The Unfreedom of the Moderns in Comparison to their Ideals of Constitutionalism and Democracy

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1   Introduction

The first session is a discussion of two critical and abstract principles of legitimacy in late-modern political associations: the principle of constitutionalism (or the rule of law) and the principle of democracy (or popular sovereignty). Since this session opens the conference I would like to begin by suggesting one way in which the discussion of these two principles by the panelists and participants might initiate dialogue on a number of issues that are of central concern to the conference as a whole.

From the famous exchange between Jurgen Habermas and John Rawls in 1995 to the present these two principles have served as the guiding norms of critical discussion of the conditions of legitimacy of contemporary forms of political association.[2] The critical discussion has developed in a number of important ways since 1995 and the scholarship of the three panelists, Anthony Laden, Chantal Mouffe and Jo Shaw, is at the leading edge of these developments. I would like to draw on the work of the three panelists and others to articulate the major lines of argument in the critical discussion of these principles of legitimacy in North America and Europe. I will do this in three parts: (I) the main features of the two principles, (II) three trends in practice that appear problematic in the

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[1]   University of Victoria, Canada. This paper comprises Chair's Notes prepared for a Session on Constitutionalism and Demoracy, held as part of the Exeter Colloquium on Constitutionalism, Democracy and Citizenship: Current Debates on Friday 24 - Saturday 25 November 2000. This event was part of the activities of the EURCIT Network. The speakers at the Session were Anthony Laden, Chantal Mouffe and Jo Shaw.

[2]   Jurgen Habermas, 'Reconciliation through the Public Use of Reason', <u>The Inclusion of the Other: Studies in Political Theory</u>, ed. C. Cronin and P. De Greiff (Cambridge MA: MIT Press, 1998) 49-74; John Rawls, 'Reply to Habermas', <u>Political Liberalism</u> (New York: Columbia University Press, 1996) 372-434. The theorists involved in the critical discussion since 1995 and whose work I draw on in the following sections are too numerous to list.

critical light of these principles, and (III) how the critical discussion of the two principles has responded to these trends.[3]

2.   The principles of constitutionalism and democracy

The principles of constitutionalism and democracy are two critical and abstract norms of legitimacy of contemporary political associations. The principle of constitutionalism requires that the exercise of political power in the whole and in every part of any *constitutionally* legitimate system of political, social and economic cooperation should be exercised in accordance with and through a global system of principles, rules and procedures, including procedures for amending any principle, rule or procedure. The 'constitution' in the narrow sense is the cluster of supreme or 'essential' principles, rules and procedures to which other laws, institutions and governing authorities within the association are subject.

The principle of democracy requires that, although the people or peoples who comprise a political association are subject to the global constitutional system, they, or their entrusted representatives, must also impose the global system on themselves in order to be sovereign, and thus for the association to be *democratically* legitimate. The people or peoples 'impose' the constitutional system on themselves by means of having a say through exchanging reasons in democratic practices of deliberation, either directly or indirectly through their representatives, usually in a piecemeal fashion by taking up some subset of the principles, rules and procedures of the system. These democratic practices of deliberation are themselves rule governed (to be constitutionally legitimate), but the rules must also be open to democratic amendment if they are to be democratically legitimate.

In summary, a political association is legitimate if and only if it is the conjunction of both constitutional democracy and democratic constitutionalism.[4]

F1   Critical discussion over the last decade has brought to light six main features of these two norms of legitimation. The first feature is the critical and abstract character of the principles. They are 'critical and abstract' in the sense that they are not agreed to and applied directly in particular cases. Rather, they are background critical ideas that *orient* participants in their critical discussion

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[3]   I do not mean to suggest that the panelists will agree with everything I say here. See: Anthony Laden, <u>Reasonably Radical: Deliberative Liberalism and the Politics of Identity</u> (Ithaca: Cornell University Press, forthcoming) and his background paper for this session; Chantal Mouffe, <u>The Democratic Paradox</u> (London: Verso, 2000); Jo Shaw, 'Relating Constitutionalism and Flexibility in the EU', G. De Burca and J. Scott, ed. <u>Constitutional Change in the EU</u> (London: Hart Publishing, 2000) 337-58, Jo Shaw, 'Constitutionalism in the European Union', <u>Journal of European Public Policy</u>, 6, 4, 1999, 579-97.

[4]   A major articulation of this view of the principles of constitutionalism and democracy is the Supreme Court of Canada in *Reference re the Secession of Quebec* in 1998, reprinted with commentary in David Schneiderman, <u>The Quebec Decision</u> (Toronto: Lorimer, 1998). See the two articles by Jo Shaw above.

and contestation of the legitimacy or illegitimacy of a form of action coordination and governance. To put this another way, participants in political struggles bring very different and often conflicting traditions, conceptions and weightings *of* constitutional and democratic considerations to bear on a case at hand. What is shared by neo-liberal democrats, social democrats, socialist democrats, feminist democrats, eco-democrats, pluralist democrats, agonistic democrats and cosmopolitan democrats is an abstract and critical democratic-constitutional *orientation* to the systems of cooperation in which they find themselves. They share, so to speak, a mode of problematisation of their political identity. Although the principles are 'abstract' in this sense, they are not idle. They are norms immanent in the practices of political cooperation of late modernity, and thus they are the orientation of critical self-awareness and self-formation that one takes on in virtue of being a participant in these practices.[5]

F2   The second feature (emphasised by Habermas and Rawls) is that the two principles are *equiprimordial.* They are equally basic. If the principle of constitutionalism gains priority over the principle of democracy, so the constitution is the foundation of democratic rights and institutions but is not itself subject to democratic deliberation, then the association is illegitimate. Politics is said to be reduced to 'juridification' and to suffer a 'democratic deficit'. If, conversely, the democratic principle gains priority, then the association is said to be illegitimate because it is 'a tyranny of the majority', without rules and procedures, or the licentious experience of 'empty willing'.

F3   The equiprimordial status of the two principles leads to the third feature, the *Mobius-band* character of political associations in late modernity. No sooner is a constitutional principle, rule or procedure laid down as the basis of democratic rights and institutions then it is itself open in principle to democratic challenge, deliberation and amendment. In early modernity it was assumed that there was some just and definitive ordering of the constitutional and democratic dimensions of legitimate political association; some end-state towards which democratisation and constitutionalisation tend. In late modernity the implication of the equality of the two principles is that a legitimate political association is one in which democratic agreement and disagreement takes place not only *within* the rules of the game, but also *over* the rules of the game from time to time.

Accordingly, a political association that strives to embody both principles in its way of life cannot be an end state or definitive ordering but must be seen as an ongoing activity, an open-ended set of democratic constitutional processes. This democratic-constitutional form of activity is like a Mobius-band in the sense that

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[5]   This first feature is analysed by both Chantal Mouffe and Anthony Laden. Of course it is possible to call into question this entire orientation given by the conjunction of constitutionalism and democracy; to reproblematise this mode of problematisation. Nonetheless, it is interesting to note, as Hegel did, how many attempts to do so are either caught up in the two principles in one way or another or border on idle speculation. This is the main point of Charles Taylor, <u>Sources of the Self</u> (Cambridge: Harvard University Press, 1989).

a set of constitutional arrangements provide the foundations for democratic practices for a stretch, then democratic practices of deliberation provide the foundations for negotiating these arrangements for a stretch. Like the European Union then, democratic constitutional association is not legitimate in virtue of possessing a constitution (a well-defined set of essential rules) or a 'finality', but more in virtue of the relation between the rules and the discursive practices in which they are negotiated, implemented and renegotiated.[6]

F4   Fourth, democratic constitutional politics has, among other things, an irreducible *agonistic* dimension. Disagreement, dissensus and dissent among adversaries go all the way down. This follows from the previous characteristics, as well as from other considerations. Once the two principles are seen as equiprimordial, then it follows that there will always be an unresolved and unresolveable tension between them. A people or association of peoples cannot, at one and the same time, be both sovereign over the rules (the principle of democracy) and subject to them (the principle of constitutionalism).[7] This abstract tension or lack of definitive resolution explains the Mobius-band character of political cooperation under the two principles. In addition, as we have seen in the first feature, the abstract character of the principles allows for an open-ended family of reasonable yet different and conflicting traditions of interpretation and application of the principles in any case and over time.

Furthermore, the conjunction of these heterogeneous principles is historically contingent, the product of the last three hundred years of history. There is no reason to presume that consensus should be an essential property of the conjunction. Finally, any democratic agreement on constitutional essentials or some subset of them - in theory or in practice - is made in conditions of real time, unequal relations of power, and limited knowledge. And, once the agreement is put into practice, aspects of injustice and dissensus arise that were not apparent during the deliberations leading up to the agreement. This is not to say that people do not reach agreement and even consensus from time to time on principles, rules and procedures, as well as compromises and legitimate decisions taken by a majority or a court. It just means that no settlement is definitive or immune from reasonable disagreement. What makes a constitutional arrangement legitimate is not, therefore, its approximation to a consensus but its openness to democratic contestation (agonism).

Agonistic deliberation among adversaries is not a flaw at the heart of democratic constitutionalism. The power of the democratic exchange of reasons to call into question and critically examine sedimented discourses, power practices and individual self-understandings requires disagreement and contestation to take

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[6]   See especially the work of Jo Shaw for this third feature with respect to the European Union.

[7]   Readers of Michel Foucault's <u>Les Mots et les choses</u> will recognise this as an instance of one of the constitutive 'doubles' of the modern age, the demand to be both sovereign and subject.

effect. This should be called the *Socratic* feature of democratic constitutionalism.[8]

F5 Fifth, in early modernity the principles of constitutionalism and democracy were understood (or preunderstood) to apply to more-or-less self-contained, representative, democratic states or societies: that is, the Westphalian model. In late modernity, modes of governance or forms of political association are more porous, overlapping, multi-layered, dispersed and subject to change. The characteristic is especially evident in the European Union, but it is also a characteristic of other polities affected by the whole cluster of processes of political globalisation and localisation (or 'glocalisation'), with the possible exception of the United States, which seems to have the power to retain its Westphalian character. The present political topography is, so to speak, this tricky combination of weakened Westphalian state-like containers and dispersed nodes of political coordination in overlapping networks. As a result, the assessment of the legitimacy of 'fair systems of social cooperation' is much more complex today than earlier in the last century. Call this the *dispersion* feature for short.

This is not to say that every traditional or dispersed form of political association is legitimate only if it passes the democratic-constitutional test. Many forms of action coordination and governance are non-constitutional and non-democratic: markets, public and private administrative bureaucracies, families, corporations, and regulatory regimes. However, it does mean that if a system of cooperation is not organised democratically and constitutionally, then it requires a reason or justification that can be made good to the people who are subject to it and its effects (justifications such a efficiency, competency, utility, a distinction between public and private, tradition). And these justifications too, for the reasons we have already discussed, are always a site of democratic contestation *pro and con* (by the adversaries mentioned in F1).[9]

F6 The final feature of the principles of constitutionalism and democracy is their relationship to *practices of citizenisation*. Subjects become citizens not only in virtue of a set of constitutionally guaranteed rights and duties enabling them to participate in the institutions of their association. They also take on their identity or form of self-awareness and self-formation *as* citizens in virtue of participating in democratic-constitutional institutions and, more importantly, participating in the array of practices of deliberation over the existing institutions. These variegated activities (from small discussions to party politics, interest groups and constitutional referenda) give rise to the from of self-awareness and orientation mentioned in the first feature: one's identity as a citizen of an association organised in accord with the two principles.

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[8]   See especially Chantal Mouffe, 'For an Agonistic Model of Democracy', <u>The Democratic Paradox</u> 80-108.

[9]   For feature five in relation to the European Union see the works of Jo Shaw.

Participation in these practices of reason-exchanging citizenisation *confers* legitimacy on the two principles and on the political association in which the democratic deliberation takes place, even though the deliberation is over the legitimacy of the association and even though disagreement is irreducible. Citizens develop a sense of identification with the principles and the association to which they are applied not because a consensus is reached, or is on the horizon, but precisely because they become aware that, in despite all its imperfections and injustices, the association is nonetheless open to this form of agonistic democratic deliberation. This legitimacy-conferring aspect of citizen participation generates the unique kind of *stability* characteristic of constitutional democracies in the face of disagreement and diversity.[10]

3   Three Problematic Trends

There are three major trends in practice in the present that are seen as problematic in the light of, or under the orientation of, the principles of constitutionalism and democracy. These trends have become the sites of political struggle in practice and critical reflection in theory. Since the trends are the concern of other sessions as well, in order to describe them briefly I will draw on the background readings for the other sessions and the work of David Held on global transformations and cosmopolitan democracy.[11] This will set the stage for the final section on how these problematic trends have been addressed in the critical discussion of the two principles.

T1   The first trend is the processes of *global juridification* which accompany the economic processes of the globalisation of capital. The proliferation of global regulatory regimes, such as the North American Free Trade Agreement (NAFTA) and the World Trade Organisation (WTO), constitutes complex processes of global constitutionalisation. These constitutions lay down the basic rights and duties of individuals, peoples, states and private corporations that provide the conditions for the expansion of global, corporate capitalism. These constitutional regimes have the capacity to override domestic and national constitutions, forcing them to conform, and to free the economy from the democratic control of existing nation states.

In the light of our two principles this trend is seen to be of questionable legitimacy for two reasons. First, the regimes of juridification do not establish new or renewed local and global representative democratic institutions to govern the economic processes for which they provide the constitutional underpinning. This is unlike the historical development of nation states and national economies, in which the constitutionalisation of market relations was confronted with the representative democratisation of the basic social and economic

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[10]   See especially the forthcoming book by Anthony Laden and Chantal Mouffe, 'Wittgenstein, Political Theory and Democracy', <u>The Democratic Paradox</u> 60-80.

[11]   David Held, <u>Democracy and the Global Order</u> (Stanford: Stanford University Press, 1995), David Held and Anthony McGrew, David Goldblatt and Jonathan Perraton, <u>Global Transformations</u> (Cambridge: Polity Press, 1999).

structure of these political associations, at least to some extent. Supra-national and global regulatory regimes are non-democratic and often anti-democratic. Second and more fundamentally, the processes of juridification do not pass through and are not subject to the democratic deliberation of the humans who are subject to them.

This is a trend, therefore, in which a specific type of constitutionalism has gained priority, and perhaps exclusivity, over the principle of democracy. It is argued to be illegitimate because it violates the equiprimordial condition (F2) and, as a domino effect, the four following features (F3-6). It is important to bear in mind that there are two distinct parts to this claim of illegitimacy. First, it is the priority of the principle of constitutionalism over democracy and, second, it is the priority of a specific type of constitutionalism: namely, neo-liberal constitutionalism. (One could imagine, in a possible world, another type of global juridification, of, say, the conditions of deep ecology, which would still violate the general equiprimordial condition.)

T2   The second problematic trend is the devolution of political power and the dispersion of political associations. This refers to the proliferation of nations, states and city-states; the devolution of powers within federal states and the European Union to sub-units under the pressures of multinationalism, multiculturalism, and regionalism; the emergence of multi-layered functional governance locally and globally; and the farming out of dispute resolution to ad-hoc, on-site bodies or 'nodes' with network-like relations to other bodies and to the more traditional institutions of representative democracy. Although this is seen by some (myself included) as the expansion of opportunities for citizen participation, it is also a trend towards *weaker* political associations. The new states and the new governing units within and across old states are weak corporations relative to the increasing power of global economic corporations and regulatory regimes.

As Claus Offe argues, except for one or two states within the G7, states lack the power to enforce democratic procedures and outcomes that challenge global corporations and their ability to move elsewhere.[12] The result is that the weak polities become trapped in a 'race to the bottom'. They reduce constitutional democracy to providing the conditions of safety and security required for the expansion of global capitalism in order to attract the economic development they require to remain solvent. They are unable to enforce the local self-determination, survival of linguistic and cultural diversity, economic equalisation, health-care or environmental safeguards they are set up to protect and promote. The trend to devolution and dispersion thus supports rather than challenges the trend towards global, non-democratic juridification, and so is of questionable legitimacy for the same two reasons.

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[12]   Claus Offe, <u>Modernity and the State: East, West</u> (Cambridge: Polity, 1996), cited in Zygmunt Bauman, <u>Globalization</u> (Cambridge: Polity, 1998) 68.

T3   The third trend is a decline of democratic deliberation and decision-making within the traditional institutions of representative nation states. The policies and decisions of representative bodies are increasingly the outcome of unaccountable ministries on the one hand and a small circle of representatives elected through non-deliberative advertising campaigns and controlled by wealthy lobbying interests on the other. Constitutional reform is crafted by unelected experts and ratified by referenda subject to mass advertising rather than democratic deliberation. Political powers are abjured to the market or passed to global regulatory regimes by small groups of unelected and unaccountable negotiators whose self-consciousness has been shaped by careers in ministries and large corporations, not in practices of citizenisation.

This well-documented trend serves to augment the other two. Finally, the three tend to work together to reinforce the underlying and growing global inequalities in power, wealth, well-being and access to decision-making. These inequalities in turn erode the capacities of the majority to organise for democratisation, thereby closing a vicious circle of 'nautonomy' (to use David Held's apt term).[13]

4   Three Responses

The critical discussion of these three trends in the light of the principles of constitutionalism and democracy has generated three responses over the last five years.

R1   The first response is to accept these trends, either by celebrating them or by resigning oneself to processes said to be beyond democratic-constitutional control. The most influential celebratory side of this first response is neo-liberalism, but certain reformulations of social democracy, such as the 'third way', have also been influential. Here the coordination and governance of human interaction and cooperation by global markets and regulatory regimes, behind the backs of the participants, is said to be far too complex and fragile for the subjects to have a democratic voice without introducing destabilising incompetence and inefficiency, which, in any case, no one wants. Rather, the demands of democratic-constitutional legitimacy are now met in the space of 'life politics' opened up and made possible by globalisation and juridification. One may now turn one's individual or collective life into a democratic enterprise; deliberating about, taking on, and revising a wide range of careers, consumption patterns, lifestyles, identities, and *'thin'* voluntary associations around gender, cultures, languages, hybridity and the environment, and being free to change these as one chooses. We, individually and in groups, are free to invent ourselves as we move from role to role, and thus to live life like an actor, as Nietzsche predicted.[14]

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[13]   Compare Richard Falk, <u>Predatory Globalization: A Critique</u> (Cambridge: Polity Press, 1999).

[14]   Anthony Giddens is often associated with this type of positive description of life politics. For Nietzsche's prediction and his concerns about it, see Paul Patton, 'Nietzsche and the problem of the Actor', Alan Schrift, ed. <u>Why Nietzsche Still?</u> (Berkeley: University of California Press, 1999) 170-84.

On the other side of this response are those who accept these trends in a spirit of resignation. They see the freedom of life politics as superficial at best. Given the enormous inequalities, the freedom of consuming ways of life is available only to the few and even for this elite the range of options is narrow. The vast majority of the world are condemned at best to watch and try to imitate the rich and famous minority in a kind of global synopticon.[15] Moreover, while those involved in life politics are free in a sense, their identities, modes of conduct and choices are subject to and constituted by new and diffuse forms of non-democratic and non-constitutional modes of governance, or 'governmentality', which are often internalised and which bring their activities in line with the three trends of the previous section.[16]

The more critical response has been to call into question the legitimacy of the three trends in the critical light of the principles of constitutionalism and democracy. The critical discussion of the principles since 1995 has developed around the elaboration of the six features (of section one) in response to the three trends and neo-liberal justifications of them. There have been two major critical responses or, more accurately, two waves of critical response.

Both responses share, to different degrees, a critical stance to the three trends and life politics of the following kind. To deliberate alone or in a private group rather than in public with fellow citizens; to deliberate about superficial life politics rather than about matters of common concern and public goods; and to deliberate in order to act within relations over which one has no say rather than in order to act together in exercising political power over those relations - all this is not freedom but freedom's disappearance. For these critics, democratic-constitutional freedom makes its appearance when subjects take up the task of acting as citizens in the threefold way of the above contrast (either directly or in some mediated relation with their representatives). On this threefold contrast, even the freedom of the mobile elite is illusionary (and perhaps pathological, as in the disturbing yet best-selling novel by Alan Stillman, <u>Diagnosis</u>). At the heart of this critical stance is the view that in constitutional democracy 'politically important choices are made in conversations with others in relevant institutions, where the relevant institution is also the one that is likely to be coercive with regard to the practices under discussion'.[17] Democratic constitutional freedom, then, is the activity that animates a constitutional democracy oriented towards legitimacy.

R2 The second response to these trends, the first critical response, has been to assert the principle of democracy in response to the three trends of non-

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[15]   Zygmunt Bauman, <u>Globalization</u>, op. Cit.
[16]   Nikolas Rose, <u>Powers of Freedom</u> (Cambridge: Cambridge University Press, 1999).
[17]   Charles Spinosa, Fernando Flores, Hubert Dreyfus, <u>Disclosing New Worlds</u> (Cambridge: MIT Press, 1997) 74. This is a theme that runs through the writings of the three panelists and of the 'second wave' critical theorists of democratic constitutionalism (who I discuss below).

democratic constitutionalisation. This response has been elaborated in various ways by theorists of deliberative liberalism, deliberative democracy, communicative democracy, neo-republicanism and cosmopolitan democracy. They have concentrated on the importance of the deliberative or 'exchange of reasons' dimension of the principle of democracy (section one, first paragraph), the critical and abstract character of the two principles (F1), and the exploration of the equiprimordial status of the two principles (F2).

However, this first wave of deliberative democrats tended to assume that democratic constitutionalism takes place within more-or-less self-contained nation states and that it aims at a just and definitive ordering of recognition and distribution, which it is the role of the theorist to articulate in a theory of justice and the role of the people to reach agreement on in practice. Accordingly, they did not make the transition to the activity-oriented view of democratic constitutionalism which now characterises the critical discussion.

R3   The second wave of critics has built on this early work but also exposed its shortcomings and elaborated the activity-oriented view of democratic constitutionalism and the four other features that define it, F3-F6. The elaboration of these features in critical response to the three trends can be summarised in three brief points.[18]

R3.i   Recall feature six. Citizens develop the capacities to exchange reasons *pro and con*, and so become citizens, in and through participation in practices of democratic deliberation. Therefore the concentration on theories of deliberation and reason-giving is insufficient. For this deeper critical response, it is necessary to study the ways in which practices of citizenisation are engendered and sustained. This marks a turn in the critical discussion from the epistemology or metaphysics of exchanging reasons to the practices in which they take place, analogous to the turn taken by the theorist of the second wave of the Enlightenment - Rousseau, Hegel and Marx - from metaphysical critique to a practice-oriented and contextual philosophy.[19]

When the critics turned from metaphysics to political practice, however, they did not discover the traditional autonomous, representative democratic nation states but, rather, feature five: the devolution of political power and the dispersion of political associations. And, they found that the practices of democratic

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[18]   Many of the theorists who initiated the first wave of deliberative democratic constitutionalism made the transition to the second wave and have been instrumental in elaborating the four features. For example, Richard Bellamy's version of neo-republicanism, Iris Young's version of communicative democracy, John Dryzek's deliberative democracy and beyond, Joe Carens theoretical-contextual approach to accommodating diversity over time, and Rawls' 'Public Reason Revisited'. When the second wave arrived on this new and rough shore of practice David Owen was already there to greet us, discussing these issues with Nietzsche and Wittgenstein. See his 'Genealogy, Parrhesia and Mourning', forthcoming.

[19]   See especially the works of Chantal Mouffe and Anthony Laden for this turn to practice and historical context.

deliberation in these political associations are weakened and undercut by the three trends of the previous section, particularly the second trend. Accordingly, the critical discussion is now seen to address a different and distinct problem: how to engender and sustain constitutional-democratic practices of deliberation under these new circumstances? This practical problem of second-wave enlightenment in the conditions of globalisation has two parts.

First, as we have seen, members of contemporary societies are overwhelmingly subject to and constituted by non-democratic practices of governmentality which tend to constitute consumption-oriented identities, abilities and modes of conduct. They have developed neither the disposition nor the interest to engage in citizen deliberation because they have not been participants in democratic practices. The problem therefore is the one that Rousseau credited Montesquieu with first identifying: how do you initially move people from market-oriented practices and ways of being to practices of democratic deliberation and constitution making, which then, over generations, become self-sustaining?[20]

Second, as we have seen, even if people can be moved in this direction, the available traditional and dispersed democratic institutions are weak relative to powerful global corporations and regulatory regimes and the combined force of the three trends. The problem is thus how to engender or revitalise democratic practices with the capacity to make and enforce democratic decisions and constitutions strong enough to govern these powerful, mobile and diffuse non-democratic actors?

The response to this two-part problem is new theoretical and contextual research on the development of global networks of nodes of democratic practice, linking together and strengthening the traditional and dispersed, glocal democratic institutions on the ground, reform of the United Nations, democratisation of the WTO, and the like.[21] Since global corporations now appear destined to become more powerful governing ensembles than constitutional-democratic states, a complementary strategy is to try to democratise the constitutional structure of these new sovereigns from the inside, as we the people did to absolutist and administrative sovereign states over the last three hundred years (to some extent),[22] in addition to trying to regulate them democratically and constitutionally from the outside.

R3.ii The presumption of the first wave of critical discussion that the telos of democratic deliberation is consensus on a just and definitive constitution, or on a

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[20]   Jean-Jacques Rousseau, <u>Du contrat social</u> II.vii. His solution, which I do not agree with, is the legislator.

[21]   For example, David Held et al, ed. <u>Reimagining Political Community</u> (Cambridge: Polity, 1996).

[22]   For this history, see Martin Van Creveld, <u>The Rise and Decline of the State</u> (Cambridge: Cambridge University Press, 1999), R.C. Van Caenegem, <u>An Historical Introduction to Western Constitutional Law</u> (Cambridge: Cambridge University Press, 1995), and David Held, <u>Models of Democracy</u> (Cambridge: Polity Press, 1996).

set of procedures for reaching agreement on the constitution, was then called into question by theorists of agonistic constitutional democracy. They have gone on to elaborate the various dimensions of disagreement and dissensus summarised under feature four in the first section. This turn has come about partly as a result of theoretical debates, but also just as much from the practice-oriented, contextual investigations of specific cases of democratic deliberations, dispute resolutions, reconciliation commissions, and constitutional negotiations throughout the devolved and dispersed forms of political associations (following from R3.i).

It follows from the irreducible element of ongoing disagreement and adversarial contestation that legitimate democratic constitutionalism is an open-ended activity, not an process with a definitive end state. Consequently, the critical discussion of the agonistic dimension of democracy lead to the elaboration of feature three, the Mobius-band character of democratisation and constitutionalisation, and so to the exploration of the freedom of democratic dissent and deliberation in practice rather than to the earlier concern with definitive theories of justice, as the key to legitimacy.

The major contribution of agonistic democrats has been to stress the positive role of irreducible disagreement in democratic deliberation in fostering a critical democratic ethos. They have argued this against the dangers of the earlier, consensus-oriented models of deliberative democracy (which either screened out differences or accepted them without critical reflection) on the one hand, and the non-adversarial, classless ideology of constitutional democratisation of the neo-liberal and third-way defenders of global juridification on the other.[23] It is precisely by exchanging *pros and cons* in dialogues with contestants who see the constitutional arrangement of the shared political association differently and who can give reasons for their views that we are empowered to free ourselves from our partial and limited views to some extent, reflect critically together on them, and to negotiate the modification of the relations of power and meaning that bear us: that is, to think and act differently politically.[24]

After all is said and done, the constitutional democrat is not Lenin. She does not aim for the end of politics and the administration of things. She is more akin to the young Olympian or warrior who greets the dawn's early light with a smile, rises, dusts herself off, surveys her gains and losses of the previous days, thanks her gods for such a challenging game and such worthy opponents, and engages in the strategic-communicative campaign anew.[25]

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[23] Chantal Mouffe, 'A Politics without Adversary?' Democratic Paradox 108-29 and Anthony Laden, background paper for this session.

[24] For a second-wave attempt to analyze the critical potential of democratic dialogue by drawing on the work of Foucault, Gadamer, Habermas and Taylor, see Hans Herbert Kogler, The Power of Dialogue (Cambridge: MIT 1999).

[25] In other words, she's human. F. Nietzsche, 'The Humanness of the Future', The Gay Science, tr. W. Kaufmann (New York: Vintage, 1974) book 4, section 337, p.268. See Wendy Brown, States of Injury: Power and Freedom in Late Modernity (Princeton: Princeton University Press, 1995) for

R3.iii These changes in the critical discussion of the two principles of legitimacy in response to the three trends have, finally, brought about a fourfold change in the understanding of critical constitutional democratic theory itself. The critical and abstract (rather than regulative and positivist) character of the principles of legitimacy that orient critical reflection has been clarified. Critical theory is now related reciprocally to the historical and contextual study of diverse practices of constitutional democracy in the context of the three trends of globalisation. Constitutional democratic theory is seen as a dialogical form of critical reflection that is within the critical orientation of the deliberative practices of modern societies, rather than a form of reasoning that stands above and aims to give a comprehensive account of universally applicable conditions of legitimacy for every case.

Fourth and finally, since democratic constitutionalism is seen as an ongoing and open-ended activity, constitutional democratic theory is reconceived as a kind of 'permanent critique' of all phases of this activity. It is a form of critical reflection in and on, and a form of learning with and from, the diverse practices of constitutional-democratic negotiations; the types of agreements reached and disagreements heard and taken into account; the regimes of implementation; and the procedures of review and renegotiation that start the whole constitutional-democratic activity going again. A critical theory appropriate to democratic constitutionalism is itself a permanent democratic activity.[26]

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a contrast of this democratic attitude to the prevailing attitude of resentment and recrimination. This is similar to Chantal Mouffe's distinction between treating one's deliberative partners as 'enemies' rather than as 'adversaries' with whom one can cooperate across respectworthy differences. See also Anthony Laden's account of reasoning genealogically and critically together versus reasoning side-by-side in Reasonably Radical.

[26] This draws in part on the account of critical theory as a permanent critique of our present by Michel Foucault in 'What is Enlightenment?', ed. P. Rabinow Michel Foucault: Ethics, Subjectivity (New York: The New Press, 1998) 303-21, as well as from the work of the three panelists.