the democratic credentials of these practices, and indeed even admit that as of yet the uses of the OMC have not become fully public. Using the master argument of her book about the proper relationship between democracy and human rights, Gould argues that directly deliberative polyarchy is merely 'quasi-democratic' and circular. 'The rights required to ensure that these processes are democratic are said to be determined at least in part by the course of deliberation and thus such rights are left open for redefinition' (p. 205). Of course, it cannot be asserted that in any actually existing democracy, liberal or otherwise, rights are not also open to redefinition in various institutional contexts. Given that there is no history of jurisprudence and no workable cross-cultural agreement on the substantive force of human rights as standards, the policies for implementing human rights as ends should be deliberated upon publicly and in ways permitting

comparisons across democratic units. The OMC as defended by Cohen and Sabel is simply one of many different ways to provide an institutional basis for such recurrent deliberation about standards, including the legal and political interpretation of various rights.

More importantly, Gould's criticism of opening rights to public deliberation can be answered normatively in two ways. First, the redefinition of rights in the course of deliberation has been part of any historical process of democratization and indeed is the means by which democracy has historically been used as a means to justice. More often than not, democratic transformations bring with them new rights and innovative reinterpretations of old ones. Second, such a process of redefinition is legitimate only if the process meets the democratic minimum (rather than fully maximal requirements of some putative democratic ideal); that is, if the process permits more than just consultation or contestation, but rather the development of robust normative powers of initiation and deliberation by participants, including deliberation about the terms of democracy itself. It is precisely when the interpretation of the substance of rights is open to debate that the dialectic between rights and democracy takes place. The dialectic is fully reciprocal: if rights are to bring about greater democratization, it is only by incorporating them as norms within various democratic processes. It is essential to the recursive character of democratic institutions that they function to create space for new publics if they are to be responsive to new claims to justice. These claims to justice often concern interpreting various rights and entitlements so that they become endogenous to the democratic process, as when they become the basis for new rights and statuses.

Conclusion

I close with one last remark. Suppose that we accept the rich, interactive and dialectical relation between human rights and democracy that Gould so cogently develops. We might think that in this process the most basic political rights that are related to having the normative status of a citizen—a self-originating source of claims—are not up for democratic revision as such. Perhaps this closes the gap between Gould's account of human rights and democracy and the alternative that I have only been able to sketch here.[5] Still the gap does not go away, since this very freedom is deepened, widened in the creative acts of democratization that comes from participating in the *demoi* of global society. The very fact that people have the right to participate in any decision that affects their basic human rights shows that democracy cannot be fully constituted by one *demos* or another, but can only be multiply realized in a variety of *demoi*, including ultimately humanity as a political community, to whom each individual can ultimately appeal for justice on the basis of human rights. I am sympathetic with Gould's diverse solutions to the problem of the scope of democracy, but they gain more force and some coherence by, among other things, rejecting the idea that a singular *demos* is a necessary condition of democracy and by adopting an account of democratization based upon the role of

rights in democratic institutions as both the subject and terrain for the exercise of global political rights.

Notes

[1] UNCHR Resolution 1999/57, paragraphs 1 and 2.
[2] This is a widely held assumption of liberal democratic theory. In order to show that it is not specific to Gould's account, it, can be shown that authors whom she otherwise criticizes clearly accept this same argument about the scope of global democracy. See, for example, Habermas (2001), p. 63. See also Benhabib (2004). She says that there is 'no way' to cut the 'Gordian knot linking territoriality, representation, and democratic voice' (p. 219).
[3] As Anthony Pagden (1995) puts it, 'the Enlightenment was, perhaps more than has been recognized, the product of a world which was ridding itself of its first, but by no means, alas, its last imperial legacy' (p. 200).
[4] Joseph Weiler (1998) points to the case of *Gayusuz versus Austria* that went to the European Court of Human Rights and led to the extension of social security benefits to third-country nationals (p. 719).
[5] For a fuller account of these arguments, see my *Democracy Across Borders: From Demos to Demoi* (forthcoming).

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Beyond Minimalism in Human Rights and Democracy: a Response to Nickel and Bohman

Introduction

I am honored to have James Nickel and James Bohman comment on my book *Globalizing Democracy and Human Rights*, and each offers an interesting and challenging critique of some of my key points. James Nickel focuses on the need for specifying my principle of equal positive freedom by way of giving middle-level justifications of human rights that are entailed by it, and especially of the right of democratic participation in national and international contexts. He further characterizes his own position as a minimalism of human rights. James Bohman argues against my conception of democratic participation as applicable to all contexts of common activities and as required when transnational institutions significantly impact people's possibilities of realizing their human rights, where these democratic processes can in turn be legitimately constrained by human rights themselves. He proposes instead what he calls a more minimalist and pragmatic account of democratic deliberation that operates to generate accountability of international institutions to the new public spheres that form around them. Implicitly, then, I am asked to defend what is regarded as a more maximalist account of democracy and human rights, and I indeed accept this characterization in certain respects and will address it here.

Beyond my core concern with the relations between democracy and human rights, my book deals with a significant number of additional issues, which I take to be strongly related to this core concern. As Nickel points out, these topics range from the idea of concrete universality and the role of care and solidarity in democratic theory, to the idea of embodied politics and an account of needs, to cultural identity and group rights, racism and democracy, stakeholder theory in the context of the corporation, technological networks for democratic participation, and finally to understanding terrorism in relation to concepts of empathy and democracy. While it would be good to be able to discuss these additional themes in more detail in this reply, my two commentators legitimately focus on certain main questions in the book's treatment of human rights and democracy, where these issues are also of interest to those authors in their own important work. I trust that some of the additional concepts I have just mentioned will come into this discussion at various points and that readers will be prompted to follow up afterwards on those that interest them.

James Nickel's comments

First, I should say that I take much of Nickel's account of the specificatory framework for human rights as a sort of friendly amendment to my own views, at least until he

gets to his concluding challenges regarding democracy in international institutions. Nickel's account of the middle-level justification of human rights in terms of protecting people's various important interests is helpful, and represents a way to fill out my own view. In my book, I too characterize human rights as protecting certain basic freedoms, needs and interests, and take rights as valid claims. Thus, I find his lucid account of claims-to and claims-against congenial to my own approach.

Moreover, Nickel quite correctly identifies equal positive freedom as the principle of justice that I advance and analyzes it nicely. But he proposes that its three elements be separated—namely, the commitment to negative liberty, the commitment to equality, and the idea of positive freedom as access to the material and social conditions for activity and for the development of capacities, understood as a process of self-development or self-transformation. For Nickel, a negative freedom norm, a fairness/equality norm and an access to opportunities and resources norm are disparate, and in addition require supplementation by a principle of humaneness if we are to succeed in justifying all the human rights.

However, I suggest that the strength of the principle of equal positive freedom as a principle of justice is that it holds these multiple facets together, for they are essentially interrelated. Thus, access to opportunities needs to be prima facie equal. And why is this? Because of their tie to freedom as self-transformation, which requires not only free choice and its protection through civil liberties and political rights but also access to enabling material and social conditions. Without these interconnections, it seems to me that each aspect of the principle would become ad hoc. I would further observe that since the freedom in question is that of human individuals, it's puzzling to suppose that we could recognize these persons and their agency, as required by equal positive freedom, without in fact treating them humanely.

One reason that I do not dwell on the intermediate justifications of civil liberties and political rights is that I see negative freedom as entailed by the conception of equal positive freedom itself, and I believe that traditional civil and political rights have been well derived and substantiated by many other theorists. Hence, in part, I simply take over those justifications, already given by numerous others, while extending the justification of democracy more broadly than they do. Yet I draw a closer connection between democracy and freedom than is customary in standard accounts and I see democracy as more than a form of government or set of procedures. I will make some comments on that in what follows and will also address Nickel's skepticism in regard to justifying a right to democratic participation beyond the traditional nation-state framework.

It would be helpful first, however, to clarify how the conception I advance of freedom and its conditions grows out of my earlier social ontology of individuals-in-relations and is thus distinct from the established liberal notion of persons, with their various interests, on which Nickel relies in his comments. In the alternative I advance, the practical and concrete agency of individuals over time is crucial, and their activity is understood to require access to conditions, both negative and enabling. The negative ones include not only the traditional absence of state interference, but also freedom from domination by others, and the positive or enabling conditions

include both material and social ones. Activity in this view is taken to involve the transformation of given conditions and requires social recognition and a strong conception of social relationships; through this process it is self-transformative, or involves the development of capacities, where such transformation can take place in individual or social contexts. I prefer this account of activity within conditions to the idea of the individual as a bundle of interests (the language that Nickel employs).

Human rights, both basic and non-basic, can then be seen to specify the conditions that people need if they are to realize projects or transform themselves individually or socially. In the most general sense, they are claims not only against a government, but are claims that each rightly make on all others to organize our social, economic and political lives in ways to make possible the fulfillment of our freedom, needs, and fundamental interests. In this future-oriented sense, human rights are quite demanding. And while I am sympathetic to Nickel's desire to keep the account of the recognized human rights rather minimal, I seek to do so by giving priority to what I call *basic rights* as conditions for any human action whatsoever, and yet allow for a set of *non-basic rights* that specify conditions for the further elaboration of this activity in self-transformation or self-development.

Among the conditions for freedom is participation in common activities, because of the social character of individuals and because systems of cooperation and the realization of shared goals permit the achievement of ends that individuals cannot accomplish on their own. The argument for democracy follows from the character of freedom as presupposing self-determination and as requiring the absence of domination, in both personal and in social and political forms. If participation in common activities is a condition of freedom (as self-transformation), then if people are to be self-determining in regard to such common activities, which are defined by shared goals, they must have rights to co-determine the activities (since no one of them has more of a right to self-determination than do the others, and therefore no one can legitimately determine this collective activity for another), that is, they have equal rights to participate in deliberations and decision making about it. This is the principle of democracy, which is seen to extend to economic and social institutions as well as political ones, and which needs to be based on reciprocal relations in personal life as well. In this conception, democracy is understood normatively not simply as a set of procedures but also as a substantive form of social relations characterized by reciprocal recognition of the equal freedom of the participants and their shared role in co-determining their activity. Democracy in this sense is not only required instrumentally as a way to realize people's basic interests, but is required as an expression of their free activity in social and political institutions and more generally in associational contexts.

Thus, in regard to the extent and the form of democracy, the conception in this book, as in my earlier one, is indeed a maximalist one, perhaps even one of radical democracy. It should be stressed, however, that it does not entail that all decisions of communities and institutions, whether at local or transnational levels, need to be made by everyone involved in them or subjected to votes. Rather, the argument is

that there is a prima facie requirement of rights of participation in deliberation and decisions by those engaged in common projects.

Given globalization, however, potential democratic communities are increasingly cross-border or transnational, and this poses the question of how to apply democratic modes of decision-making, both in my sense and in more traditional ones, to the variety of these new communities. Some of these new communities are what I have called emerging cross-border or transnational localities. The suggestion in my book is that democracy will apply to these associations and communities in a plurality of ways. I also argue that a variety of interpretations of democracy (and human rights) are in fact normatively acceptable, provided they involve equal rights of participation and no permanent renunciation of the power of decision. Thus the concept of democracy should not be taken in exclusively American or Western European incarnations.

My approach differs from standard conceptions of democracy that see it as entailing rights on the part of all affected by a decision to participate in making it. I criticize this 'all affected' principle in the book, especially in view of the difficulties of delimiting all who may be affected, a feature exacerbated by globalization, which renders the principle in this pure form inapplicable. Nonetheless, in addition to my somewhat communitarian emphasis on common activities and associations, I do propose a certain role for permitting input from (or, in some cases, more strongly allowing for full-fledged participation) on the part of those affected by decisions in the context of economic and social globalization.

In regard to decisions by important multilateral institutions like the WTO and the IMF, which set conditions for people's ability to gain means of subsistence and otherwise realize their basic human rights, particularly for those in the Global South, I argue that people at a distance who are importantly affected in their ability to realize their basic human rights ought to have input into these decisions. Thus the fundamental principle remains that of rights of participation in common activities; but given the growing impact of decisions on people at a distance, it is supplemented by an additional principle that specifies when those affected need to have input into these decisions, namely, when they are affected in their human rights, or at least in their basic human rights.

This latter principle can be brought closer to the earlier one of common activity by recognizing that democratic self-determination also requires some degree of (shared) control over the conditions of one's activity (and not only over the activity itself) (see Gould 1988, especially Chapter 6). Accordingly, where people at a distance are fundamentally affected by decisions of multilateral organizations or transnational corporations, there may well not be fully shared goals at stake, but the decisions of these powerful agents do set conditions for the activities of those at a distance, where these may seriously affect their ability to realize their human rights. Thus to the extent that they are to have some control over the conditions of their activity, they need to have some input into these decisions.

In terms of these considerations, I can now address Nickel's objections to recognizing a right to democratic participation in relation to international institutions. While I

reject the idea of world government or a single world community that would entail
rights of participation or representation analogous to those we recognize in nation-
states, I would say that, to put it in Nickel's terms, people's basic interests (as protected
by human rights to means of subsistence and security of the person) may in fact
readily be significantly impacted by decisions of these multilaterals. A further factor
from the standpoint of justice is that these transnational organizations and the govern-
ments that support them may in part be responsible for these impacts. Even apart
from such a direct tie, however, the importance of the basic economic and social
rights, particularly the right to means of subsistence, supports the idea that human
rights impacts need to be considered in the decisions of corporations and the insti-
tutions of global governance. We can further recognize that the people who are
affected are indeed concerned with realizing these human rights (not a difficult
assumption) and moreover that to understand the impacts of decisions on them we
in part need to hear from them concerning these effects and concerning their funda-
mental interests and needs. Relying on Mill's old observation that people are the best
judges of their own interests, people affected at a distance therefore have rights of
input into these decisions by transnational organizations, if not fully equal rights of
participation in making them.

This democratic right can take various forms, from current weak though helpful
proposals for consultation by these institutions with international NGOs, to
Nickel's own very convincing proposal of recognizing a right to petition in these
new contexts, to Bohman's recommendation of input into the deliberation of
experts by new publics (whether this is to operate through the Internet or in face-
to-face ways). But such a right to democratic participation also requires the develop-
ment of new modes of transnational representation within these institutions, beyond
those currently available. Institutional design or redesign to facilitate such influence is
clearly needed. In addition, where people are increasingly connected in new cross-
border or transnational communities of various sizes and types—whether economic,
environmental or simply communicative through the Internet—I have suggested that
we need to recognize rights to co-determine the direction of those activities by all
those engaged in them. My view is thus more maximalist than that of my commenta-
tors with respect to the scope and extension of democracy, but it is certainly not maxi-
malist in insisting on just one interpretation or understanding of it for everyone, or on
specifying the forms it may take.

It is indeed difficult to imagine the forms that new institutions and new modes of
democratic delegation could have, especially in view of the multiplicity of cross-border
or transnational communities that are emerging. My concern in the book, however, is
mainly to offer a justification for extending democratic participation to these new
transnational institutions and communities. Without such a justification, we would
lack any convincing argument as to why powerful new multilateral or transnational
institutions should in fact be open to such participation.

However, I also suggest that an adequate conception of cross-border democratic
participation, as in more traditional political democracies, sees it as legitimately
constrained by human rights frameworks in case these democratic decisions violate

the rights of minorities or otherwise infringe on the recognized human rights. Thus I am sympathetic to the establishment of regional agreements to protect and enforce human rights, including regional courts to which people could appeal even against the decisions of their own governments. These represent only some of the complex interrelations between democracy and human rights that are my focus on in the book.

James Bohman's critique

That democratic decisions can be constrained by human rights also casts doubt on Bohman's formulation of what he takes to be the main question of my book: how might global democracy promote human rights grounded in positive freedom. It is clear from the analysis I have given that I see democracy and human rights as mutually supporting, where both of them are normatively based on the value of freedom (in its full, positive sense). As I indicated in the previous section, on my view human rights specify the conditions for freedom, and democracy is required by equal positive freedom as the norm of justice. Because of its connection to free agency in social contexts, democracy takes a more substantive form—of reciprocal recognition of each person's equality in social interaction, and additionally requires new forms of solidarity with those at a distance. It will become clear, I think, that many of Bohman's criticisms in his interesting article miss the mark by failing to see the integral connection that both democracy and human rights have to freedom in my theory. In *Globalizing Democracy and Human Rights*, my central concern is with understanding the relation of democracy and human rights in the context of globalization, but I retain the tie to positive freedom that I developed in earlier work, where this involves both freedom from domination and access to enabling material and social conditions. In this book, I am also concerned with working out a new conception of universality that supports a certain social and historical contextualization of these norms and allows for a greater multiplicity of cultural interpretations.

To recognize the interdependence of democracy and human rights as I do does not imply that human rights do not have a certain priority. Thus I do not argue that democracy and human rights are simply conditions for each other or that they come into being contemporaneously as Habermas suggests in *Between Facts and Norms* (1996, especially pp. 104–131). And I will try to show that, despite Bohman's arguments to the contrary, any alternative to regarding freedom (understood as equal freedom, explicated through and protected by human rights) as having fundamental normative status will likely be circular or question-begging.

I will turn to that question shortly, and also to Bohman's arguments regarding the issue of the scope of new forms of transnational democracy. But it would first be helpful to clarify why I think that Bohman is mistaken in his use of Berlin to propose that non-democratic institutions can sometimes be better than democratic ones for achieving human rights or perhaps even for achieving democracy itself, as his reference to Algeria suggests. If democracy is understood, as I have proposed, in terms of democratic self-determination, it follows that it can never be right to impose it, either internally within a community or state, or on other communities

or nation-states. Since democracy on my view is an expression of freedom and required by it, and is the collective form of self-determination, it is in principle up to the agents directly involved in the common activity to implement democratic forms of decision through their own actions. Where people live under authoritarian regimes, it can certainly be legitimate to aid them in establishing democracy, provided a majority or substantial minority want and ask for this aid, but any imposition is not justified.

Further, I would suggest that Bohman's argument at this point wrongly implies that freedom is only personal freedom, which a liberal-minded despot might then conceivably allow his subjects. Freedom is also a social conception in the form of collective self-determination, and is an active process where the ends are not achievable through undemocratic means. Likewise, inasmuch as human rights specify the conditions for free activity, they cannot be successfully imposed on people without undercutting that for the sake of which they are adopted. As already noted, freedom requires the absence of domination, in both personal and socio-political contexts, as well as participation in controlling one's own activities and their conditions. This right of participation in fact amounts to a (rather demanding) requirement for democracy across the range of associations and communities to which a person belongs.

We might add that it is a further mistake to suppose that the economic human rights can be separated from the civil and political rights and successfully imposed by dictators or authoritarian regimes. This claim has, I think, been effectively refuted in empirical terms by Amartya Sen and others (see Sen 1999, especially pp. 171–173). In a theoretical perspective, Shue (1980) has shown how rights to democratic participation are essential for people's claiming and protecting their economic rights to means of subsistence and conversely that the realization of economic rights are essential for equal liberty and effective democracy. I rely on this argument as well in Chapter 9 of my book, where I argue for the interdependence of democracy and human rights, in this and other senses.

In his own analysis, Bohman in fact appeals to the idea that particular rights against tyranny and domination are constitutive of justice and he sees democracy as a means to achieving justice in this sense. But his important emphasis on freedom from domination, which I fully share (though, as indicated, in a broader sense that encompasses freedom from personal and social, as well as political, domination), raises the question of whether in fact Bohman—along with other deliberative democrats—is tacitly appealing to just such a conception of freedom and human rights as the one I advance or one closely related to it; and indeed, he seems to be in accord with my approach when he suggests at one point in his article that democracy is required by justice. For we can ask, where else are we to find the source of the value of freedom from domination if it is not a feature of human activity? Indeed, when freedom from domination is proposed as a core value by republican theorists, I do not see its distinctiveness from an account of freedom of the sort I and some others present, except that for them freedom from domination is limited to the political domain. Moreover, to the degree that republican views retain an emphasis on sovereignty and the nation-state, it is difficult to see how they can maintain their full

significance in the context of transnational democracy and globalization. In this connection, it is somewhat puzzling to continue to rely on the concept of 'citizens', as when Bohman speaks of the new sorts of publics relevant to transnational contexts. If he means to speak of global citizenship in some new understanding, then it would be helpful to specify this somewhat further.

Bohman's central critique of my book, through which he also differentiates his own influential approach, proceeds by reference to my critique of quasi-proceduralist theories of democracy. Bohman holds that on my view human rights provide an independent normative criterion by which democracies can be judged. But this is a misleading statement of my view. I do argue that democratic decisions can be rightly constrained by human rights, particularly where these decisions violate the rights of minorities, and I also argue that a conception of justice as equal positive freedom, protected and fulfilled by human rights, gives rise to the requirement for democracy and is in this sense prior to it. In this approach, human rights are not simply necessary conditions if we are to have democracy, but rather require democracy (in fact, a right to democracy has come to be recognized as one of the human rights, as Nickel points out). It is thus the value of (equal) freedom as self-transformative activity that has priority in my theory and we might say a sort of independence, where human rights are understood as conditions for its realization. Thus it is possible to have divergent interpretations of these human rights and to recognize the importance of genuine intercultural dialogue and hopefully achieve greater agreement about them over time.

We may observe, however, that freedom, as well as the human rights that protect and enable it, has only a very limited sort of independence in my account, namely, the sort that it can gain from a *social* ontology. Freedom and human rights are not grounded in any kind of transcendent metaphysics, nor do they have an otherworldly foundation of any sort. Rather, they are based in features of human activity and interaction, and reflect the claims that we reciprocally make on each other for recognition of our equal agency and our common humanity.

I would propose that this sort of social ontological basis succeeds in avoiding the question-begging nature of most discourse theories, which (*pace* Bohman) in fact tend to presuppose that freedom, equality and reciprocity are built into ideal discourses. If these normative desiderata are inserted as presuppositions (whether ideal or real) of the discourse, without independent status or argument, it is not surprising that they will also emerge from the discourse as constitutive of a norm of justice. It is also not sufficient to posit human rights simply as conditions for democratic deliberation itself, because this would amount to asserting without further argument that democracy is an end in itself. Moreover, if these rights are merely instrumental to a functioning democracy, as in some of Robert Dahl's formulations, it becomes only a hope that they will be consistently recognized, and that the rights of minorities will be sustained by majorities. There is also then no basis for appeal if they are violated.

Bohman presents a related critique that needs addressing: He writes, 'If we treat the democratic principle in a maximalist sense, as requiring the full realization of a variety of independently specified rights and freedoms, it will be difficult to make democracy a

means to global justice'. I think it partly depends on the meaning of 'independently'. In my view, the only really independent element is in fact the self-transformative activity of people, more richly interpreted than on most traditional liberal views; this freedom, moreover, presupposes social interaction, including in common or joint activities. In this way, equal freedom and the human rights that serve as conditions for its realization are not merely contingent on people's agreeing to them in a democratic deliberation, or even hypothetically in an ideal discourse.

This is not to say that interpretation plays no role in explicating this freedom and its human rights conditions, nor is it to deny that the particular interests and needs that specify the conditions themselves have a history and depend in part on their social context. In this sense, the conception of human rights is rather minimalist in seeing them as core understandings open to divergent cultural interpretations, which, moreover, are transformed and expanded (or hopefully expanded) over time. Of course, to assert that means of subsistence are basic conditions for people's activity is also not purely a matter of interpretation, and requires elaboration in a theory of basic needs. Yet, the caution that Bohman expresses in his remark is in order in one crucial respect: we need to remember that there is a danger of excessively limiting democracy if constitutional or human rights protections become too strong. Good judgment and a sensitivity to diverse cases are required in their implementation, and the rights themselves need to be held open to new and broader cultural and social interpretations.

Bohman's effort to show that there is a non-circular interpretation of a democratic minimum may succeed, but I fear it is at the cost of leaving freedom, human rights and also minority rights too dependent on decisions by rational/ideal or actual democratic deliberators (even leaving aside the excessively rationalist and cognitivist aspects of such a view, a point I also develop in my book). Thus Bohman speaks of the desirability of achieving a democratic arrangement sufficient for citizens to exercise their creative powers to reshape democracy according to the demands of justice. But where do these demands of justice come from on his view? It seems that for him they include self-development and self-government. But isn't this precisely a conception of freedom of the sort I speak of? Further, he implies that practices are just to the extent that they treat persons as 'free and equal'. But this presumably entails that people are free and equal, as on the equal positive freedom argument. It is not a feature derived simply from deliberation. To put the point more sharply (and it is unclear whether or not this applies to Bohman's view), my impression is that to the degree that deliberative democrats deny that they are presupposing freedom and equality, seeing them rather as norms that emerge from deliberation, they may be operating in bad faith; for they inevitably tacitly appeal to those very presuppositions in framing their argument and making their case. Of course, I can agree with Bohman's statement that 'democracy promotes justice precisely because it enables citizens to demand to be treated justly, as free and equal persons'. But the question is, are they free and equal persons? If so, this view is very much like mine. If this is only a presupposition necessary for democracy, then that would be a different view, but I would say one that is dangerous from the standpoint of possible tyranny, and

ungrounded. I am also puzzled by the recursive idea, as he presents it in his article, if this means that democratic practices can be judged for adequacy only in retrospect. This certainly would seem to eliminate the possibility of any current critique of their inadequacies and injustices within them, where such contemporary critique is in fact an urgent need.

I propose that Bohman's criticisms sometimes miss the mark because of one additional misinterpretation of my view. In Chapter 1 of my book, I in fact distinguish three positions concerning the relation of democracy and justice, not simply the two that Bohman discusses in his article. There he seems to conflate two of the three possibilities that I analyze in the book, assimilating the idea that democracy is required by the norm of justice with the third position I discuss, namely, that democracy is instrumental to achieving just outcomes in decision making or legislation, and is legitimated in these terms. But this in fact contrasts with the first position, in which equal liberty or freedom requires equal opportunities to participate in decision making independent of the outcome of the decisions. My position is generally aligned with this first one, whereas Bohman seems to think of me as an instrumentalist of the third sort. For readers unfamiliar with the book, I should add that the second position analyzed there holds that democracy is the prior or basic value and civil liberties and equal rights are justified primarily as necessary for the preservation and viability of democracy, a position sometimes advocated by Robert Dahl.

In regard to the third position, where the justification of democracy is that it is instrumental to just outcomes, I distinguish two versions: in one, the criterion for the justness of the outcomes of democratic decision making is not merely the appropriateness of the procedure, because even with properly democratic procedures, unjust outcomes are possible. A second version instead holds that an outcome is just if it is produced by an ideal democratic procedure, as in the formulation by Iris Young. On such a view, there would seem to be no appeal possible to any independent criterion of justice. I further distinguish from these the rather complex approach of Habermas (which has itself undergone some important transformations over time), yet I raise certain difficulties with his theory as well. Without reciting the extended argument, and simplifying it here, we can say that the core problem with what we might call discursive proceduralism is that it appears to build the freedom, equality and reciprocal positions of the discussants into the ideal procedure that is in turn supposed to eventuate in agreement about norms, especially that of justice. But these counterfactual conditions of free and equal participation sound very much like equal liberty as a traditional principle of justice. The account would then be rendered circular. It also apparently adduces independent normative criteria not themselves constituted as consensual norms but rather presupposed for procedurally legitimate decisions.

Habermas did not originally present discursive practice or dialogue as a model of democracy per se, which he saw as a question of political organization. More recently, while regarding the discourse principle as applicable to both law and democracy on the one hand and to morality on the other, he sharply separates these two domains, regarding justice as pertaining to the sphere of morality. Regrettably, on my view,

human rights on this later approach belong only to the sphere of political institutions, not to that of morality. They are no longer what used to be called the 'rights of man' and thus seemingly cannot function as claims that people can make on each other independent of their nation-states, as I have argued they should be understood.

I believe that the appeal of deliberative democracy in these versions depends on theorists' presupposing, often without the necessary argument, the freedom and equality of the participants, which they build into the discourses. The alternative (second) position referred to earlier—which simply regards freedom, equality and human rights as presuppositions for a successful democracy—in turn leaves democracy itself ungrounded. Granting that the ideal of democracy has considerable and widespread popular appeal in recent times, simply positing its value in this way would be philosophically unsatisfying. Further, I believe it does not help to appeal to Estlund's concept of legitimacy to settle the issue of justification. For one thing, he advances an epistemic sort of justification for democracy; unlike all these other approaches, he points to democracy as the best way to achieve *correct* choices (making some allowance for justice in his own account). Further, legitimacy on his approach seems to primarily concern the relation between outcomes (taken as decisions or choices) and the majority rule procedures employed to arrive at them (Estlund 1997). This is a rather different issue from the justification of democracy in relation to justice, which is the main focus of the views I consider in my book.

We can observe, then, that there are in fact two sorts of deliberative democrats and I count myself one of the first type. In this type, deliberation is recognized as playing an essential role in the form and practice of democracy. Thus I have argued that democratic participation has to be widely open to discursive contributions from all those with a stake in the outcomes, which I argue extends to some residing at a distance from a given community, and has to be inclusive of all who belong to an institution, association or community, whether political in a strict sense, or social or economic. Discourse and deliberation, where this is reciprocal, and I would add empathic, plays a crucial role, then, and indeed needs to be considerably expanded on grounds not only of conducing to just outcomes but in recognition of the equal freedom of agents.

Nonetheless, I believe that a second sort of deliberative democracy is not successful normatively and has been overplayed: that is the attempt to argue that discursive democratic procedures, even ideal ones, are sufficient for democracy and for assuring just outcomes. Such views do not give an account of the way democracy is itself required by justice, where this principle of justice cannot be understood as itself arrived at consensually, through an ideal or real procedure. Moreover, we need an analysis of the way in which institutions and associations can embody (or, by contrast, obstruct) democratic deliberation and decision making, and also of new ways in which they can protect and fulfill human rights.

This brings us finally to the questions concerning implementing democratic decision making in contemporary contexts of transnationalism and globalization. Here, I would like to defend my idea of the importance of considering the scope of democratic decision making in the face of Bohman's critique. I will leave aside his

occasional questioning of the importance of the pluralism of *demoi* in my own approach; this pluralism is, of course, as central to my account as to his, as is the transformation of the idea of democracy itself and its elaboration in global contexts, though we interpret these factors somewhat differently.

As I indicated earlier, despite the new emphasis I place on the requirement of input from people at a distance when their fundamental human rights are affected, I rule out the simple use of 'being affected' as the basis for the constitution of a *demos*; in fact this is a central argument in my account. And I wish to retain the emphasis on democratic participation as pertaining to already constituted institutions, associations and communities, understood as characterized by common activity, involving a range of shared goals. In the account I give, then, common activity is not the same as the more general notion of interdependence (contrary to Bohman's apparent assimilation of these two notions in his criticism). The latter has indeed become ever more transnational. And were one to take a set of interconnections as a sufficient criterion for the constitution of a *demos*, that would indeed make any demarcation of democratic communities impossible.

Beyond existing communities and associations, I argue in my book that the institutions of global governance ought to permit input, representation, and even a degree of direct participation when people's human rights are importantly affected by the decisions of these institutions (as well as where there are genuinely shared interests that communities or nation-states may rightly co-determine). Apparently like Bohman in his recent work, my own view is definitively anti-sovereignty (though in a recent paper [Gould forthcoming, a] I argue for a new conception of self-determination). Thus Bohman's argument against a single *demos* and against old-fashioned sovereignty misses the mark, since I also argue in this way. Further, to the degree that Bohman calls for a minimum set of powers and conditions that make it possible for citizens not to be dominated and free to make claims to justice in unjust circumstances, I do not see how they can do this without protection of their human rights. Indeed, Bohman seems to concede this as an interpretation of his view at the end of his text. I am apparently more willing than he to see some binding human rights agreements across borders, which can also support regional human rights courts. Yet I would suggest that this does not entail the sort of domination he fears, if it is introduced through genuine intercultural dialogue and agreements, and if it remains only a supplemental framework for democratic associations and communities, now increasingly cross-border.

My approach to transnational democracy thus calls for democratic deliberation and decision making within existing associations, communities and nation-states, as well as in new cross-border ones. In addition, I am developing proposals for transnational representation, and for new forms of deliberation and participation in case people's capacities for fulfilling their basic human rights are affected through the functioning of transnational institutions, whether they be global corporations or the institutions of global governance (Gould forthcoming, b). Note, too, that I have recently clarified that it is impact on the *basic* human rights, rather than the entire range, that most urgently requires these opportunities for participation. I suggest that open deliberation in what

I have called an 'open source model of democracy' is central to facilitating this input by distant stakeholders (Gould 2005). Their participation can serve to expand the epistemic communities—most often composed exclusively of elites—that currently decide important global issues. I see this occurring through the mediation of the Internet and other new technologies, including video in addition to text-based ones, but with a component of face-to-face interaction as well. Such deliberative modes go along with a new emphasis on horizontally networked relations among relatively autonomous local associations and communities. In my book, I call this model one of *intersociative democracy*, and see it as requiring new relations of solidarity among people participating in a variety of overlapping networks and associations.

In the book, I place considerable emphasis on these new social networks and global civil society. But I do not see the possibilities of democratization as limited to them, or as eliminating the questions concerning the scope of communities and participation within them by all their members. Relying on an aspect of Dewey's view, updated with a Habermassian account of the public sphere, Bohman calls for the interaction of institutions with new publics that may form around them. I agree that this is important and is perhaps the best we can hope for in the near term, with various sets of non-state actors interacting with and making demands on the new multilateral institutions of global governance. But it is hardly a recipe for enduring or deep democratic transformation along the lines that Dewey was calling for, which he saw, as I do, as extending to the multiple associations and institutions of economic, social and political life at all levels. With Bohman's approach, we will certainly have more transparency and influence of publics on existing governmental institutions. Yet, it is not clear that these amorphous publics are given an essential role in transforming the transnational institutions themselves or creating new ones. Without further clarification, which I trust Bohman presents in his own forthcoming book, it may even be unclear how they can be distinguished from the older idea of 'pressure groups'. I would agree that where experts are deliberating, say on the Law of the Sea, it would indeed be beneficial to have strong input from the public, but how this will proceed, whether any credentialing is to be introduced for any part of the discourse, how much input distantly and less affected people ought to have, all remain to be formulated.

Bohman places emphasis on a specific proposal by Cohen and Sabel for using the EU's Open Method of Coordination as a model, particularly for testing rights policies. Although I find this method of interest as one effective model of networked decision making, I have two main problems with it. First, it is primarily carried out among elites and bureaucrats, and does not yet give much public access to the shaping of policy or decisions. Further, I argue that it cannot be correct to regard the rights to be adopted as only those that emerge from such a deliberative process. Indeed, this method already operates within a quasi-constitutional framework of rights, one that Europe has developed over the past decades.

My objection here as elsewhere is not to the idea that rights should be open to dialogue, interpretation and agreements across cultures—I have strongly argued for that view in my book, even in regard to human rights. Rather, my claim is that it is

incorrect to regard the ground of human rights as simply dialogue itself, as Bohman sometimes appears to. By contrast, in his concluding remarks he comes very close to my view of the priority of freedom and justice, in acknowledging the need to recognize a basis for these rights in being 'a self-originating basis for claims'. But, unfortunately, he limits this only to the political rights pertaining to citizenship, rather than the range of human rights pertaining to human beings. I also precisely share his idea that freedom expands through 'participating in creative acts of democratization', resulting from participating in multiple transnational *demoi*. For me as well, freedom is a process of development and transformation over time, where a certain concrete universality of networked relations can be expansive of human possibilities (though this must not be conceived in a way that would denigrate or diminish the role of more local forms of expression).

In conclusion, then, I think we need to fully accept but also to go considerably beyond Bohman's important proposals for interaction between governmental institutions and new publics outside them, if people are to gain some measure of real control over their lives and their joint activities in contexts of globalization, as well as some modicum of influence over the distant forces that increasingly impact their basic life possibilities. I would argue that governments, whether national or transnational, need to be brought back into their relation to societies, understood in terms of the freedom and power of associated individuals, connected in horizontal and overlapping networks, and in new, often cross-border communities. These networks and communities are not only discursive, but importantly also action-oriented and sometimes affective. To remain simply with governmental institutions on the one hand and social publics on the other would be to retain the old, sharp separation of state and society. We can say that in addition to public deliberation, people need opportunities to participate in decisions, whether directly in innovative ways or through transnational representatives or delegative structures. Further, this democratic participation would need to take place in a context in which their human rights—including the full range for which James Nickel has forcefully argued in his work—are adequately safeguarded.

In short, then, while I share the emphasis on deliberation and on the multiplicity of new and overlapping transnational democratic communities, I believe we need to be more explicit in our commitment to freedom and human rights than are many deliberative theorists and we have to address the question of scope of decisions and argue for input into them by relevant others situated at a distance. In this way, we can make room for a rather maximal account of a renewed role for democratic participation in a wider array of institutions and communities and under more diverse interpretations than is presently recognized, both in theory and practice.

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