

**THE ADAPTIVE APPROACH TO DEMOCRACY: A NEW LOOK AT DEMOCRATIC
GOVERNANCE IN THE EUROPEAN UNION**

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University of Pittsburgh, 2009

Consideration of the democratic qualities of supranational institutions—specifically the European Union (EU)—consistently display a reliance upon principles of democracy as they are found in nation-states. While there is considerable discussion about the problems that this reliance poses, finding strategies for avoiding that reliance, especially in the case of the EU, has proven difficult. This study examines the way in which European institutions are judged by democratic criteria, and demonstrates the problems that come with replicating state-bound principles of democracy as if they say something about a perceived deficit in European-level democracy. Instead of rigidity in principles, what is needed to examine democracy at the supranational level is a fluid and flexible approach that still provides a robust understanding of what is happening (and not happening) democratically in the institutions of focus. The *adaptive approach to democracy*, using a framework that distinguishes between first-order principles and second-order principles of democracy, is a tool that provides this flexible yet robust perspective. This approach views democracy as clusters of different principles at work in a variety of institutions, rather than as a specific set “laundry list” of principles that must be included for a system to be judged democratic or not. This approach is particularly valuable for supranational institutions, where assumptions about democracy make a rigid lens for analysis. This rigidity can

cause descriptions of supranational institutions to either miss new ways of democracy being met or to result in excessive reliance upon a defined set of democratic principles that are misfit to the institution in question. This study lays out the adaptive approach, based upon the central first-order principles of freedom and equality. Then through three case studies of EU institutions the method is employed: focus is upon the European Parliament (the traditional spot for democratic hopes to be hung), the European Court of Justice (an institution often considered to have the most undemocratic features in the EU), and Daphne, a Commission program against gendered violence (an under-explored location where democratic principles can be found working in unexpected ways).

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PREFACE

The writing of a project such as this one could not have been accomplished without the support, insight, and critiques of my advisors, colleagues, friends, and family. I especially want to acknowledge Dr. Michael Goodhart, for his insightful critiques and advice—not to mention his continued patience. Thanks also go to Dr. Guy Peters, Dr. Frederick Whelan, and Dr. Andreas Føllesdal for their commentary on previous drafts of the work. Other colleagues and mentors whose help—either intended or not—include Dr. Kate Floros (who believed I could complete this more than I did), Dr. David Bearce (whose first term advice saw me through the course of my studies), and Becky Taylor (whose insight finally let me escape my worries and just sit down and write). Other thanks to colleagues are due to Dr. Matt Weinstein, Luis Jimenez, and Eric Wagner, for being sounding boards for ideas and motivators to meet deadlines. On the personal side, I want to thank my family—Mom, Dad, and Meredith—as well as good friend Nate Wallace for their support and belief in me.

1.0 INTRODUCTION: FROM THE DEMOCRATIC DEFICIT TO AN ADAPTIVE SOLUTION

Of the many difficulties posed by political inquiry, one has remained constant through time: change. From Athens to Sparta, monarchy to democracy, and campaigns by train to the era of televised debate, study of the political has always occurred over a landscape of change. One of the more recently recognized factors which changes political inquiry is the phenomenon of globalization.¹ While the same process may have existed long before being assigned the name “globalization”, modern scholars and policymakers have become increasingly sensitive to the ways in which globalization affects our political analysis. Like all change, consciousness of globalization as a phenomenon required a shift in the way in which researchers and policymakers thought about politics. Yet while there is consciousness that globalization requires altering our thinking about issues, successful navigation of changing the way we as scholars think is not always an easy task.

The work that follows is an attempt to focus on the way in which we, as scholars and thinkers about political questions, can change the processes, paradigms, and concepts in our minds to adjust to change—in particular, the change that political organization and governance

¹ Here I use the term globalization in the manner of Held et. al. (1999), pg. 16: “a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions—assessed in terms of their extensity, intensity, velocity, and impact—generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power.”

above the level of the nation-state (the *supranational*) brings. Danger resides precisely at the moment where our concepts and paradigms are not keeping pace with the changing reality of the topics we study, where the old institutions and ideas are evolving, mutating, re-arranging due to the phenomenon of globalization. Many issues can draw our focus here, between changes to the state system itself, to the international system and transnational political life.

Theorization on global democracy has been one area particularly good about addressing the effects of globalization on our consideration of familiar and new structures of governance. Yet gaps exist, most notably with a system of supranational governance that is potentially the most state-like and/or federal in composure amongst the field of supranational governance structures: the European Union (EU). While global democracy literature is just now beginning to consider the EU in depth, previous and continued hesitancy to consider the EU is at least explainable.² Factors such as its complexity or its unique contextual development (the EU as *sui generis*) may leave it somewhat unappealing to the political theorists and global democrats.

Yet two initial observations are important here. First, the field of work on the democratic deficit in the EU was not in sync with the growth industry of political theory treatments of democracy at the global level. Second, theorists we might consider as global democrats are surprisingly quiet about the way that the EU may or may not fit the points that they raise about supranational institutions. The EU, as one of the most institutionalized supranational governance structures in history, seemed ripe for comparison to the concerns of global democracy. The puzzle is not simply why these two literatures remain so isolated, but also how to bridge the gap between the two in a world where our paradigms and concepts must cope with the changes that globalization brings.

² For an example of the emerging global democracy theory treatments of the EU, see Goodhart (2007).

This dissertation considers whether the practices of the EU can be a starting point for creating a more appropriate conception of what supranational and non-sovereign democracy looks like. Existing literature on global democracy has a significant blind spot that obscures such considerations of the EU. Global democrats seek to define supranational democracy while sometimes paying little heed to a significant institution that may already contain answers about the nature and quality of supranational democracy. Cases from the EU context can be used to specify a new understanding of what democracy above the nation-state might be.

However, reaching that new notion means changing the very way in which we as scholars approach our thinking about democracy. Current democratic theory approaches fail to provide the sort of traction that is desirable to make connections between democracy in the supranational and the specifics of the EU. Democratic theory can prove to be too rigid, in which case the specifics of institutions can fail to meet their requirements. The tendency toward rigidity leads us to rule out new democratic phenomena simply because they do not fit the pre-formed notions that we are carrying. Conversely, our principles of democracy can be so simplistic—in the interest of applying to multiple cases—that their very broadness causes problems in judgment. If we restrict democracy as a concept so much that it becomes voting and voting alone (for instance), it may become *too* applicable. We would not want a theory so thin that the electoral process and telephone voting for contestants on reality television get treated as similar phenomena (let alone both indicators of democracy). Given these difficulties, scholarship on democracy, the supranational, and the EU needs a fresh approach.

I argue that my *adaptive approach* provides an initial account of democracy that can allow for creative interrogation of supranational institutions. In this way, the EU serves as a case which can tell us something new about the nature and democratic possibilities of supranational

institutions. The adaptive approach provides a means to avoid a central problem of democratic theory, namely needing to choose between a specific account that lacks applicability or a general account that may travel well yet provides insufficient insight into democratic principles.

It is important to be clear about what questions I am *not* trying to answer in my research. I am not saying that certain practices in the EU can be viewed as democratic in reference to a particular theory of democracy. Instead, I will be exploring how an adaptable definition of democracy can be crafted to facilitate the type of inductive theorizing about democracy that this research envisions. I do not want to stake out a detailed normative democratic theory position then systematically compare the institutions and practices of the EU to that position, essentially labeling each case as democratic or not. That is a different project. Instead, what I develop is a preferable variation of minimal or thin definitions of democracy, which I call the *adaptive approach* to democracy. When applied to the ways in which the EU acts at the supranational level, the adaptive approach forms a lens for viewing particular institutions and practices that can allow greater insight (via the EU as one example) into what our judgments about democracy at the supranational level should look like.

Through the adaptive approach, we can reformat the way in which we think about the principles of democracy to allow for a flexible yet robust conception of democracy, which is suited to political inquiry in an era of globalization—as chapter two will explain in full depth. However, in order to proceed with the project at hand, there are three important literatures which must be addressed before getting to the adaptive approach. The following three sections review the critical literatures that form the background from which the adaptive approach stands out in sharp relief. I review them with the purpose of demonstrating why adaptive democracy applied to the EU is a more useful approach than much of the literature on the EU and global democracy.

The first section deals with the continuously-referenced topic of the democratic deficit of the EU, showing the statistical limitations of much of that body of literature. The second section briefly considers the usefulness of inquiry into theories of integration for my project. The third section explores the way in which global democracy has previously been theorized, and considers why the EU has received undue neglect in that literature.

Through the exploration of these preliminary matters, I hope to show that there is a gap in scholarship between the ideas of the EU and the insights that global democracy theory brings. This sets up the meat of my theoretical argument (which appears in chapter two) where I show how my adaptive approach generates progress toward closing that gap—providing a perspective for researchers that allows us to evaluate supranational structures, both ideal and existing, without being mired in old state-constrained notions of democracy. Following the review of relevant literatures in the next three sections, I lay out a brief overview of the structure of the dissertation that follows.

1.1 DEMOCRATIC DEFICIT

There is a great deal of literature on democracy and the EU, most of it focusing upon a so-called democratic deficit. While there is some debate about who coined the term “democratic deficit”, it surfaced in the late 1970’s and mid-1980’s in reports and pamphlets about the democratic and quasi-federal situation of Europe. The term gained salience among EU scholars, with a consensus appearing that the EU lacks certain democratic components usually associated with national democracies.

From these studies, an interesting set of opinions emerge. Despite differences, a common perception of the source of the EU's deficient democratic character emerges.³ The novel institutions of the EU have been judged by some as not democratic, because the EU does not possess the democratic legitimacy of the sovereign nation-state.⁴ Some thinkers suggest that the EU lacks “traditional” forms of democratic legitimacy that originate from state-based democratic notions like representation and electoral accountability.⁵ A number of democratic deficit studies center on institution-focused conceptions of legitimacy.⁶ Often these considerations involve procedural legitimacy stemming from majoritarian institutions—“political decisions and outcomes are legitimate because they are taken by elected officials.”⁷

Recommendations for fixing the democratic deficit also reflect a bias toward the characteristics of nation-state, sovereignty-infused, electoral conceptions of democracy. Despite the different character of the EU as a supranational governance regime rather than a sovereign state, many suggest that the same democratic legitimacy of the nation-state should be realized at the EU level. This means a need for representative institutions to secure the “core attribute of democratic governance”: public control.⁸ Often this takes its cues off of the role that parliaments play at the nation-state level; the single defining item is the accountability of government to the parliament.⁹ In this view, democracy requires popular representation through elected officials in the policy-making process. Stronger democratic institutions provide the means to democratic

³ Alternatively, Andreas Føllesdal (2006) suggests that the democratic deficit literature contains multiple mutually incompatible views of democracy. As this section will demonstrate, his read is entirely correct. Yet it is useful to point out, as I strive to do, some key areas where consensus seems to be reached if not between all scholars, at least among a sizeable segment of them.

⁴ Cowles and Risse (2001). pg. 223.

⁵ Peterson and Bomberg (1999). pg. 256.

⁶ Newman (2001); Rothschild (1997); Scharpf (1991); Sjursen (2002); Weiler et. al. (1995).

⁷ Rittberger (2003). pg. 205.

⁸ Lord and Beetham (2001). pg. 458.

⁹ Siaroff (2003). pg. 446.

controls over policy, which in turn are linked to a sense of popular legitimacy.¹⁰ Again, the common element is that the features of existing state democracy are being used as a guide for thinking about the EU.

Others raise notions of identity as important to consider when discussing the democratic deficit, though these views often invoke a definition of democracy that is tied to the experience of the nation-state. Their focus is on the levels of legitimacy individuals perceive within supranational institutions, and how that legitimacy is expressed. Examples include community, identity, scope of EU governance, levels of regime support, and individual policy performance judgments.¹¹ These types of studies examine notion of European identity, and how levels of national pride, belonging, and attachment are linked to system support (legitimacy) for the EU.¹²

There is also some literature on the democratic deficit in the EU that seeks to justify the EU without explicitly requiring EU institutions to look like democratic institutions of states. This subset of scholars suggests that the EU has other ways of meeting expectations that it be democratic. One set of studies that move in this direction are those that focus on indirect representation. The basis of this argument is that with the integration of the union, the legitimacy that national governments enjoy is transferred to the institutions of the EU.¹³ The institutions of the EU are considered representative because they are accountable to member state governments, which are in turn democratically elected.¹⁴ This indirect representation relies upon the executives of member state governments having pre-existing claims to democratic legitimacy cemented

¹⁰ Dahl (1994). pg. 25, 33.

¹¹ Schmitt and Thomassen (1999).

¹² Duchesne and Frogner (1995).

¹³ Newman (2001).

¹⁴ Moravcsik (2002). pg. 611. The executive governments of many European states are legitimate to their constituents but also participate directly in guiding EU policy through the Council of Ministers. Thus, the Council can be considered "at least formally subject to [national] parliamentary accountability." J.H.H. Weiler (1999). pg. 265.

through support from national parliaments and electoral systems.¹⁵ This mode of legitimization has been applied to other international organizations and is argued to support the EU case as well.¹⁶ The problem faced by this set of arguments is that it carries a notable subtext: that democracy at the international level requires that the international be composed by a collection of cooperating, semi-sovereign states. This persistence of the state as the foundation of democracy can pose problems for how the concept of democracy is applied to supranational systems.

Other studies search beyond the actions of states in the system, focusing on other sources of democracy. These studies commonly explore factors such as institutional performance, effectiveness, and European identity as ways to lessen concerns about a deficit of democracy at the supranational level.¹⁷ The idea here is that these factors matter to state democracy, but may look different when realized at the EU level. Some move toward a linkage of legitimacy as the primary component of democracy, and pose new modes of legitimating the supranational space. Verhoeven (2002) presents a different take on the mixed approach, arguing that formal legitimacy (juridical) and social legitimacy (system support) work side-by-side to legitimate the EU.¹⁸ Advocates of “new governance” stress functional (output) legitimacy rather than representative legitimacy.¹⁹ Finally, allocation legitimacy is another label applied to the EU because of its quasi-federal nature, drawn from principle-agent theories.²⁰ Legitimacy, however, continues to be tightly entwined with the nature of state level democracy. Legitimacy implies the

¹⁵ Benz (2004). pg. 875-876.

¹⁶ “Traditionally the democratic legitimacy of international agreements and organizations is thought to derive from the mutual consent of the contracting party governments, which are, in turn, elected domestically.” Bignami and Charnovitz (2001). pg. 279.

¹⁷ Lord and Beetham (2001). pgs. 23, 26-28, 33-39.

¹⁸ Verhoeven (2002).

¹⁹ Peterson and Bomberg (1999). pg. 256. See also Rittberger (2003). pg. 205.

²⁰ Coglianese and Nicolaïdis (2001). pg. 280.

same fundamental correlation between the sovereign citizen and codes of right behavior and responsiveness from the institutions that represent them. With legitimacy, we gain a host of other concerns about the nature and origin of the relationship between state and individual. With the role of the state so prominent, moving this concern outside the state brings rather than reduces complications.

A minority of EU scholars interpret legitimacy differently, leading to alternative judgments about the primacy concern for evaluating the democratic character of supranational institutions. Arguments highlighting discursive role of the Council, with its associated norms of trust, collective action, agreement, and mutuality are one of these strategies.²¹ Likewise, other authors focus on the democratic implications of participation in a multi-level civic space.²² Finally, some authors look at separate values that can act as surrogates for the usual need for popular legitimacy. These include accountability, participation, transparency, and independence, among others.²³ While included to demonstrate the breadth of ideas that compose democratic judgments, notions like participation, accountability, and discourse too easily feed back into similar traps: our observations of states inform the principles that we are bringing to bear on supranational institutions.

This review has touched on a number of different “camps” of scholarship, and it could continue indefinitely given the number of forays into thinking about the democratic deficit. The following graphic displays what I take to be the major camps of scholarship on the democratic deficit.

²¹ Hayes-Renshaw and Wallace (1997). pg. 275-276.

²² Chrysoschoou (2002). pg. 756.

²³ Zweifel (2003). pg. 541, 545-547.

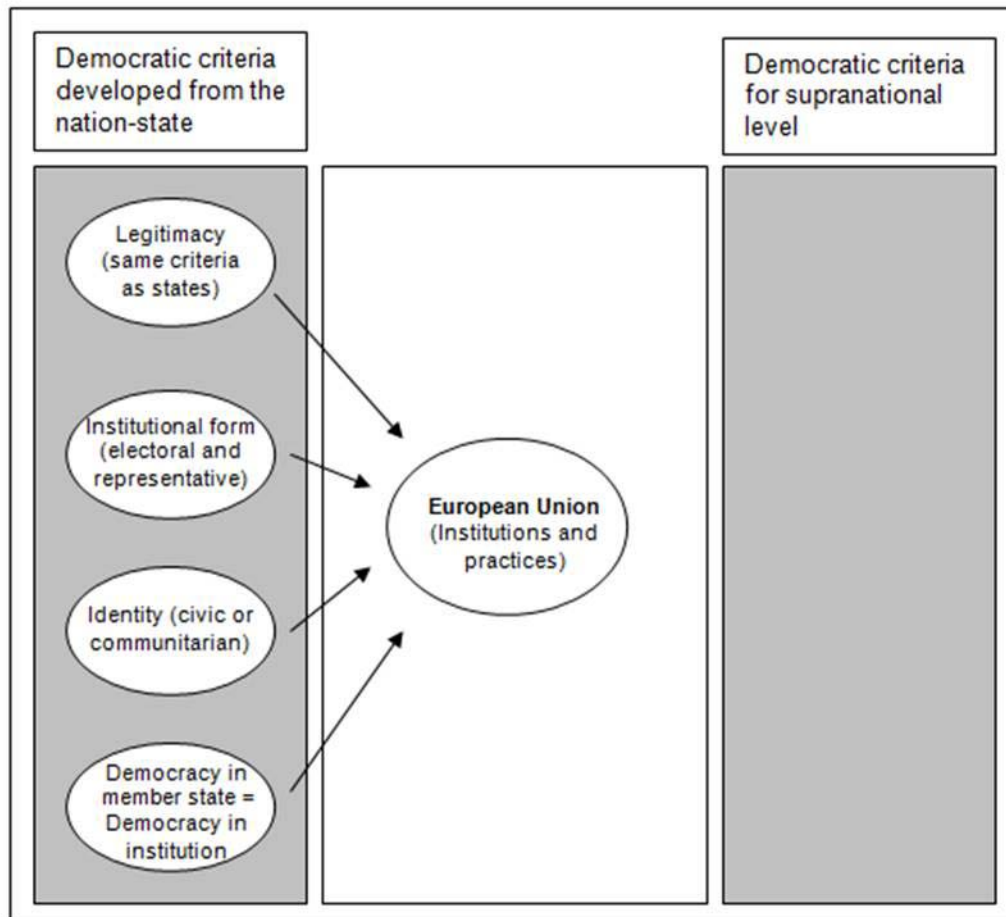


Figure 1. Democratic credentials applied to the European Union by the democratic deficit literature

The first thing to note is that this depiction is not sensitive to whether a particular argument holds that a deficit exists or not. Instead, it relates judgments pro and con in terms of the evidence that they consider in the EU case. The prior review developed four main types of criteria for democracy: legitimacy in all of its forms, institutional similarity (or functional similarity) to democracy at state level, nationalism-spawned notions of collective civic identity, and the simple transfer of democracy from members to organization. What I find most notable, however, is that all of the ideas I've discussed above fall into the camp of concerns that

developed from the historical experience of democracy in the nation-state.²⁴ My argument and the construction of adaptive democracy is a means to populate the right side of the graphic that has been largely ignored by democratic deficit scholars.

My preliminary judgment is that the democratic deficit literature remains too thoroughly wedded to state-centric versions of democracy. This is perpetuated by the “somewhat idealized image of representative democracy in terms of accountability or responsiveness of decision-makers” that exists in the literature.²⁵ Mythical visions of what state democracy looks like get conflated with considerations of how the supranational institutions realize (or fail to realize) the principles of democracy. Another branch of scholarship addresses the concerns of state-centric democracy, and how the shape of a more global or supranational democracy might be described.

1.2 INTEGRATION THEORY

It is the industry standard of EU studies to address the broad literature on integration and to work out the niche of integration theory where one’s work fits best. Integration theories attempt to explain how and why the EU was constructed, as well as theorizing the fundamental nature of a political regime like the EU. This is a generalization of course, as integration theory is a broad descriptor. Intergovernmentalist theory, neofunctionalist theory, and constructivist approaches all vie for students of the EU to choose their story for European integration.

²⁴ Admittedly, the treatment presented here is brief. City states, federal arrangements, and local government all complicate matters. However, I maintain that the basics which are most frequently applied to the EU and other supranational structures are colored primarily with vestigial notions drawn from the nation-state experience of government.

²⁵ Papadopoulos (2003). pg. 473, 492.

Integration theories are crucial for comparative political inquiry into the EU for a specific reason. The way we theorize the creation and expansion of institutions (the integration process) explains how one might classify and compare those very institutions with regard to existing political categorizations. The creation and interpretation of the institution can matter as much as the content and actions of the institution. The rub of integration theory is that different theories suggest very different stories and interpretations of EU institutions, which in turn affect what lessons about supranational democracy can be drawn from them. The story of integration accepted by a theorist will have consequences on the lessons for democracy drawn from any consideration of EU institutions.

The difficulty is that the story told of how EU institutions became what they are determines how we describe the crucial nature of those EU institutions. Those descriptions of EU institutions in turn prejudice our standards by which we judge those institutions. The genealogy of the institution becomes its ontology, which then becomes its epistemology. Put simply, the story we tell of the history of integration informs our definitions of the institutions, which in turn bias what we know about those institutions according to the story we told from the start. Thus, any meaningful consideration of what we make normatively of a given EU institution has already been determined by the story we told of how that institution developed in the first place.

For the purposes of my argument, I explicitly choose not to align myself with any of these theoretical camps. Allowing my argument to get caught up in the integration debate would lead to an inability to fully explore the types of question that I am interested in. By choosing a specific story of integration, the answers to questions of democracy and the nature of the EU become pre-ordained. So instead of picking sides or even engaging the debate, my position is that the debate simply isn't worth having for my type of argument. This is not to say that

integration theory isn't a valuable tool to many comparative studies. Rather, these questions are simply not the questions that motivate my inquiry.

1.3 GLOBAL DEMOCRACY

The literature on global democracy is a primary location where the consideration of the unique nature of supranational democracy is found. While there is little examination of the European Union directly, the arguments do have bearing on how the shape of supranational democracy might look—an important resource for EU-based considerations of democracy. The critical point of this literature is that democracy at the supranational level may simply not look like democracy at the national level.²⁶ As such, the extent to which the democratic deficit debate is based on comparisons to national-level democracy (where legitimacy and popular control are key assumptions) is problematic.

The existing literature on global democracy—political theory that focuses on supranational organization, norms, and identity. These theorists—including Carol Gould (2004), Charles Beitz (1999), Onora O'Neill (2000), David Held (2004), Andrew Kuper (2004), Michael Goodhart (2005), and others—have reached a number of interesting insights about the normative foundations and possible organization of supranational democracy or justice regimes. However, they reference in passing (or exclude entirely) the facts and history of the EU—an existing supranational governance regime. What all of these disparate theorists share is an absence of discussion of the EU.

²⁶ See Goodhart (2005), Goodhart (2005a), Gould (2004). Note that these theorists tend to discuss democracy in a different way, focusing less on institutions and legitimacy. Instead, the key is understanding democracy as a commitment to equality and human rights.

Other supranational institutions have served as references in this literature: the International Criminal Court, other international legal regimes, the United Nations, and national models of social arrangement such as Held's (2004) use of national social democracy models. Yet the EU has been under-explored. A few global democracy and justice theorists have addressed the EU, particularly Thomas Pogge's (1997) consideration and the recent essay work of Jürgen Habermas. Yet these works are explicitly EU-focused and responding to specific debates about the nature and purpose of the EU. Their interest is a step in the right direction, but yet they fail to produce full linkages between theories of global democracy and the EU case. Only more recent work, typified by Michael Goodhart (2007) begins to do this in any meaningful way. By taking the example of the EU seriously, and trying to show how insights about the EU can enrich theorizing about the supranational, I hope to provide a critical element of the global justice and democracy debate that is only now starting to emerge.

The *sui generis* description of the EU weighs heavily here. Many authors have defined the EU as an entity that shares similarities to other institutions and regimes, but is fundamentally a unique occurrence. The exclusion of the EU from the global democracy literature may be a product of that treatment. In this way, the EU may be avoided by theorists for the very same reasons that comparative literature on the EU hesitates to generalize from it.

Yet the evidence that the EU is a good candidate for consideration by global democrats is apparent. It is at least on the same level of supranational institutions that global democratic theorists seek to target. Both EU studies and global democracy grapple with the same fundamental concern: how we deal with the sometimes rigid categories of what governments, institutions, and governance should resemble. The *sui generis* nature of the EU should show that

it defies the serigid classifications, making it an exceptional case for global democrats to consider.

Having developed a sense for the global democracy literature, we can now locate their thoughts on the prior figure.

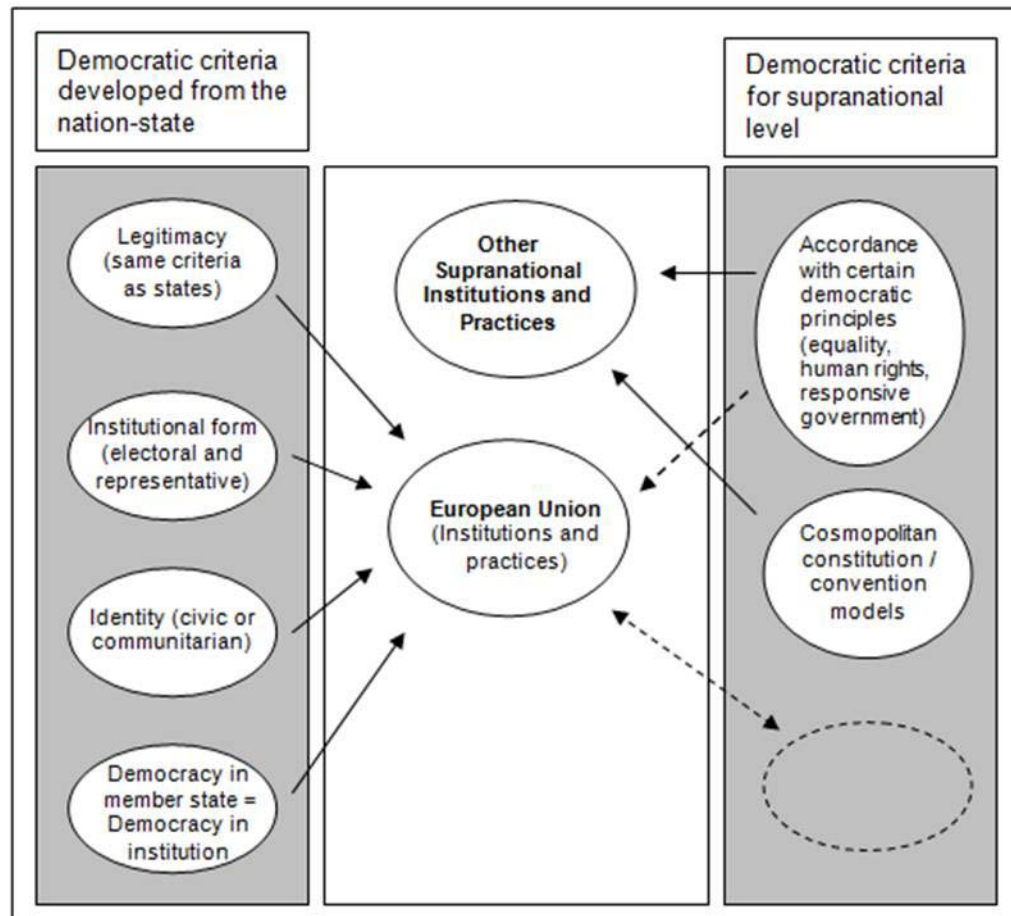


Figure 2. Democratic credentials examined in supranational governance by the democratic deficit literature and theories of global democracy

The notable element here is that global democracy has defined some notions of how we might judge supranational phenomena as democratic or not. Yet, the arrow between those judgments and the EU is incomplete at best—although recent work by Michael Goodhart (2007)

and others has begun to fill that line in. Furthermore, the horizons for what new democratic ideas can appear in the supranational context remains open (the dashed oval). It is the remaining space on the right-hand side of the chart that this project seeks to fill.

It attempts to do so with an adaptive democracy account of the EU in a way that is also directionally different from other approaches. The dashed arrow in the chart above is indicative of this. My approach starts with the institutions of the EU, using adaptive democracy to generate arguments about the nature of supranational democracy from the experiences of the EU. In this way, my adaptive approach proceeds in a different manner than other theories of global democracy—it begins with only a modified thin theory of democracy and builds from case examples, rather than fully specifying global democracy in the abstract and then comparing that to existing cases.

Looking at the practices of the EU can be a starting point for creating a more appropriate conception of what supranational and non-sovereign democracy should resemble. The prior comments have served both as a review of the relevant literatures to my question, as well as the limitations of those literatures. The contribution of this project will be a means of easing those limitations. My argument will show that existing institutions in the EU provide excellent cases for reconsidering the foundational principles of democracy at work in institutions. By using the EU case to train the adaptive method, scholars can better apply the logic of adaptation to other contexts and principles. In doing so, the democratic deficit literature and the global democracy literature would gain a crucial foothold on realizing how we can understand democracy in the supranational space.

1.4 TOWARD AN ADAPTIVE PERSPECTIVE

Given these background literatures, the stage is set for my presentation of the adaptive approach: both its theoretical foundations and a series of applied case chapters where the unique insights of the approach are displayed. By the concluding chapter, the nuances of the adaptive approach and its unique method of shaping our methods of investigation should be clear. This section provides a brief road-map of the argument to come.

Chapter two is the meat of my argument, where I map out my concept of the adaptive approach. I demonstrate where it comes from and the value-added it provides over conventional thin/thick versions of democratic theory. Given the ease with which democratic theorization slips into the thin/thick mindset, the adaptive method is correctly situated as an *approach*. It is not a specific theory of democracy, but rather a method of using (and changing and losing) second-order principles of democracy given the case at hand and the way in which that case accesses the two first-order principles of democracy: freedom and equality. The adaptive approach works to free the mind of the researcher from patterned assumptions and problematic defaults, in a way that enables a flexible yet robust inquiry of *both* theory and the case at hand.

The remaining chapters in the project come in the form of *paired sets*. Each paired set explores a different institutional case in the EU, thereby raising different insights into democratic theory through the adaptive approach lens. The three cases are the European Parliament (chapters three and four), the European Court of Justice (chapters five and six), and the Daphne program, a particular Commission initiative to combat gendered violence (chapter seven).²⁷

²⁷ Daphne is the exception to the paired set formula for the case chapters, for good reason. With Daphne, there is no existing treatment of the program from a strictly democracy-thinking lens. Instead, my cut is the first and thus the need for a paired structure, with its “first other approaches, now my approach” logic is inapposite.

The selection of these cases was based upon their ability to be illustrative of the three general situations of democratic consideration. The European Parliament is the traditional spot for democratic hopes to be hung (a most likely case). The European Court of Justice, on the other hand, is an institution often considered to have too many undemocratic features to figure into democratic considerations of EU institutions (a most unlikely case). And the Daphne program, while extensively considered from the standpoint of its operation and impact, has received minimal exploration through the democratic lens—thus providing a new space where democratic principles can be found working in unexpected ways.

The paired structure allows the argument to proceed in orderly fashion. The first chapter of each pair lays out the basics of the institution in question, and addresses both the failures of existing democratic inquiries into the topic and the democratic questions or concerns that remain unsolved. Then, the second chapter of each pair sets a pplies the adaptive approach to democracy. It locates what second-order principles are (and are not) present in the institution, and demonstrates how those potentially new second-order principles not only connect to basis of democracy but also allow for a different and fresh view of the institutions at hand. The Daphne chapter, which diverts from this form, serves as a model of the adaptive approach, worrying more about the way democratic principles are found in the institution rather than starting with a pre-formed set of expectations about democracy's appearance.

The final chapter groups the findings from developing the adaptive approach to the three cases and uses those findings to answer the remaining questions of the project. First, it gives a response to the lingering concern about the EU being democratic as a whole. As I have pointed out here, and will continue to illustrate, a pressing question for many EU scholars is “Is the EU democratic?” I suggest that a change in question is the essential starting point—instead asking

“How is the EU democratic?” The conclusion lays out the way in which the adaptive approach to democracy is particularly useful in giving answers to the latter question, providing insight into how various principles of democracy are captured in different ways across the myriad of institutions that compose the EU. The adaptive approach does not endeavor to answer the question of “Is the EU democratic?” While a adaptive democracy’s insights could be useful to those making such broad judgments, I argue that considerably more is gained by focusing on mapping various ways “how” the institutions of the EU display democratic characteristics.

The conclusion also examines how the insights of the adaptive approach can travel from the EU context to the broader field of global democratic questions and supranational institutions. It argues that with increasing trends of globalization, the traditional boundaries of states themselves can become problematic. Thus, the case of the EU—where the existing theories of democracy come from states not supranational structures like itself—can help us think about both global democratic theory and the specific patterns of other supranational governance structures (WTO, IMF, or transnational political associations, for instance). In this way, the adaptive approach to democracy is able to fill the empty spaces in theory and the charts presented above, to better assist scholars and researchers understand the effects of their paradigms and conceptions about political life as they are applied to new, different spaces of political behavior.

2.0 THE ADAPTIVE APPROACH TO DEMOCRACY

The previous chapter demonstrated the shortcomings of current evaluations of the democratic character of the European Union. Yet from the wealth of attempts, it seems clear that scholars, policy-makers, and European citizens continue to think that quantifying the democratic character of the EU is important. Comparisons and judgments of democracy are an attractive enterprise—from Freedom House rankings to detailed case studies of democratic character, scholars want to be able to say whether a government is democratic or not. However, the prior chapter demonstrated that most of our current tools for making such judgments fail to evaluate a supranational body like the EU properly.

In response, it is essential to consider the pressing follow-up question to the prior chapter: How *should* we go about evaluating the character of democracy in the EU? If we cannot do so with notions of democracy gleaned from state experience, what do we turn to? What sort of theory can tell us something meaningful about the case of the EU yet allow us to effectively compare the EU to other governance structures?

There are at least two approaches that one may try to escape the dilemmas presented in chapter one. The first response could be to build an explicit theory of democracy in the EU. This inductive approach would begin with a detailed analysis of how the EU is doing new things democratically. It would construct an argument from the richness of the case, showing in the end that an in-depth view of the EU can tell us that it is democratic or not on its own particular

merits. The drawback of this approach is its inability to be comparative. The EU, as the *sui generis* case *du jour*, would provide decidedly particularistic insights that could only allow us to discuss it as a single case. Any comparisons with other supranational bodies (states, IOs, NGOs, etc.) would be difficult from this vantage point to say the least.

A second response to the dilemma of chapter one takes the opposite approach. Instead of starting from a fully-specified model of what democracy should be in the EU, we could start with a minimalist account of democracy. From this, a central theme or focus can be delineated. Then we would scour the EU for examples of this central notion across institutions. Democratic judgments could then be drawn from presence or absence of the idea, and compared to all sorts of other institutions and locations where the central components we choose for democracy can be found. This response makes us lose sight of the variety that makes the EU an interesting case for democracy in the first place, a significant drawback. As detailed in the prior chapter, it is difficult to escape reliance upon prior notions of democracy, which may apply incorrectly to the EU. Likewise, we may get a very weak evaluation if our thinking remains at the most maximum range of observation.²⁸

Both of these viewpoints have important elements, but I will also show that each is ultimately inadequate for treatments of the EU as a democratic entity. Neither the first “thick” paradigm of democratic models specific to the EU alone, nor a second “thin” paradigm of applying a watered down version of democracy seems ideal for solving the problems presented. So the question left by the first chapter remains: how should we go about evaluating the character of democracy in the EU?

²⁸ Consider participation, for instance. If we boil democracy down to simply the need to see “enough” participation in the institutions of the EU, then our judgments about democracy would be entirely based upon rates of voters or counts of contact between officials and citizens, whether or not other democratic essentials were being met.

In chapter one, we were left with this puzzle; in this chapter I will try to solve it. In doing so, I will address the two seemingly incompatible paradigms (thick and thin) that I briefly sketched above. I will consider each in turn. While both have merits and elements that can be deemed essential to thinking about the EU democratically, in the end we need to escape the thick versus thin paradigm. Democratic theorization need not be either-or when conducted in a comparative setting as long as we can develop a new approach that transcends the dichotomous tendencies outlined above.

My answer is a shift in democratic thinking, a paradigm I call *adaptive democracy*. Understanding democracy in supranational institutions does not need a new theory of democracy. A new theory would simply add one more to the pile of transient and over-specified theories about democracy. Theories of democracy are the one thing we have. What is needed, and what adaptive democracy supplies, is an approach to thinking about principles of democracy. Or better put, an approach that can evaluate and incorporate the myriad of different ways that democracy can be expressed in every context (including the supranational). Adaptive democracy attempts to split the difference of the two insufficient responses above. It is simultaneously thick and thin, and through a bit of work, manages to preserve the benefits of both paradigms while removing their flaws. Adaptive democracy allows the researcher to draw from multiple existing theories of democracy, rather than trying to build its own unique theory.

In this chapter I will show that adaptive democracy is desperately needed in the case of supranational institutions, and demonstrate how it succeeds in giving political thinkers a new tool for making democratic evaluations. To that end, my argument for adaptive democracy will proceed as follows. First, I will explore the genealogy of scholarship that spread *thick versus thin* paradigms in the first place. This dichotomous thinking, drawn from certain strands of

democratic theory and from comparative research methods, finds itself mired in a set of bad trade-offs that limit our ability to make desirable democratic inquiry. I argue that instead of the dichotomization inherent to the *thick versus thin* approach, a desirable alternative of *adaptability* is preferable. The adaptive approach recognizes that the limitations of *thick versus thin* are a tension that comes from desired qualities falling on both sides of the dichotomy. Thus, it chooses to simultaneously exercise thick and thin methodology by allowing flexibility of indicators within target institutions. The advantage the adaptive democracy approach provides is that it is both flexible and robust. After expanding on the approach's particulars and why it is different from *thick versus thin* theorization, I will then show why adaptive democracy is particularly useful for hard-fit cases such as the EU. I will end with an examination of how adaptive democracy can be employed—a process that later chapters will demonstrate.

2.1 THICK VERSUS THIN PARADIGMS

In the prior section, I sketched the bare bones of two potential responses to the puzzle of chapter one: how do we apply democratic theory correctly to the EU in a way that both says something meaningful yet allows for comparisons to other institutions? These two responses (a close-fitting inductive democratic account of the EU or a broad and generalized democratic account of the EU) represent a common paradigm in political theorization: a *thick versus thin* approach. This section will look more specifically at the nature of this approach and how it has appeared in other works. The choices of thick and thin have been used with different emphasis by certain scholars. I will illustrate the differences briefly, and then demonstrate that *thick versus thin* becomes a viewpoint that shapes theorization about democracy. The nuances from scholar to scholar are

interesting, but ultimately the usefulness of *thick versus thin* for my argument comes from the patterns that this approach to theorizing yields.

The usage of thick and thin in the social sciences stems from the insights of Gilbert Ryle (1950) and Clifford Geertz (1974). Initially drawn by Ryle to discuss cultural interpretations of eye movements (a wink as the movement of the muscles of the eyelid or a meaning-laden symbol of communication), Geertz utilized thick and thin to talk about differences in ethnographic research. For Geertz, a coherent study of context was necessarily a “thick” description.²⁹ The term spread through the social sciences, taking root particularly in comparative literatures and political philosophy.

Additional examples of the appearance of the *thick versus thin* approach to theorization are plentiful. A full catalog of such examples is not necessary for my purposes. Instead, I present two ideal types that are central to the analytic approach of *thick versus thin* thinking. What is important is that two different usages can be distilled. First, thin can mean abstract and non-controversial, while thick can mean embedded and rich in detail. Both of these take thick and thin as descriptors of the level of theory. I term these usages *specification descriptors*: thick and thin are used by authors to convey the level at which their theory is pointed (akin to the initial formulation of Geertz). In this case, thin is a deliberately minimal notion. The virtue is the flexibility of the theory, which allows for applicability and comparability across cases. Thick theories, on the other hand, are employed to describe a fully-specified normative statement of a particular context—a theorization that reaches a normative theory from the particulars of a case—and what principles are included and realized in that context. They build theorization upon the specifics of the case, describing (for instance) Swedish democracy or bargaining space in the

²⁹ Geertz (1974). pg. 14.

IMF. This leaves thick theories with less ability to be universally applicable. Instead, their pallet is one of qualification, compromise, complexity, and disagreement.³⁰ Thick democracy is purposefully particular, applying to a specific set of circumstances or cases. This usage of thick and thin is essentially an expression of the trade-offs of the comparative method: either we can include a lot of cases along broad issues, or we gain depth on a single case without applicability to many others.

I characterize the second usage of the *thick versus thin* paradigm as *motivating accounts*, typified by John Rawls (1999). Rawls describes a thin conception of the good as one that is intentionally minimal for purposes of theory building. Again, a minimal nature appears, but with a different goal. In this case, the minimal is intended to provide a baseline of goods that motivate his argument. This motivation is the essential component to generating the normative account, in this case. By choosing thin, or the particular thin set of goods, Rawls' argument draws its normative power—as it establishes a thin set of goods that *should* be provided by a satisfactory account of justice.

Rawls chooses a thin theory over a thick theory because it fits with liberal assumptions about the differential prioritization of goods from individual to individual. However, motivating accounts can also be thick. A perfect example is Benjamin Barber's (1984) preference for thick ("strong") democracy over thin democracy shows this well. For Barber, thick is the "most vigorous" response to democracy.³¹ The theory will not be restricted to a minimal baseline. Rather, the moniker thick tells us that the theory's motives include a large list of outcomes that are valued. Barber criticizes the liberalism-inspired thin accounts of democracy, suggesting that

³⁰ Walzer (1994). pg 6.

³¹ Barber (1984). pg. 118.

their “values are prudential and thus provisional, optional, and conditional.”³² The notion is that only thick accounts are able to force thinkers into including all of the important components of democracy.

Again, the account is motivational: thick is shorthand for a need to include many theoretical features into a practice. Exploring this dualism, Michael Walzer suggests that thinkers take a “(thin) set of universal principles adapted (thickly) to these or those historical circumstances.”³³ While his notion shows some working together, his maximal versus minimal categories retain a distinctive dual nature of holding one set of benefits over another. The emphasis here is still in familiar territory: the focus remains on the virtues of minimal motivation versus a rich and specified motivation.

³² Ibid. pg. 4.

³³ Walzer (1994). pg. 4.

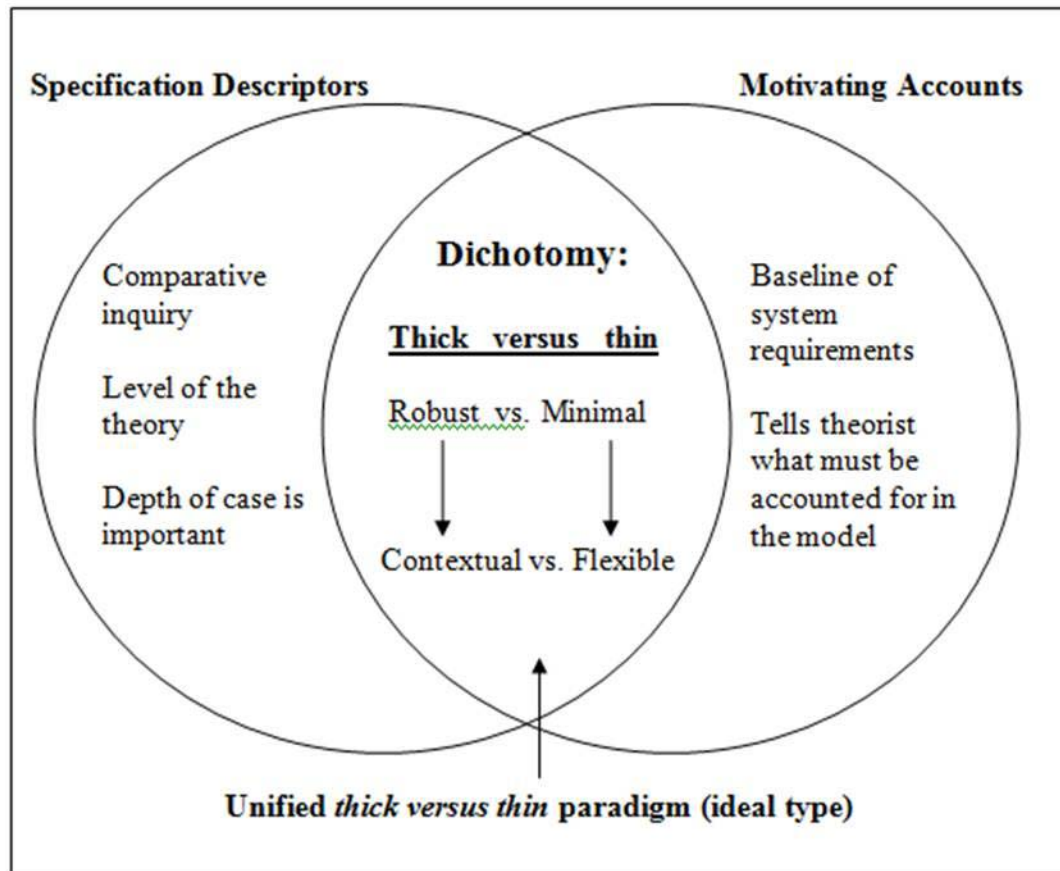


Figure 3. Typologies of thick and thin

Despite the two main usages of thick versus thin terminology, a unified notion can be constructed—the shared section of the Venn diagram in the figure above. Both the specification descriptor approach and the motivating accounts approach share features. The central ethic which is shared by both is an intuition of dichotomization. From dichotomization, an initial trade-off of minimal versus robust focus appears which in turn determines whether the argument will be perceived as flexible or contextual.

The fundamental perspective of scholars working under the *thick versus thin* viewpoint is that the labels thick and thin categorize a divide that is roughly dichotomous. This is especially true when the terms are used as specification descriptors, as there is an implied trade-off to be had: you get the benefits of one but not the other. The utility of a thin theory is balanced by what

is lost for not having a thick theory. Both specification descriptors and motivating accounts display this treatment. While scholars may not actively label their accounts as thick or thin, we can recognize the impact of which side of the paradigm the author falls.

From this account, the intuition is that thin theories are fundamentally minimal while thick theories are fundamentally robust—two qualities which are treated as mutually incompatible under the paradigm. The minimal/robust nature may affect different parts of the theory, but the distinction remains. The virtue of the thin theory is the same in specification descriptors as in motivational accounts. We gain a low threshold that facilitates comparison and theorization. Minimal affords a high degree of generalization for the argument. In the motivational account, minimal assumptions are included as a means of allowing the theory to fit multiple places—the pressure to be a specific way is limited, giving the theorist more space to design their account to include other factors that they deem important. The minimization allows for wiggle room, in a way that a robust account does not. The issue is much the same for specification descriptors. Robustness limits the range of the theorization in a way that minimizing enables. While the theorizing that is done is different, the intent carried by the terminology is the same.

The derivative component of the *thick versus thin* paradigm is that it describes a flexible versus contextual situation. I describe this as derivative because it stems directly from the minimal versus robust construction—as indicated by the arrows in Figure 2.2.a. The choice of minimal or robust *determines* whether the theory will be flexible or contextual. Flexibility is the dividend of the minimal ingredients that compose thin theories. Thin theory gains its flexibility because of its *lack* of content. These approaches equate an empty theory with the ability to apply to multiple contexts. Likewise, it is assumed that a thick theory derives its contextual nuance

from its logic of robustness. The thinking is predicated on the belief that a nuanced, particular view that desires to understand a case in depth is handicapped when applied to other situations.

The unified notion of thin versus thick that I have developed here is not a perfect classification of all views, but it is indicative that a general paradigm of thick versus thin thinking does indeed exist. The purpose of this section is not to establish an exhaustive genealogy or taxonomy of every account that uses thick and thin terminology. Instead, I have developed an ideal type of the *thick versus thin* paradigm, and considered how this perspective molds the choices and claims that the scholar employing it can make.

2.2 FAILURES OF THE *THICK VERSUS THIN* PARADIGM

The problem with the *thick versus thin* paradigm is that it leaves us with an undesirable choice for making evaluative and normative judgments. We are presented with a choice that necessarily implies drawbacks. A thin theory is set up to always fail to reach the level of specification that we might really want. Our accounts will be too general, too sweeping, and too minimalistic to give real purchase on the case. Likewise, a thick theory is set up to always provide substandard applicability across multiple cases. We may have a great description, but our cases cannot be placed in comparison to other similar units due to the level of detail alone. The dichotomization of the terms leaves us stranded with the traditional easy escape route for both comparative research and normative theorization: we speak clearly about the limitations of the approach and justify whatever ensuing trade-offs are made, as if that trading off is a necessary evil. Dichotomization is the root of this problem. The *thick versus thin* approach is treated as if it provides contrasting utilities to the researcher. A thin theory provides utility $X_{\text{applicability}}$ but

removes the possibility of utility Y_{depth} . And thick theory is capable of giving us utility Y_{depth} , but cannot provide utility $X_{\text{applicability}}$. In the choosing of one, we somehow cannot get both.

This type of dichotomous thinking is a fallacy. This is not a zero-sum situation: with my adaptive approach, we can have our cake and eat it too. It is not necessarily the case that a flexible theory must include minimal content. Walzer suggests that minimal isn't shallow (for morality) but rather is “close to the bone” in its ability to be vigorous yet applicable.³⁴ While his analysis goes back into contrasting thick and thin, that need not be the case. We can have a flexible treatment of a concept that allows for multiplicity of realizations. Democracy serves as a particularly useful example here. A flexible notion of democracy can include various principles such as fundamental belief in human rights, egalitarian outlooks, norms of tolerance, and notions of participation and responsiveness of government. Because these principles can be realized in different ways by different institutions, we might suggest that democracy can adapt to a situation where there are multiple spaces and sources of fulfilling democratic requirements, such as a complex supranational governance structure. The following section explains how theoretical flexibility—when not treated as dichotomous to contextual depth—generates a means for achieving the goals of both thin *and* thick theorization methods with a single approach.

2.3 SYNTHESIS: ADAPTIVE THEORIZATION

The overarching goal of this chapter is to salvage the utility of both thick and thin views within a single approach. I argue that it is possible to do so with certain concepts—particularly with

³⁴ Walzer (1994). pg. 6.

democracy. The theoretical outlook that I call the *adaptive approach to democracy* is the means that can realize this goal of capturing the best of both: providing us with a democratic theory that is simultaneously robust and flexible, able to satisfy concerns about comparability while retaining a meaningful normative and descriptive basis.

The fundamental way to escape from the dichotomous trap of the *thick versus thin* paradigm is to expect and relish the variety of life. The complexity of political systems produces a great variety of difference among them. Yet we can also realize that there are some core components to anything that we want to theorize about (i.e. democracy). These “core” elements are definitional in nature—the root of what defines that we are talking about democracy instead of autocracy, a Danish Red cow, or the starting line of the ’86 Philadelphia Flyers. Assuming that we are interested in our political concept (democracy), we can come to terms with the variety of ways in which that concept is realized in the political realm. We start with a set of core principles, and then must move to the ways in which those principles are realized in the world through institutions and practices.

I argue that we can use a strategy of adaptation to capture the benefits of flexibility without losing the robustness of our insights. An approach does not need to be minimal, just adaptable. Theorists must recognize that the core principles of the concepts we like to define can be met in multiple fashions from system to system (and even within systems). This is akin to a family resemblances approach, but even more adaptable across units than the resemblances notion explained by David Collier and James Mahon (1993) and others. Like family resemblances, we need not observe the exact same set of qualities in everything we deem “comparable”. The family resemblances model reminds us, simplistically, that the traits of related things are not always completely shared. We do not rule two siblings with the same eye color but different hair

colors incomparable—despite the differences, we recognize them as belonging to the same family. I argue that the same holds true for democratic institutions, which access different components of democracy. Both over time, and from place to place, the components of democracy have varied (in theory and practice)—and thus why would we want to limit ourselves to a single, situated description of the concept? In fact, the adaptive approach goes far beyond family resemblances, by allowing us to see that even sharing none of the same traits, two institutions can still be democratic.³⁵ Theory needs to be able to recognize the core components of its focus at work in institutions, and be able to cope with situations where those core components are realized in different ways. The alternative to the *thick versus thin* approach is a way of working *diagonally* across the dichotomous divides that are usually upheld.

³⁵ Skeptical readers be assured, this ability is explained fully in section 2.3 below, where radial categorization and family resemblances are considered and applied to democratic principles.

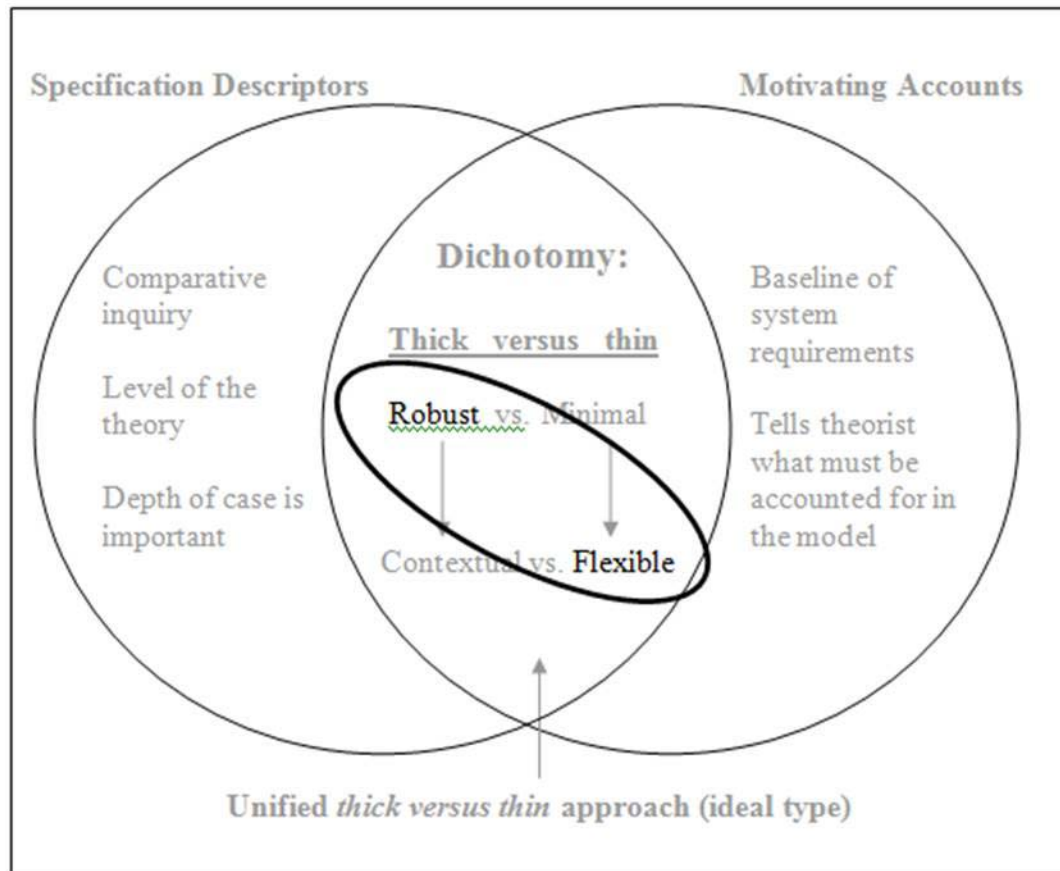


Figure 4. Thinking diagonally means adaptability

An approach that is capable of providing the focus of the dark oval above is the ideal solution to break the bad *thick versus thin* trade-offs that have long plagued democratic treatments of the EU. To think diagonally in this way is an exercise in breaking the assumptions of dichotomy that plague *thick versus thin*. It is about generating an approach that is flexible *and* robust, not merely one or the other. In short, it is an analytical perspective that asks the researcher to be adaptable in her thought processes. The following sections explore this response of being adaptive and how it manages to break from the limitations of the world of *thick versus thin*.

2.4 ADAPTIVE DEMOCRACY: ATTENTIVENESS TO THE SECOND-ORDER

An idea that helps break the dichotomy problems of thick and thin theory is adaptability. That is why my approach is labeled *adaptive*. The prior section made room for breaking with dichotomy and thinking in a more open and variable manner. This mindset can be applied to various types of political phenomena. Yet as the first chapter suggested, my argument cares about one specific political concept: democracy. Thus, the main focus of my argument here is a particular form of adaptive thinking: *adaptive democracy*. While this chapter sketches the adaptive approach relatively abstractly, I will develop the idea in the following chapters through the application of the adaptive approach to democracy in the particularized case of the EU.

The history of democracy as a concept is our first clue to why a varied and flexible approach to the concept is needed. As discussed earlier in this chapter and in chapter one, any sort of rigidity to one specific historicized set of principles (i.e. those drawn from an idealized “nation-state experience”) proves problematic. Defining an explicit set of particular qualities runs the danger of becoming too specific to their cases or the danger that the concept is so watered down that it can apply to multiple different institutions and systems of governance. Any particularized account or theory of democracy suffers these problems. Instead, the first step in adaptive thinking is releasing the need to do this.

A moment to consider how we form conceptualizations of ideas is essential here. In particular, two forms of conceptualization—radial categories and family resemblances—prove useful in helping orient our thinking away from the difficulties of rigid accounts and their associated thick versus thin paradigm. In the prior section, I mentioned the notion of family resemblances to argue that not all principles of democracy need be present in every case, or in

every component part of a democratic system. That sense of variable component attributes is explained by Collier and Mahon (1993) as:

“a principle of category membership... there may be no single attribute that category members all share. The label for this type of category derives from the fact that we can recognize the members of a human genetic family by observing attributes that they share to varying degrees, as contrasted to nonfamily members who may share few of them. The commonalities are quite evident, even though there may be no trait that all family members, as family members, have in common.”³⁶

However, it is unclear just how useful the family resemblances categorization is with normative principles—we may demand more of normative principles than we do from means of sorting sea shells or other empirical classification questions.

Thus we might consider a different approach to concepts with various attributes: radial categories. Again, Collier and Mahon (1993) put the idea most simply:

“As with family resemblance, with radial categories it is possible that two members of the category will not share all of what may be seen as defining attributes. In contrast to the family resemblance pattern, with radial categories the overall meaning of a category is anchored in a “central subcategory”, which corresponds to the “best” case or prototype of the category.”³⁷

By this, they mean that radial conceptualization defines a central notion (the “central subcategory”) of the idea, to which other features—not always present in every case—are linked. Instead, the central core is what makes things similar, despite the appearance of a multitude of other yet linked features. Here we reach a conceptualization that starts to embrace the adaptive ethos that is more desirable in thinking about democracy.³⁸ The idea is that for complex notions,

³⁶ Collier and Mahon (1993). pg. 847.

³⁷ Ibid. pg. 848.

³⁸ In fact, Collier and Mahon (1993) reference democracy as their example of a radial category when explaining the notion. Pg. 848.

like democracy, there are a variety of traits that compose the concept. Furthermore, appearance of those traits in cases need not be identical in presence.

The question becomes: what principles are central to democracy if we are to treat it with the insights of radial and familial categorization? And what effect does that treatment have upon our employment of democratic theories? I argue that democracy has two shared central notions that form a basis similar to a “central subcategory”: freedom and equality. These two principles, which I will refer to as the first-order principles of democracy, form the central ethic of democracy from which all other expressions have been drawn. Despite alterations to the notion of democracy that have occurred as both history and theory changed and developed, freedom and equality remain two central portions of the idea. What is changing is not freedom and equality, but the ways in which freedom and equality are reached. Other principles, which link to freedom and equality, are the ones that go in and out of fashion among democratic thinkers and practitioners. These other, competing principles of democracy, I will refer to as second-order principles. They become a part of the democratic picture for two main reasons. First, freedom and equality are difficult to measure on their own accord. We cannot simply say “add more freedom to that institution, and it will be democratic”. Instead, we say things like “increased participation makes it democratic”, where participation is a means of reaching the first order principle of freedom—for instance. In this way, we see a radial-like categorization of the concept of democracy being useful.

I use both the family resemblances and the radial categories depictions of democracy purposefully—as the adaptive approach treats the concept of democracy as a hybrid of the two. As models for the way we think of concepts, they are helpful for being suggestive of how we think as researchers. And while the radial structure fits with the first and second principles

notion, the adaptive approach recognizes that rarely (if ever) do we observe freedom and equality being directly applied to any case. Thus, maintaining both methods of conceptualization seems useful, given that when looking at a particular political institution, and identifying what principles are at work there, we generate solely a list of second-order principles (which are explored as to their link to our first-orders). Thus, while democracy itself may be radial in terms of a central set of ideas and associated principles to that central notion, our observations of it in cases need to draw in the radial linkages (as the central elements of freedom and equality are difficult to perceive independently of their linked second-orders), and therefore begin in a more family resemblances-type situation. In this way, democracy is somewhat differently treated—the notion of “core” that comes from the radial conception fits with our first-order notions, and the constellations of observable second-orders appear in the family resemblances pattern. It is important to note, however, that this core is not some essential or best prototype, to revisit the phrasing of Collier and Mahon (1993). Instead, I use the notion of “core” to recognize that theoretically, there are two principles that all democratic systems possess (freedom and equality), albeit in varied modes of expression. Thus the adaptive approach, while possessing similarities to radial and family resemblances categorization, is not reducible to either.

Given that adaptive democracy (like *thick versus thin* theories before it) seeks to say something about real world political arrangements, it is important to establish the types of thing that adaptive democracy looks for when evaluating the democratic character of a system. I argue that adaptive democracy works by identifying second-order principles of democracy that link to the more central first-order principles of freedom and equality that lie at the heart of democratic intentions. It pays attention to one second-order principle at a time, and need not be concerned

with ensuring that a *specific* set of second-order principles is always present or always realized in the same ways to recognize democracy.

Instead, as I suggested before, democracy is a concept with core components that tell us what it is we are talking about. In the case of democracy, those core components seem to be freedom and equality. These are the first-order principles of democracy—the elements without which a democracy cannot be composed. Any institution that leaves out or systematically treads upon one of these first principles seems to fail in qualification as a democracy.

The hitch to these two first order principles is that they are first order. There are many different ways in which these two principles can be met inside a given political system. The history of democratic theorization is the history of continual re-examining new ways that these two basic principles are realized in political practice. They are first-order for this very reason. They spawn a number of secondary principles that do all the work in these varied cases. There are many ways of achieving freedom or equality, and these are the practices that we actually observe being realized in institutions. Here I empathize with the intention of David Beetham's (1999) attempts to define democracy without being tied to a particular institutional formula. While I differ from Beetham on the content of first-order principles (his participation reads more as a second-order means of ensuring freedom under the system and equality of opportunities to influence it), the intention feels the same.³⁹ Adaptive democracy recognizes that there is a core ethic to democracy, and searches out institution and practices where that core ethic is being achieved through the related but more easily institutionalized goals of second-order principles.

³⁹ Other scholarship addresses this intention of finding overlapping consensus from democratic theory, but with less of the dedicated thrust that Beetham (1999) provides. See also Føllesdal and Hix (2006) as an example of this intention to work from overlapping democratic basics with a direct application to democracy in the EU.

Securing freedom and equality as first-order principles of democracy is not an easy task. Here I draw primarily from the democratic notions that came as part of Enlightenment thought. Democracy emerged in its modern turn as an escape from limitations and a desire for self rule. Individuals chose democratic principles for the opportunities they brought, particularly in their radical rejection of old hierarchies where the other was placed above the self. This stemmed from the recognition of the value of self in the first place—hence the Enlightenment link. From this point forward, criticisms and contrary ruling systems aside, the focus of political life shifted from the wellness of the whole, to the wellness of the individuals within the whole (which in turn, constituted the whole). This notion of citizen as constituting state leads to the primary foundation of freedom and equality in democracy.

Democracy began and continues as the system by which these two central principles are secured for each individual through the arrangement of governance over their lives. An initial concern in early democratic and enlightenment thought was the question of why individuals, if allowed to pursue their own goals, would not trample over the freedom and rights of others—John Locke’s essential concern. The answer from Locke and others was that a bounded liberty was ideal, a balance between maximum personal freedom and the equality of all to engage in their own freedom—equality being a product of a) all being equally restricted and b) none being unfairly limited due to the desires of others. From these central points, the other accoutrements of democracy seem to flow. Our right to self governance clashing with our need to coexist with others is the central turmoil here. Democracy emerges as the system which best enables these two elements to be located. Like mathematical limits, Locke’s point reminds us that the system will never allow total freedom and total equality at the same point—each places a limit on the others’ expansion. Yet we can, and do, see systems that have more or less of each factor. The

goal of democracy, broadly writ, seems to be a system of maximizing freedom and equality at the same time—similar in turn to that of Rawls. All second-order principles seem to stem from this, as *means* of ensuring the two mutual goals of the actualized individual. Democracy is the catch-all name for our collection of various historical methods which do this task, and thus is the name for the pursuit of freedom and equality mutually. When found in combination, freedom and equality create democratic spaces.

Now I turn my attention from the first-order principles to the second-orders that stem from them. Second-order principles of democracy are numerous and varied, and the temptation exists to make a full listing of all of them. I could identify the numerous second-order principles that have been painstakingly employed by theorists of democracy, global justice, and the EU. The benefit of providing a full listing of all relevant second principles would be to demonstrate that some are mutually incompatible after a sense—there is no institution that could possess all of them at once. Exploration of difficulties stemming from the incompatibility of certain democratic principles has been carried out elsewhere (see Føllesdal 2006), removing the need for such a proof here.

Instead, we reach a critical junction of this project—demonstrating the way in which different second-order principles are connected to the first-order principles of freedom and equality. Principles such as *participation*, *accountability*, *contestation*, and *human rights* have been explored many times as democratic components on their own. Here, I want to treat them as the second-order principles that they are, to demonstrate just how principles such as these are plausibly linked to freedom and equality.⁴⁰

⁴⁰ Here I am concerned only with the briefest of sketches connecting these second-order principles to the first-order principles of freedom and equality. I provide only a short treatment because I am concerned with the *plausibility* of the second-to-first-order connection, more than the details of any particular connection.

Participation may be the most commonly mentioned principle in democratic theories. It can go by many names and variations—responsiveness, contact, input, and access—yet with each the principle remains roughly the same. With each, the idea is that the people have some connection between their will and the actions of the government above them. And despite little differences, in each case principles of participation are means of ensuring the freedom and equality of the person. The idea is that without participation, we lose our ability to voice and thus our control of the situation. Loss of control means a loss of freedom, as we are unable to guide the system to either achieve what we want it to achieve, or to ensure that it does not hinder actions in areas of behavior we wish to keep open. Likewise, given a system where there is more than one citizen, participation similarly realizes the equality of the procedure. Should one person be denied participation, while others retain it through formal or informal means, our equal standing with others erodes. In this way, participation (and its various similar concepts) can be seen as a second-order principle of freedom and equality.

A similar story can be told for *accountability*. By itself, accountability does not create a democracy, nor do the host of similar concerns that have appeared throughout democratic literature (guarantee, assurance, fairness, consistency, and transparency, being only a few examples). Rather, accountability as a principle is the idea that the system of governance should match the procedure and outcomes of its institutions to a pre-determined standard—in effect, that the governance produces what it promised without externalities that detract from the system's resources or functioning (graft, nepotism, etc.). In democratic cases, that standard is where we find the connection to freedom and equality. Why do we care about accountability in a democracy? Because it is our money spent and our goals pursued. The link between governance and the people is essential here. To the extent governance operates without reference to the

people's interests, it acts as a restraint on the freedom of its citizens. The disparate nature of outcomes in that case (pursuing the goals of some, not all), again violate notions of equality in the same manner as lack of participation did. Accountability, then, serves a similar purpose to participation. While different in *means* of achievement, the goal of securing freedom and equality remains the same.

Contestation forms a third example of a second-order principle of democracy. And again, a host of related yet different principles can be similarly treated (discussion and discourse, for instance). The idea here is that a democratic system needs to have some form of contestation in order to be properly classified as democratic. Mexico's years of single party rule are often faulted as non-democratic according to this concern. So why is some form of contestation or discussion of varied ideas and viewpoints important for democracy? Stemming from J.S. Mill and others, the lack of contestation leads to stagnation and lack of challenge. Without contestation of ideas, liberty is lost. Those who may think differently are tread upon, while those in the majority may find themselves holding an incorrect position which limits their freedom. Likewise, without contestation of political agendas (whether they personal or party-promoted), the outcomes of governance run the risk of being too narrowly guided: minority rights and preferences would quickly be lost. That loss of the minority view limits the freedom of those citizens, not to mention their equal standing amongst all citizens of the state. And again, we see that the principle is simply one specified way of reaching the real core of democratic concern: freedom and equality.

Finally, a fourth second-order principle to consider is *human rights*. Often packaged with democracy, or even *as* democracy in the work of Michael Goodhart (2005a), recent democratic theory and global democratic thought has consistently relied upon human rights as an indicator

of democracy. And like the other sample principles I discussed above, human rights also fits well as a second-order principle that secures the first-order principles of freedom and equality. While conceptions of human rights do vary, one critically important viewpoint comes from Amartya Sen's (2005) capabilities description of human rights. The idea with treating human rights as capabilities is that without certain basic goods human beings are restricted in their range of actions and choices. Without the food and water we need to survive, we lost many liberties of action that others with those goods possess—our capability to act in certain ways is limited. The same holds true for other, more intangible, basic goods that fill out social, economic, and civil rights. Without a right to speak our mind, to assemble together, or even (in some formulations) guaranteed health care, a person is incapable of pursuing their will. This is where human rights links to freedom and equality most clearly. Without a set of human rights present, our range of actions (capabilities) is limited. Thus, with those limitations our freedom is constrained. And in any situation where there is variable distribution of those human rights, equality is sacrificed as some enjoy the capability to be free while others do not.

The four principles I explored in brief above are only a few out of many second-order principles that realize the first-order principles of freedom and equality. Essential to notice is that with each of them, the *means* were different while the goal remained the same. This furthers the notion that democracy is properly considered in terms of first-order principles of freedom and equality met by a variable host of second-order principles that form particular methods for assuring that the first are met in a given system of governance. I provide a more expansive listing of various second-order principles in the figure below. Some of these principles are commonly linked to democracy, and thus self-explanatory. Others may hold more tenuous links (federalism and subsidiarity, for instance, could be considered freedom and equality enhancing by some, yet

can clearly appear in systems supporting other first-order principles such as security or efficiency). As will be explored, the adaptive approach recognizes that all second-order principles must be checked when found in an institution, to be certain that they are working to secure the first-order principles of freedom and equality instead of any other competing first-order principles that can be a basis of governance that is not specifically democratic.

<u>First Order Principles</u>
Equality
Freedom
<u>Second Order Principles</u>
Accountability (Zweifel 2003)
Consistency / Fairness (general)
Contact (Briggs 1998)
Contestation (Schumpeter 1976)
Discourse (Habermas 1996, Dryzek 1994)
Federalism (Stepan 1999)
Human Rights (Goodhart 2005a)
Legitimacy (various)
Oversight (general)
Participation (Barber 1984, Beetham 1999)
Protection (Madison 1966)
Responsiveness (Kuper 2004, Føllesdal 2001)
Rule of Law (Weber 1972)
Social Welfare (Held 2004)
Subsidiarity (Maccormick 1997)
Toleration (Gibson and Gouws 2002)
Transparency (Zweifel 2003)

Figure 5. First-order and *suggestive* second-order principles of democracy⁴¹

The list provided in the figure above is intentionally *suggestive* rather than exhaustive. Remember that the adaptive approach to democracy is not limited to prior conceptualizations of democracy. This is why it works so well to address the problem of the first chapter: the influence

⁴¹ Just as the list is suggestive rather than exhaustive, so are the cited proponents for each second order principle. The authors cited for each are not necessarily the definitive proponent of that principle, but rather a place where that principle receives treatment as a (at least partially) free-standing component of democracy.

of the state-model on our democratic judgments. An adaptive democracy can work with both established *and* new notions of democracy all at once. It is required to cope with the existing variety of democracy, both present and future. As such, it cannot provide a “definitive” list of second-order democratic principles. As the world changes and globalization alters the places and modes in which governance is occurring, adaptive democracy has the potential to discover more and more second-order variations designed to capture first-order principles. This focus on multiple second-order principles allows the approach to attain its flexible yet robust structure. We’re dealing with varied pathways to democracy (flexibility), yet attention to nuance (robustness) remains present by the treatment of the second-order principles that appear in various institutions.⁴²

While a definitive list of second-order principles would compromise the approach, proceeding without some listing would limit the sort of conclusions that the adaptive approach can make about the specific case that I treat in this work: the EU. Part of this work intends to provide a real engagement with the democratic questions of the Union, questions that require some cluster of likely second-order principles in the EU case. For the purposes of my EU cases, I suggest that the following provisional list of second-order principles that can be used for comparative and claim-supporting purposes. Not surprisingly, the four example second-orders form the basis of this provisional list: participation, accountability, contestation, and human rights. This list is fully open to contestation and revision (much of what the following chapters

⁴² Adaptive democracy is neither a first- nor second-order principle of democracy. This is purposeful. Adaptive democracy as I have endeavored to present it here is not a principle of democracy, it is an approach to ordering and dealing with the principles of democracy that we have (and have yet to discover).

do is exactly that), yet it provides a sort of baseline when applying the adaptive approach to the cases.⁴³

I select these principles rather than others for the provisional list as they combine into a rough caricature of the predominant view of democratic requirements among current scholars. Thus, these form the general expectations and likely places to begin inquiry when thinking about a given supranational institution. The adaptive approach lets us be flexible and robust; this provisional list of the central second-orders that we would like to see at work in the EU enables us to actually make claims about the EU that benefit from that flexible and robust tempering. The tension, which is difficult to manage, is that such a list helps make the sort of grand claims that are desirable (i.e. so, on the whole do these institutions make the whole system democratic?) yet starts to impose structure that is not as comfortable with the open, flexible ethos of the adaptive approach. Thus the list needs to be taken as it is: a provisional list that generalizes a set of principles that are roughly consensus second-order principles of democracy. The list cannot be our “laundry list” of what to look for in a given institution. Rather, it will serve its purpose most fully in the conclusion of this project. The adaptive approach gives researchers a perspective to question their own assumptions and generate a more robust understanding of what principles are actually being met in a given institution. The question is less “how democratic is the EU” as is commonly asked, but “how is the EU democratic”—which is what an adaptive democracy will show us.

With this suggestive list of second-order principles, the next step is to understand the process by which adaptive democracy works. To that end, I offer the following set of guidelines

⁴³ This list also recognizes a certain sort of endogeneity in democratic accounts of the EU. The EU was created by people working with certain principles about democracy, and thus the institutions should reflect those proclivities if the EU is indeed achieving any democratic goals that were intended for it. My provisional list is simply a cluster of the four most-likely candidates from that list.

that establish the nature and boundaries of adaptive democracy. It is in these guidelines that we move from thinking about the adaptive approach to the question of how the adaptive approach is actually employed.

2.5 EMPLOYING THE ADAPTIVE APPROACH

The adaptive approach to democracy focuses on changing the viewpoint we use to address questions of democracy. Paradigm shifts are often easier said than done. This section explores how one uses the adaptive approach, in effect a set of guidelines for thinking about an institution's democratic character that push toward the adaptive mindset and away from dichotomization or excessive use of state-based expectations. In effect, this section touches on the question of "how to do" the adaptive approach. By starting our analysis of an institution with the knowledge of the pitfalls of other paradigms, and then do adaptive democracy by applying the guidelines. Note, however, that the approach is still a viewpoint bundled with some guidelines that help ensure that we stick to adaptive thinking rather than straying into old and perhaps unwanted approaches democratic thinking (*thick versus thin*). The five guidelines are presented in the graphic below:

The Adaptive Democracy approach: being flexible and robust

- I. Identify what second-order principles are present, understanding that not all will be realized in each institution or practice
- II. Remember that second-order principles are not lost, they lose their usefulness
- III. Identify the reasoning given for the second-order principles
- IV. Check that the first-order principles of freedom and equality are not being violated
- V. Don't seek definitive qualifiers or quantifiers; instead develop a nuanced way of viewing democracy in a complex and multi-layered world

Figure 6. Guidelines for adaptive democracy⁴⁴

The first guideline tells us where to begin. Inquiry starts by identifying a second-order principle at work in a particular institution. This is the essential starting point of the adaptive approach. Make a list of what the institution does, and what it was intended to do (noting that these two may not be the same). This lets us develop a list of principles that are at work within the institution. What are the means the institution is using to reach its ends? Here attention to both the function of the institution and the institution's own rhetoric is needed. Understanding what the institution "gains" from a particular second-order principle is the goal—since that will be the essential consideration paid attention to by guideline three. As expressed in the prior section, second-order principles are the means to the ends of freedom and equality, as these two first-order principles are often not directly observable in an institution.

⁴⁴ The order presented is the way that I conceive the adaptive approach working. Objections to the ordering should consider the context of the approach—the goal of these guidelines is to reinforce the adaptive viewpoint and to keep the researcher in the adaptive paradigm.

We start with this listing of second-orders to get a handle on what is going on prior to making our democratic claims. The adaptive approach does not bring a particular list of democratic qualities to an institution—instead, it views what is going on in the institution that may have a connection to democracy, whether familiar or new. This interest in second-order principles stems from their relationship to the first-order principles that motivate the research. Again, first-order principles get realized in practice through other means (second-order principles). Thus, the central points of attention for an adaptive democracy are places where a practice or institution is realizing a second-order principle that follows from freedom or equality.

It is essential to recognize that adaptive democracy does *not* require all second-order principles to be present all at once, or even all within the same complex governmental structure. This is the essential reason why adaptive democracy is not merely a checklist. Democracy is not a state of degrees. Rather, it is an approach that can be realized in many different guises and in different concentrations over different units. Again, this is why the moniker “adaptive” is appropriate. Adaptive democracy can be robust and flexible at the same time, by analyzing specific descriptions of democracy without creating a taxonomy of which ones are “necessary”. Instead, adaptive democracy points toward democratic judgments based upon various and often-overlapping qualities, no particular combination of which needs to be present in order for a system to be democratic or not. Adaptive democracy is secure on first-order principles, but adaptive in its treatment of second-order principles.

The second guideline clarifies the way we think about the multitude of second-order principles—how we organize this list of principles that we have just drawn up. The second guideline reminds us that second-order principles are not lost, they merely lose their usefulness. This is a key difference between the adaptive approach, which organizes our thinking about

democratic theories, and a particular democratic theory. With a particular theory, the theorist chooses a set number of principles and articulates the mass “the” combination that means something is democratic. Thus anything that don’t make the list would be “lost” as the theorist concludes that they are not a part of his or her model of democracy. The adaptive approach does not fall into this trap. When a second-order principle is not present in an institution, it does not mean that the principle is no longer a second-order of freedom or equality. Instead, it is not present at the given time, in the given institution—they lose their usefulness for that particular case.

Practitioners of the adaptive approach must deal with a great variety of second-order principles. The prior guideline reminded us that not all of these principles are necessary to be realized in a system for that system to be democratic. Yet this leads to a concern about the constellation of second-order principles. As discussed in chapter one, this project is motivated by the recognition that state-based principles of democracy are improperly suited to talk about systems of global governance. So what becomes of second-order principles that drew their main motivation from the history of democracy as it was realized in states?

For the purposes of adaptive democracy, those principles should not be discarded. Instead, they should be considered as less useful for the purpose at hand. Adaptive democracy is not about throwing out the old notions of democracy for new ones. Rather, it encourages us to determine how new and old second-order principles are realized by existing institutions. If the focus of study does not include certain second-order principles, then we place those “on the shelf” for the time being. They lose their usefulness for that particular case, but adaptive democracy does not call for discarding that principle because of that fact. If discourse (for example) is simply not a second-order principle for realizing equality in the EU, it does not mean

that we must discard that principle. It only loses its usefulness for the case, institution, or practice at hand. Adaptive democracy is about recognizing second-order principles at work, not about making claims about which ones are valuable or archaic.⁴⁵

In the same way, if a principle does not show up on our list that we would have expected, it the reaction should not be to proclaim that there is a deficit. Instead, the list should be interrogated further—seeing how the second-order principles that are at work in the institution access democracy. Remember that there will be more institutions to consider, and that democracy simply may mean something different in the supranational context than it does within states.

A third guideline also helps clarify adaptive democracy's treatment of second-order principles. Adaptive democracy is concerned with the reasoning behind the second-order principles observed in institutions. This attention to the story political practitioners and their citizenry give for any second-order principle comes from a principle tension in the approach. There are second-order principles that can stem from multiple first-order principles. Efficiency serves as a good example. It can be derived from freedom and equality, but it can also be derived from other concerns that have nothing to do with democracy. This complexity is a difficult one, but not an obstacle for adaptive democracy.

With each second-order principle, it can have one of three origins relative to our democratic first-order principles of interest. First, it could stem from both of our democratic first-order principles exclusively. Second, it can stem from a conjunction of first-order principles: it satisfies democratic principles of freedom and equality as well as other principles that those

⁴⁵ It may be the case that certain second-order principles do go out of style for long periods of time, leaving their loss of usefulness akin to a disappearance of the principle. The argument for the second guideline is focused on the fact that adaptive democracy doesn't go about pronouncing certain second-order principles lost, even if certain principles become *de facto* lost because they simply cease appearing in modern political arrangements.

vested in the institution also care about. And third, it can stem from a non-democratic first-order principle yet take the same form as second-order principles that come from democratic first-order principles. For an adaptive democracy, the first holds no problem—the second-order principle’s pedigree is democratic and we proceed with the approach. The second is not a problem for an adaptive democracy on its own. The second-order principle remains focused on securing democracy. However, the difficulty of the second instance is the difficulty in discerning between it and the third instance—the two are easily confused. What is needed is a measure that can reliably discern between a principle drawn from democracy and something else and a principle drawn from something else that happens to resemble other familiar democratic principles. How do we know if the designers of a central bank are concerned with transparency because of democratic motivations or because of economic reasons (i.e. encouraging investor confidence)? Attention to the reasoning behind the principle is the way to escape these difficulties.

Adaptive democracy cares about the story given for second-order principles in addition to the way the principles are institutionalized. The adaptive approach relies upon the notion that second-order principles are implemented because we care about freedom and equality as first-order principles in the first place. For complex situations or second-order principles that can be drawn from multiple first-order principles, learning the reasoning behind the principle can tell us whether democratic motivations are present or not. Later chapters will explore how this attention to reasoning is managed, and how we can discern between rhetoric of democracy and actual concern for democratic principles. While it is a nuanced procedure, this attention to reasoning is the means to escape problems of the sources of the principles we focus on.

The fourth guideline complements the earlier guidelines. The only necessary element that adaptive democracy needs to identify is that the institution of interest does not systematically violate the first-order principles of democracy. While each institution may privilege freedom or equality somewhat over the other, the essential concern is that neither is critically absent (or purposefully restricted). Adaptive democracy can examine the second-order principle, as well as other outcomes of the institution or practice in question, and simply ensure that harm is not being done to the first principles. The democratic qualifier is then freed for discussion. This guideline allows us to also escape criticisms of the broadness of our first-order principles. While it is true that some amount of freedom and equality is present even in the most abusive of regimes, our fourth guideline focuses on the extent to which freedom and equality are not present. Calling the equalization of citizens under dictatorial tyranny equality (i.e. all are equally repressed) would be captured by this guideline, and the institution rejected as democratic accordingly. Note that this step comes later in the list on purpose. If we started with this step, things might get tossed out too early—before we have a chance to understand the story of the second-order practice and consider any potential new ways that it accesses freedom and equality. Front-loading this guideline would act as a screen, and might save a bit of wasted consideration. But by leaving it until later in the process we can keep options open—which matches the flexible nature of the adaptive approach. The goal of changing paradigms is to be able to find democracy in unexpected and new places. Excessive rejection of principles early on might compromise that.

The final guideline, again building on the prior ones, is that no democratic judgment can be made with the voice of an end-all analysis. The judgments that one can make from adaptive democracy are relational and complex. Adaptive democracy is about looking at the patterns and practices of all components of a system and analyzing whether each part is democratic. The

complexity of political systems will make such an enterprise a dense and multi-form task. It enables us to say whether a practice is democratic or not, and may allow for “on the whole” type judgments of a regime. What it does not enable is a definitive dichotomous democratic or not-democratic judgment. This enterprise is one of normative inquiry, designed to look at complex institutions and demonstrate the similar-yet-changing face of democracy in practice.

It is important to recognize one particular danger at this point: fallacies of composition. One could be tempted to suggest that with enough micro-level democratic practices that the whole institution is democratic. A federal example serves well: if the German Länder contained millions of democratic micro-processes, but the Federal Republic was a benevolent yet authoritarian rule, the danger would be calling the system democratic because of the multitude of lower-level democratic processes. This is why any “on the whole” judgments stemming from the adaptive democracy approach must be tempered with the fourth guideline. Concern that the first-order principles are not violated serves as the primary break for any claims that can be made.

Adaptive democracy allows for nuance in our democratic judgments, which couples perfectly with approaches to democracy that must deal with the reality of globalization. As governance is split over different layers, institutions, and practices, adaptive democracy gains strength as a mode of thinking about disparate second-order realizations of democratic principles that are not required to be unanimously present in a unified political regime. Adaptive democracy allows for applicability and depth of inquiry (substance) while still being able to judge a variety of disparate situations with their own contexts along the same mode of normative inquiry. All told, it solves the difficulties of the thick and thin dichotomy while simultaneously providing an approach that can better deal with the changing face of democratic governance today.

2.6 FROM APPROACH TO CASES

Early on I said that adaptive democracy is a tool for inquiry into the democratic nature of systems. I characterize it as a tool because it is fundamentally a means to make judgments. Adaptive democracy allows us to make analytic claims about whether an institution/practice/system is democratic or not without being rooted to a particular historical trajectory (such as democracy learned from the nation state). These analytic claims will be made within a normative framework. These arguments are of normative interest, but they yield analytic claims about how principles of democracy are specified.

Adaptive democracy is a tool because it is an approach that can be used. It's not only a philosophical attitude, theoretical lens, or a new paradigm for the same old thinking. Instead, it provides traction for discussing the democratic qualities of real cases of democratic concern. This is the reason why I developed the set of guidelines in the prior section. Adaptive democracy is meant to be employed, and the chapters that follow this one are attempts to utilize it.

The process of working with adaptive democracy, as I envision it employed, is particularly suited to finding *likely principles* at work in *unlikely practices*. At the outset, the adaptive approach begins with a simple set of existing principles. In addition to the first-order principles of freedom and equality, we have a number of “off-the-shelf” second-order principles. Inquiry begins by looking for the existing second-order principles in the usual places. Where the existing universe of second-order principles fails, only then do we begin looking for additional second-order principles that are realizing freedom and equality in new ways. Thus, our focus is on seeing where the likely principles are present or absent. Following that the focus turns to whether democracy is present in those moments of absence through other second-order principles.

With a starting point of likely principles also comes an ethic of looking at unlikely practices. Looking in the likely places for likely principles will not be difficult work. Adaptive democracy gives a vehicle that can cope with both the likely institutions and unlikely practices. There is a growing literature on new institutional practices. Some of these practices are likely to contain second-order principles at some point, especially when they are taking place in societies where democracy is a prior value (thus the first-order principles are broadly agreed upon by citizens and politicians). This also applies to new practices in old institutions, or practices that take on a new significance when the basics of their institution change. Question time in the European Parliament has a different focus than question time in national parliaments because the different situation of a parliament at the supranational level: it serves as a more direct mode of policy control through discourse as opposed to working strictly to ensure accountability (a case I will explore in depth in later chapters). The essential ethic here is that different circumstances, such as those of supranational institutions, can lead to unlikely practices that promote democracy both in familiar and new ways.

The process of using adaptive democracy is then one similar to Rawlsian reflective equilibrium. We take our principles to the world, and see if they are met by existing second-order principles. If they are met in new ways (why we start looking at unlikely practices first) then we can work out what second-order principles those practices are meeting. This allows two benefits. First, we may discover brand new second-order principles that might exist: new ways of realizing the core principles democracy cares about (freedom and equality). Second, we can make our democratic judgment calls if we are so inclined. Thus we can point at a practice and say: “Yes, this is a democratic practice,” which in the case of the EU can help to balance latent worries of non-democratic governance that motivate the democratic deficit debate.

The adaptive democracy approach is especially useful for problem areas such as the EU. The supranational space is one where we don't have the usual mapping to a set of second-order principles. All we have is the kind of second-order principles that seem to support freedom and equality in the state context. Our state experience gives us one long list of second order principles, but ones that are not always reflected or possible at different levels of governance. Scholarship about democracy in the EU needs an approach that can be flexible in its analysis yet speak robustly about the realized nature of the institutions: adaptive democracy. Thus, the following chapters begin exploring the new possibilities that combining adaptive democracy methods with the case of the EU can bring to the field of democratic theory.

3.0 THE EUROPEAN PARLIAMENT: INSTITUTION OF FIRST RESORT

Imagine a child growing up in a family that owns a number of dogs. As she grows up, she learns that there may be many different breeds, be it English mastiff, German shepherd, or Italian greyhound. Yet each behaves in comparable manner. The dogs are kind, friendly, and socialized. They fill a certain role in the home (companionship), and require certain circumstances to flourish (food, water, security). The child becomes accustomed to the nature (concept) of “dog”.

Now consider when the child moves beyond the defined boundaries of the home—perhaps a woods far behind the house. It seems similar enough here, as there are trees and grass just like the backyard where the child played with her dogs many times. Yet here in the forest, the only animal is a wolf. The child observes the wolf, which matches her conception of “dog”. If the child were to theorize about the behavior this new “dog” were about to display, her predictions would be dangerous to say the least. And when she was being chewed upon by the wolf, she might well think: “this is not how a dog should act.”

That example is a simplistic version of the problem that this chapter focuses upon: how do we disassociate the assumptions that come with a concept, idea, or name from our scholarship? While our theories may not worry about dogs, they do focus on particular concepts such as parliament, president, demos, and democracy. What happens when we carry what we know about those concepts to a new place? What happens when we consider a familiar-looking political institution in a new context? Will it turn and “bite”, so to speak? This concern is of

particular importance to comparative political analysis of global institutions. A cross-national assembly is very different than a parliament in a national setting, even if the name and appearance of the two seems the same. The case of the European Parliament (EP) is one such instance.

When scholars begin thinking about the question of democracy in the EU, often concerns about the EP are at the forefront. Issues of legitimacy, representation, and access drive much of the democratic deficit debate, and many scholars focus upon the EP's relationship to these factors. My inquiry here focuses upon not only the various studies about democracy and the EP, but also on the very question of why the EP is a focus area. The answer to this latter question is deceptively simple: because it is called a Parliament.

We look to the EP first because it is parliamentary. It matches, in name and in manner, the site that is most often associated with democracy in the state context that we're familiar with. Whether one thinks of it as Parliament, Assembly, Congress, Diet, or Knesset, this system of elected representatives discussing and voting on behalf of citizens has long been the iconic symbol of a democratic state. Thus it seems entirely natural that the EP is the first institution that springs to mind when scholars want to examine democracy in the EU.

Yet it is important to examine this tendency. I argue that it is indicative of an attitude in research that ultimately leads to certain forms of prejudice and bias. This chapter will explore existing work on the EP, and see how both the trends and arguments can be explained by this tendency of looking at parliaments as the place where democracy happens. Like the wolf that bites us when we expect a dog, our base assumptions about parliaments may lead us to miss crucial changes that the supranational setting imposes on the EP. I will endeavor to show why this attitude is insufficient for scholarship of European supranational governance. Linking back

to the discussion in chapter two, any bias for “parliament is the site of democracy” is based upon pre-existing notions drawn from the nation state, which may not apply in the supranational context. Just as Giovanni Sartori (1970) pointed out that “the pre-1950 vocabulary of politics was not devised for world-wide, cross-area travelling,” I argue that the pre-globalization vocabulary of democratic government was not devised for spaces of supranational governance.⁴⁶ Parliament is a word steeped in history, assumptions, and expectations—all things which hinder rather than help scholarship on the EU.

This chapter sets the stage for the adaptive approach treatment of the EP which can remedy these problems. In order to do so, it first takes stock of the major trends in current theorizing about the EP as a democratic (or not) component of the EU. It starts with the question of why the EP receives particular attention when questioning the democratic character of the Union. It explores the familiarity that the name parliament brings, as well as assumptions about the character and design of the institution. It then turns to the existing work looking at the EP, detailing two main approaches in the literature that form two distinct groups of theories. The first group consists of theories that find the EP to be either sufficient or insufficient as the democratic backbone of the EU. The second group of theories contains those theories that find the EP to lack certain democratic characteristics, and thus turn to other places in the EU for bolstering of the Union’s democratic credentials. Given that most of the first group find democracy to be lacking in the EU, the divide breaks down into not democratic enough versus democratic enough given the other elements of the system.

I will go on to show the difference of the adaptive approach. There is a passing similarity between the adaptive ethos and some of the thinking in the second group, but ultimately group

⁴⁶ Sartori (1970). pg. 1034. Note that the “supranational” period of EU operation is dated by Tsebelis and Garrett (2000) as beginning in the mid-1980s and continuing through today.

two makes moves that defy the adaptive standpoint. Both groups share a commonality that the adaptive approach rejects: both begin with the burden of expectations about parliaments. While each operates differently from that point, both too easily fall into reliance on pre-existing assumptions about how parliaments work in states. From this observation, I build a notion of how our scholarship gets prejudiced by both experience and language itself, and how that keeps us from evaluating an institution like the EP fully.

I categorize this reliance upon the word and notion of parliament a phenomenon I term *the weight of association*. By this, I mean the way scholarship can be burdened when assumptions are lifted unconsciously from a different case that happens to bear the same name and “feel”. I argue that the history of linkage of parliament with certain notions about democracy leads to the very name (not to mention a similar institutional make-up) carrying assumptions into our treatment of the EP. This applies our old notions about democracy that come bundled (associated) with the idea of parliament. Yet the EU is a fundamentally different thing from the states where our associations about parliaments are rooted.

Exploring this notion, I argue that it is symptomatic of many approaches to the EP. By understanding the way in which the weight of associations skews research, it becomes clear that a new approach is needed to remove these pre-existing notions. My adaptive approach fits the bill nicely. The following chapter moves from this insight to showing how the adaptive approach to democracy is uniquely situated to better insulate against the difficulties caused by the weight of association. I examine and ultimately reject a few other options for dealing with linkage of parliament to certain state-based democratic ideas, and build a case for using the adaptive approach to democracy in the case of the EP.

3.1 THE TWO GROUPS OF PARLIAMENTARY PUNDITRY

Scholarship on the European Union has become something of a cottage industry in both comparative politics and international relations fields over the recent years. In this explosion of literature, every institution and practice has been scrutinized to some degree. As discussed in chapter one, the democratic deficit has been one particularly active component of thinking, scholarship, and general hand-wringing among EU scholars and EU politicians alike.

Within the scope of work on the democratic deficit, the European Parliament is consistently a central, if not *the* central, focus of discussion, theorization, and worry. This institution's prominence in the debate is entirely understandable, given the discussion from the introduction of this chapter. The very foundation of the democratic deficit claims stems largely from a sense of loss of national sovereignty paired with concerns about perceived defects of the EP. Among the host of new supranational institutions, the EP has the distinction of appearing most similar to the institutions of the state system where democracy is traditionally thought to reside: parliaments and representative assemblies. In political thought, the history of democracy, and even life experience we learned what it meant to be democratic through the development of these institutions. So we can understand the natural progression of questions about the EP leading to worries about democracy in the EU. While I will ultimately argue that this naturalness is a problem for scholarship, I do not dispute the fact that the EP is likely the most frequent site of research, punditry, and worry about democracy in the EU.⁴⁷

⁴⁷ I am fully aware that my own work starts in a manner that I seem to critique: starting with the European Parliament first. My reasoning for this is located somewhere between “because others pay such attention to it” and “it allows my project a starting point that is both the obvious case and a means to show the unique features of the adaptive approach.” And even when actively working to think democracy outside of the nation-state box, the EP has a strong draw as a natural starting point, because it does come into contact with many second-order principles we might care about.

A number of excellent works lay out the nuances of functions, role, and institutional character of the EP. Instead of an exhaustive, and perhaps excruciating, detailing of the history and nature of the institution, I provide only the basic brush strokes of the EP as an institution below. For general and specific insights into the inner workings of the institution, readers should consult any of the works I reference. What is important here is less the workings of the EP than the exercise of scholarship about the EP.

In brief, the EP is a directly elected body of representatives selected via a cross-nation-state electoral contest. The history of the EP is one of transition and growth, arguably one of the institutions in the EU that has changed the most through time. The EP began as a simple assembly that was intended to provide a small measure of accountability to the High Authority that administered the European Coal and Steel Community. With successive European treaties, the EP has developed into a major policy actor within the EU in its own right.

The exact moment of the EP's emergence into a meaningful institution can be argued, but clearly the Treaty of Maastricht played a central role. With Maastricht, the EP was given powers of co-decision along with the European Council of Ministers. While limited in scope to economic matters and monetary union—excluding security, justice, home affairs, and Union foreign policy—this allowed the EP a measure of power in the European supranational system. In addition to co-decision, the EP had rights of consultation, which notably will prove central in chapter four. With the Treaty of Amsterdam, the number of areas where the EP possessed co-decision power was increased. This trend of gradual increases in competence has continued through successive treaties.

In terms of organization, the EP functions as a representative assembly. It relies heavily upon plenary discourse and a complex committee system to conduct its business. While turnout

for EP elections is low, and access to Members of European Parliament (MEPs) remains difficult for some across Europe, the institution has generally patterned itself as providing many of the same functions as national parliaments: representation, discussion, accountability, and even a limited role in ombudsman-style representation.

Having sketched a very brief overview of what the EP is, I now turn to the real action: scholarship about the democratic deficit that centers on the EP. The EP is consistently a concern for both scholars and Europeans alike when thinking about the Union's democratic character. The European Court of Justice (ECJ) directly linked the EP to the community's democratic character, saying that expanding the role of the Parliament matched the "fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly."⁴⁸ Other statements are equally straightforward with their democratic language and deployment of what the EP's role should be.

Beyond these general positions, I argue that the bulk of democratic thought regarding the EP can be categorized into two main camps.⁴⁹ The dividing line is deceptively simple. Some theories examine the EP and conclude that it is lacking. They then suggest ways that the EP could be expanded, changed, or empowered in order to become what it should be. These types of theories hold that the EP is *not democratic enough*. For some the EP lacks some critical factor that is perceived to be a problem. For others the EP is plenty democratic in its internal workings,

⁴⁸ Shackleton (2002). pg. 98.

⁴⁹ In the construction of two camps, some scholarly work necessarily fails to fit in either. In this case, much of the literature on the democratic deficit comes from quantitative and qualitative political science. Recently political theorists have begun taking a more sustained interest in the democratic character of the EU and supranational organizations in general. While my critique may be applicable to some of these works as well, their approach tends to lead away from easy classification into one of my two groups. The work of John Coultrap (1999), Daniel Wincott (1998), Christopher Lord (2001), and Michael Goodhart (2007) tends to be harder to classify in these two groups and should be considered more in line with the ethos the adaptive approach is trying to define.

but is not empowered enough to color the entire system as democratic. In any case, for this first group, the EP is both the problem and the site for solution.

The second group of theories gives a different read on the EP. They articulate that the EP is *democratic enough, given other sources of democracy in the EU*. These theories start from a notably similar point to the first group: that the EP is lacking something. However, they differ on diagnosis that the institutional reality of the EP is a problem. Instead, they proceed outward from the EP and look to many other institutions and practices in the EU for democratic processes. While not all say that these other parts exist (or are as present as is desirable), the emphasis is that the EP is not the sole container of democratic hopes for the EU. Instead they show how other institutions can or could provide the sorts of democratic processes that the EP fails to provide. Thus the EP may be a problem, but the solution is an EU-wide one, not just a matter of the EP. Any shortcomings of the EP can be made up through other sources and in other, perhaps non-traditional places.

Group One: Not Democratic Enough. Much of the thinking in this grouping starts from an observed difference between parliamentary democracy at the national level and the manner in which the EP functions. In this way, the elements that parliaments were thought to provide are felt to be absent at the EU level. Expectations for the EP include it being a source of democracy through legitimacy, accountability, openness, and representation in the EU.⁵⁰ For some, these “traditional” forms of democracy, particularly electoral accountability or representation, are lacking the EP and therefore the EU by extension.⁵¹ Diagnosis of why this occurs is varied, but the trend seems to be an understanding that the transfer of sovereignty from nation states to

⁵⁰ Lodge (1994).

⁵¹ Peterson and Bomberg (1999). pg. 256; Ericksen and Fossum (2002) pg. 401.

supranational caused a disjunction in familiar pathways of legitimacy. Empowerment of the EP is seen as a means of generating increased legitimacy for the system, and is therefore widely endorsed as the primary solution for democratic concerns.⁵²

For many others in the debate, the problem of the EP is that it does not capture the relationship of representation that citizens in Europe have come to expect from a parliamentary body. For some, the democratic deficit is a function of citizens feeling under-represented.⁵³ Contact, participation, and even limited ombudsman roles for parliamentarians are considered essential goods that the EP should provide as well. Likewise, moments when EP seems more interested in securing its own institutional power through driving integration are critiqued as detractors of democracy—when the EP operates along any lines other than public interest, democracy appears jeopardized.⁵⁴ The relationship with the European public plays an important role here. The EP is compared to national parliaments, and many of our measures for democracy in the national context are directly transferred. For instance, some scholars suggest that support levels for the EP are an indicator of its legitimacy, and thus of its democratic credentials.⁵⁵

These currents all feed into a central difficulty that group one scholars perceive in the EP: it simply does not function as the institution where the public feels it controls government. As discussed in chapter one, this notion of public control is believed to be the “core attribute of democratic governance” by many.⁵⁶ Through national parliaments, the citizens feel that they have a means of securing the accountability of governance to their will. At the state level,

⁵² Rittberger (2002); Newman (2001); Rothschild (1997); Scharpf (1991); Sjursen (2002); Weiler et. al. (1995).

⁵³ Rohrschneider (2002). pg. 463.

⁵⁴ Hayward (1995).

⁵⁵ Gabel (2003).

⁵⁶ Lord and Beetham (2001). pg. 458.

parliaments are the primary (though not exclusive) loci where citizens feel they can achieve this accountability.⁵⁷

From these sorts of approaches, the answer to problems of democracy in the EU seems clear: increased role for the EP. The diagnosis determines the prescription. The problem is a lack of elements that have always come from parliaments, and thus the EP's marginalization in the Union's decision-making process is questioned. Many scholars doubt that the EP has any real ability to serve as a representative body through which the Europe-wide populace can influence the supranational decisions of EU institutions.⁵⁸ Therefore, only expansions of the EP's role and power in decision-making can guarantee an increase in the characteristics of parliamentary democracy. The fact that successive treaties have consistently widened the abilities of the EP serves as a reminder that this concern remains a pressing force on the part of many Europeans.

Before we leave group one, there is an interesting subset to consider. There are some theories which find the EP to be democratic enough on its own terms without additional support from elsewhere. I include them in group one as their answers to EU democracy reside solely inside the EP. These tend to examine procedure and behavior more closely, such as the work of Noury and Roland (2002) which suggests that under co-decision, the behavior of the EP dovetails closely with the behavior of national parliaments (along party lines). Thus they feel that the EP is more representative rather than simply a different looking forum for member state interests to clash. Similar results are found in the work of Franklin and Scarrow (1999), who conclude that similarities between MEPs and national MPs in behavior demonstrate the democratic "health" of the Union.⁵⁹

⁵⁷ Sioroff (2003). pg. 446.

⁵⁸ Shackleton (2002). pg. 113.

⁵⁹ Franklin and Scarrow (1999). pg. 45.

In short, group one tends to include scholars who feel that the EP is not democratic enough, and that the solutions to democracy in the Union reside within the EP itself. Those solutions may be closer or further from reality, but in all cases, the EP remains the site of ensuring that the functions of democracy are met. These functions, primarily legitimacy, accountability, and public control, find much of their impetus from national understandings of parliamentary democracy. For group one, what is good for the goose is good for the gander: ensuring that the European parliament guarantees the same qualities as the idea of *parliament* is paramount.

Group Two: Democratic Enough, Given Other Sources of Democracy in the EU. For this group, analysis often starts in a similar place. The EP has notable flaws that are motivating factors of the democratic deficit discussion. Where group two differs from group one is in the response to those flaws. The answer is not transforming the EP to look like parliamentary governance as we know it on the national level. Instead, the concern is in identifying what gaps in democracy are left by the EP and how other institutions in the EU provide traditional or novel sources of democracy that fill those gaps.

For some, the process is simple. The EP may be lacking, but the essential element to remember is that the EU is a collection of legitimate, democratic states. As mentioned in chapter one, some thinkers suggest that all institutions of the EU can be considered to be representative because they are accountable to member state governments, which are in turn democratically elected.⁶⁰ From this vantage point, the democratic qualities provided nationally simply transfer to

⁶⁰ Moravcsik (2002). pg. 611; J.H.H. Weiler (1999). pg. 265.

the EU, as long as the member-states themselves are sufficiently democratic.⁶¹ In this way, national parliaments are a part of the EU's structure, and thus the parts of parliamentary democracy that are absent in the EP are simply filled indirectly through the member states.⁶²

For others, the process is more complex and centers on exploring alternatives within the EU institutions themselves. This set of scholarship is more widely diverse, considering institutions ranging from the major to minor, obvious to obscure. Often times, this procedure involves searching out the functions we associate with parliaments located in other institutions. For instance, Tsebelis and Garrett (2000) suggest that the EP is simply part of a new evolving bicameral system in the EU. They argue that a combination of the voting procedures in the Council of Ministers combines with the EP to produce the sort of parliamentary process that is desired.⁶³ Others suggest that the procedures within the Council itself display desirable democratic norms: trust, collective action, agreement, and discourse.⁶⁴

While the Council is a popular location for consideration by scholars of group two, other institutions and practices are certainly analyzed as well. Given that a perceived problem is the EP's inability to transfer citizen interest into the EU, other structures that inject European citizens' will into the Union's decision-making process become attractive to scholars. One instance is the European Economic and Social Committee (ESC) treated as parallel to the EP in some ways, and able to provide the critical transmission of interests that the reductive parliamentary body could not.⁶⁵ The difficulty here is that the very notion of citizenship, and therefore translation of citizen interests, is problematic in the EU. Adjusting expectations for

⁶¹ Newman (2001); Benz (2004).

⁶² Katz (1999).

⁶³ Tsebelis and Garrett (2000).

⁶⁴ Hayes-Renshaw and Wallace (1997). pg. 275-276.

⁶⁵ Smismans (2000).

what citizenship means in the new context play a role in some group two scholarship. If the traditional links between the citizen and governance are changed, then new links become the focus.⁶⁶

Thus the final subset of group two looks for substitutes for the legitimacy that is provided through parliamentary representation in state systems. These sorts of approaches begin from the standpoint that legitimacy is the critical element seen in national systems, and thus democracy in the EU is about increasing the legitimacy of the system. However, legitimacy is both a broad and contested concept, and this space gives EU scholars room to maneuver. Other forms of legitimacy can complement the traditional parliamentary ones, often by adding new types of legitimacy (formal, social, output, behavioral) to the traditional representation-based notions of the term.⁶⁷ Even the EU itself consciously pursues this notion of multiple legitimacy.

While characterizing group two is difficult, a central theme emerges. The idea begins with the notion that the democratic deficit stems from problems with the EP and failures of the system to provide the standards of parliamentary legitimacy, accountability, participation, and control. What sets group two apart from group one is that the remedy does not lie in the EP. Instead, mixed strategies of democracy emerge through seeking the parts of representation that are missing in the EP in other places. Where such supporting measures are found, scholars are lead to conclusions similar to that of Maccormick (1997): that there is “no absolute democratic deficit in the Commonwealth.”⁶⁸

Examples of theories in both camps could continue indefinitely. However, the distinctiveness of the two camps should be as clear as their areas of similarity. The central

⁶⁶ Wiener and Della Sala (1997).

⁶⁷ Verhoeven (2002); Peterson and Bomberg (1999); Rittberger (2003).

⁶⁸ Maccormick (1997).

element to notice is the continued reliance by both sides upon the notions of representative democracy and parliamentary governance. As suggested in chapter one, this similarity is perpetuated by the “somewhat idealized image of representative democracy in terms of accountability or responsiveness of decision-makers” that exists in the literature.⁶⁹ The following section addresses this central flaw that is shared across both groups—the weight of association that the notion of parliament carries.

3.2 PARLIAMENTS AND THE WEIGHT OF ASSOCIATION

The pitfall for both groups of scholarship addressed in the prior section is that each starts from a view that includes certain expectations for the EP. While certainly some do a much better job than others in relaxing those expectations in order to inquire into the EP, a consideration of the expectations is important. The difference in the two groups can all be expressed as a function of how they cope with their parliamentary expectations clashing with the muddy reality of the European supranational system. Yet the similarity of the two groups is what I find most striking. With each, the baggage of parliament is clearly present. Group one finds the EP failing to meet parliamentary expectations. Thus they propose a change in the EP. Group two likewise views the EP as failing expectations. They go out looking for the aspects that are missing in the EP as compared to parliaments, and seek to locate them elsewhere in the system.⁷⁰

⁶⁹ Papadopoulos (2003). pg. 473, 492.

⁷⁰ It is important to note that group two is preferable from the vantage point of my adaptive approach to democracy. They demonstrate the sort of moves in thinking that are the staple of the adaptive approach: seeking democratic elements in new places when the traditional places fail. Their only drawback is that the taint of state-based parliamentary democracy remains too influential. Their search is for the same old elements that we learned are important *through* the parliamentary experience.

What I hope to reveal in this treatment of EP democratic scholarship is the way in which the idea of parliament has a distinct influence on the practice of theorizing about the EP. Central to this is the power of the name parliament itself. When the architects of the EU solidified the common assembly of the European Coal and Steel Community into the EP, the very development of the name EP (and the notion of “assembly” before it) was of crucial importance.

The word *parliament* is a word steeped in history, tradition, and meaning. The name immediately adds a layer of assumptions about the structure of the institution as well as its normative role. All concepts carry meaning in this way, though not necessarily with the same importance to scholarship. When I utter the words *dog*, *sidewalk*, or *player piano* they call forth a set of assumptions, beliefs, and understandings in both me and the listener. This is the nature of language. Yet there is a critical distinction between *player piano* and *parliament*. The assumptions that *parliament* carries with it are confined to a particular historical experience: the state. When the term is employed, it carries with it the state-based understandings, history, and normative role. The term parliament, like most concepts in social science, carries a heavier burden of social understandings than simple objects. It was generated in a particular context of history, time, and event. Those particulars are bound to the concept more closely than the contexts of a general term. The concept is thereby *heavier* than other concepts.

While similar notions may exist in critical language theory, I consider social science concepts to carry a *weight of association*. When the researcher employs them, the heaviness of their social origins influences their use, either consciously or unconsciously. And this process occurs from the very instant of scholarship about such a concept. As Giovanni Sartori (1970) points out so well: “*concept formation stands prior to quantification*. The process of thinking

inevitably begins with a qualitative (natural) language.”⁷¹ Our language influences our thinking even prior to our active work with the concept. I argue that the weight of association is a particular problem with research on the supranational. A supranational organization such as the EU is recognized by many as *sui generis*, yet we continue to use concepts that are steeped in old meanings, different contexts, and potentially different norms.

Consider the two groups of scholarship on the EP. In both cases, the weight of association carried by the term parliament seems to leave its thumbprint on the scholarship. The central difference between the groups as I have laid them out is not their approach. Both start with the calcified notions of parliament learned from the state-origin model. Each group attempts to find parliament, and thus democracy, in the EU as they already know it. The only difference comes when they realize that the EP simply does not replicate what we expect from something called parliament.

The first group responds to the difference between the EP and similarly named concept through attempting to reconcile the EP with its name. Their critique of the EP is it falling short of what its namesake bears, and their suggestions involve transforming the EP (perhaps radically) in order to make it more parliamentary, and by extension somehow more democratic. The focus is on trying to push the institution to work in a similar way, despite the different context.

The second group, on the other hand, recognizes that the EP does not match what a parliament seems to provide in the national context. In this way, I find the works in the second group more inspirational. They recognize, either consciously or unconsciously, that the EP is unable to replicate parliamentary democracy as known because of its different context. This move alone is a positive one, which gives both hope and inspiration to my adaptive approach.

⁷¹ Sartori (1970). pg. 1038.

Yet the second group still does not entirely break from the weight of association carried by *parliament*. Far too often they accept that the EP is not the whole picture of democracy in the EU, and then go out looking for the components of *parliament* in other locations. So while they detach the EP from parliament, they are still convinced that the components of the state-born notion of parliament should be present in the supranational space. The fact that they reference the EP in showing that the functions of parliament are nonetheless secured (wholly or partially) shows the continued influence of the concept in the democratic thought.

Is this a problem? That is a fair question to raise at this point. If parliamentary governance is what we collectively associate with democracy, then why is seeking more parliamentary functions a problem? Why should we not identify what a parliament does, then put those functions into other institutions that we would like to democratize?

I argue that the state-origin weight of assumption carried by parliament is a problem. It is not necessarily a problem for the EU, but rather is a problem for our scholarship about the EU. The difficulty of the weight of association is its influence on the research approach of some EU scholars. It provides yet another layer of difficulty to the concerns about escaping statist notions raised in chapter two. Language itself becomes an obstacle that must be dealt with in order to think about this new notion of supranational governance with a completely blank slate. The problem is one of prejudice and bias on the part of the researcher. If we go into our considerations of the EU with the hidden conception that the functions of a parliament must be present, we color our research with those assumptions from the beginning. It is no wonder, then, that the EP is the institution of first resort for so many democratic pundits of the EU. Our very language conspires to lead us to using the EP as the central democratic litmus test of the Union.

This language-based tendency is reinforced by our methods as political scientists. Comparative politics has made a science out of making comparisons across unlike structures. For many, the cautions against conceptual stretching and the travelling problem would suffice in the case of democracy in the EU. Yet these cautions have yet to be fully developed for cases of comparison across units so utterly unlike as states and the supranational. The problems of comparing an assembly in South America to a parliament in Europe are simple compared to those of crossing the national-supranational barrier.

All of this is not to say that national parliaments and the EP are not comparable. Moves in the opposite direction, such as John Coultrap's (1999) absolute rejection of parliaments as meaningful for the EU or for questions of supranational democracy, may be admirable for escaping the prejudices that other works suffer from. Yet we cannot say that our national notions of parliamentary governance have no bearing. Rather, an approach is needed that can allow all scholars to realize the hidden assumptions that come packaged with our approaches. It is the notable similarity of the EP to the national parliament that makes the weight of association such a pernicious problem. The central danger is not that the EP is somehow not parliamentary, but rather that our focus as researchers can be artificially narrowed when the notion that "parliament equals democracy" is too deeply ingrained. It can lead to missing other components in both the EP and the EU as a whole that may contribute to democracy, but simply not in the nation-state parliament way.

3.3 LINGUISTIC GYMNASTICS OR THE ADAPTIVE APPROACH TO DEMOCRACY?

The status quo of scholarship on the democratic deficit and European Parliament sets up an artificial either-or scenario for researchers. If we start with the preconception that parliamentary notions are the location of democracy in the supranational in the same way as the national, we come to the place where most current work on the EU resides. One option is that the EP must be altered or empowered to provide those functions that we have drawn from national parliaments. The other is that the EP may be fine as it is, as long as other parts of the Union are providing the same parliamentary functions, albeit in potentially different skins.

The problem with this scholarship is that it leads to the continual circling we see in the existing debate. The question devolves from “what is democracy in European supranational governance?” into “how can our traditional parliamentary notions be found in the EU?” While ultimately this may be a comfortable switch in question for many researchers, it can leave an uncomfortable gap in identifying what may be new and different about democracy in the EU. While the second group (*democratic enough given other parts of the EU*) can have some success in identifying the new and the different, the weight of association with parliamentary democracy may still cause certain blind spots.

This chapter ends by raising the question that will occupy the next chapter: how do we escape the EP as an institution of first resort? Or more to the point, how can we get out of the bad habit of looking for what we expect to see, and then worrying when we do not see it? How can the weight of association carried by parliament (as the expression of national democracy for many) be dealt with, given its roots in language itself?

At this point I want to reject certain strategies for dealing with the problem. While the problem lies partially in the nature of language and conceptualization, the solution is not simple linguistic gymnastics. It is not as easy as changing the name of the EP (even from the very beginning). These habits are deeper than the language. They are reinforced by the institutional form. Had the name been left Common Assembly, the institution would still carry some weight of association thanks to its design and operation. Call it the European Congress, the European Diet, or the European Toaster Oven, the institutional form's similarity to the ones learned from states will still have an impact. It's not the word that has the power, but the process of association. We identify what we are looking at as a parliament, because it is similar in appearance to parliaments (reinforced by the name itself). And we take that similarity of appearance to be similarity in function. Thus our solution cannot be one of linguistic maneuvers alone.

Instead the problem can only be solved by starting from a new vantage point. Instead of conducting political inquiry as normal, a new methodology of thinking needs to be conducted by researchers of the EU. As I will show in the following chapter, the adaptive approach to democracy can serve as this alternative perspective for scholarship. The critique in this chapter is admittedly extreme in one sense. It is impossible to break from language, and certainly not desirable to entirely break from all that we've learned about democracy in the context of parliaments. Rather, we need a research approach that can accommodate the researcher being conscious of her own assumptions and able to include both the traditionally important components of democracy *alongside* any new ones that may only be found when starting from an emptier slate. As the following chapters demonstrate, the adaptive approach to democracy is the essential alternative.

4.0 DEMOCRATIC HORIZONS AND EUROPEAN PARLIAMENTARY FOREIGN POLICY

As the prior chapter suggested, much of the problem that the European Parliament (EP) poses for democratic investigation of the European Union (EU) comes from problems ultimately bound up in its own name and idea as an institutional form. The two general trends in scholarship about the EP do show some promise, particularly from studies that try to consider functions outside the EP that parliaments normally bring. While it seems like group two (*democratic enough given other things in the EU*) fared better than group one (*not democratic*), they remain burdened by existing assumptions about parliament. *Both* sides continue to struggle with escaping the weight of associations. “Parliament” carries a particular meaning, and despite the structural and contextual change of the EU, we continue to search about for the facets of that state-born meaning.

The looming question then is: how do we escape this weight of associations, especially when both institutional experience and even language itself push us toward the research assumptions detailed in the prior chapter? Diminishing the weight of associations is not as easy as simply changing the name or modifying institutional practices. How can scholars talk about democracy in the EP and not be overwhelmed by the search for comparisons? How can we successfully examine the EP as both something familiar to us and something that may hold the promise of new and different modes of democracy?

I argue that the adaptive approach to democracy creates a pathway through these difficulties. By starting from first- and second-order principles, rather than state-based assumptions about how particular principles *must* be institutionalized, the first big step away from the weight of association that the moniker parliament carries can be made. Searching for what second-order principles are present, and then inquiring how those link up to the two first-order principles of democracy (freedom and equality) provides a mechanism for thinking about the parliament that starts from a different angle. From this angle, the new and the old can be analyzed without prejudice from prior associations of the target studied.

The adaptive approach turns the weight of association into a useful component of inquiry, by being clear about what baggage scholars tend to carry when looking at parliaments. We get a ready-made list of second-order principles that might be important, but the inquiry gains two distinct advantages. First, it is not limited to our initial list of principles—there is room for exploring what the EP actually does, and what new and/or old principles guide those actions. Second, being clear about the baggage that comes with our associations gives us the ability to watch how that baggage is changed in a different setting. Perhaps the same second-order principles are connected in a different pathway to the first order principles of freedom and equality. The adaptive approach not only escapes the problems of associations connected to the word parliament, but allows us to gain a better understanding of those very principles that we tied to the idea of parliament in the first place.

The EP displays multi-faceted, evolving democratic potentials, and only an approach that can handle that complexity can escape the old language and familiarity structures that place limitations on our understanding of new phenomena that bear similarity to old associations. This focus has been on the most iconic of associative terms with democracy: parliament. This chapter

demonstrates how the adaptive approach to democracy can enable us to say something new about the democratic character of an institution that seems similar to the most familiar form of democracy in history.

To do so, this chapter will begin by applying the adaptive approach to the European Parliament, paying particular attention to the details of what parliaments do in principle. To do this, I briefly consider the way in which the parliament grew into the democratic lynchpin of the state.⁷² Parliaments were part of societies before they reached the point of being fully democratic. Thus, we start with what principles were added to parliaments that made them so central to democratic visions today. This process allows us to work out our second-order principles first. Following the approach as laid out in chapter two, I demonstrate that our view of the EP's democratic character grows even more flexible and robust than had we started from a set of current parliamentary assumptions alone. The adaptive approach allows us the freedom to draw from the past of parliaments yet add newly emerging democratic factors from the EP experience as well.

Then the argument will turn specifically to the case of the European Parliament. It examines the EP's role in an area that is typically considered outside of the realm of a parliament's influence: foreign policy. Given the particulars of the EU, this seems doubly removed from the EP. Yet instead of accepting the old adages about parliamentary roles in foreign policy, the adaptive approach allows for a closer read on what the EP does, and how that may or may not be an expression of second-order principles that are directly linked to freedom

⁷² In this case, the historical development of the institution is important to the adaptive approach—because it is that weighty history that causes limitations to our thinking about the institution. One need not always do such historical work in the adaptive paradigm—many of the institutions considered may not have some state-bound historical precedents. However, as this chapter will demonstrate, the EP is consistently viewed through a lens that includes these historical attributes.

and equality. The adaptive approach allows us to consider the EP and its influence on foreign policy, though notably outside of any strict institutional controls, as a matter of democracy.

The roots of the EP's unusual role in foreign policy lie along the lines of Frank Schimmelfennig's (2001) work on rhetorical action. While Schimmelfennig focuses on other cases, the phenomenon he identifies (using rhetorical tools to exert influence) can also be seen in case of the EP. In foreign security policy, the EP has found an influential role simply through use of rhetorical action—particularly finding itself effective when basing that action on ideas that we can identify as second-order principles of democracy. This has potential as a new innovative democratic practice, which becomes visible only when we start from a vantage point that is not laden with the weight of a association that comes from the idea of parliaments being virtually isolated from security policy.

Thus, the adaptive approach allows us to break with the weight of associations and demonstrate the ways in which the EP is a blend of familiar and innovative institutions for realizing second-order principles, principles that may not be the ones we usually associated with parliaments. The weight of associations is what is causing the problems of putting all our democratic eggs in the EP basket. Adaptive democracy's fluid approach gives us the ability to talk about the EP without needing to feel that the entire democratic hopes of the Union reside in this one institution. Instead, the EP brings certain democratic elements—both familiar and new—to the table in ways that are hopefully complemented by other parts of governance in the EU.

4.1 THE ADAPTIVE APPROACH: ESCAPING THE WEIGHT OF ASSOCIATIONS OF “PARLIAMENT”

Having explored the case and made preliminary points in chapter three, I want to now place the European Parliament into the larger adaptive approach methodology. The central ethos of the adaptive approach to democracy is that it can be flexible and robust. In this section, I endeavor to demonstrate what an adaptive study of the EP can provide for the democratic character of the Union. It can avoid the trade-off of saying that EU is wholly democratic or entirely non-democratic based upon the qualities of the EP alone. The adaptive approach provides a look that works flexibly with the unique nature of the EP yet manages to provide meaningful insight into how democracy is present in the system.

This section begins by applying the adaptive approach to democracy in the manner developed in chapter two. The goal of the adaptive approach is to consider second-order principles that are both present and absent in the EP. In order to do this, I begin by looking at the historical trajectory of parliaments and how they became intertwined with our notions of democracy. Assembly structures existed for centuries before democracy in the modern form, with Greek and Roman structures being the most recognizable. Other pre-parliamentary institutions included Norse and Germanic *things* or *tings* (leader and free citizens deciding in unison for their locality), Polish *sejms* (meetings of the populace), Anglo-Saxon *folk-moots* (meetings of tribal freemen), and Indian *samiti* (gatherings of the male members of a kingdom). The more familiar parliament structure also emerged prior to the appearance of democratic states, with the English parliament's origin in the *Magna Carta* and the evolving relationship between king, lords, and people in the 13th Century.

Notably, all of these earlier models—including the English parliament—emerged prior to moments of what would be considered reasonable democracy in their country. These parliaments differed in key ways from the modern democratic parliament. As one writer quipped about the English parliament: “The earliest form of National Assembly known to English History differed very considerably in character from the modern Talking Machine which fills so many columns of the daily papers with its proceedings.”⁷³ While the warning of differences is indeed correct, the change from parliament to parliament within a democracy was a great one.

There were some simple elements that early democratic systems did not fully realize: citizenship for all despite race, sex, and/or income, guarantees of some set of basic human rights, and an open, equitable, and fair election system. Thus the history of parliament inside democracy becomes one partially of social evolution and changing norms leading to increased suffrage as minorities, women, and the poor successfully argued for their equal inclusion in their political systems. And sadly, in some cases the parliaments themselves worked against these notions of increased inclusion and voice.

More salient to the argument of this chapter is what principles emerged as the standards of reasonable democracy were met—not only what principles were added, but also how and why were they added. Three big principles seem to lie at the heart of the modern democratic parliament: legitimacy, public control, and discourse. While each could be argued to be present in the earlier forms of parliament, they do not reach their full expression without the social changes of suffrage, increased protection of rights, and ensured fair elections.

Legitimacy is a difficult term to deal with simply, as many different qualified expressions legitimacy (i.e. output legitimacy) have emerged over time. Legitimacy is simply the idea of

⁷³ Skottowe (1887). Pg. 1.

popular endorsement of the authority of an institution. Where the term diversifies is the manner in which that endorsement is generated—be it through legal arrangement, election, sense of tradition, or identity to name just a few. Earlier parliaments had fragments of this, but the true appearance of legitimacy stems from the early modern political thought of John Locke and other Enlightenment thinkers, where notions of the people needing to accept their system for it to have properly-situated authority emerged.

Public control is a second principle that stems from the development of the parliament in democratic systems. Stemming from legitimacy concerns, the question of how the institution of parliament was legitimate was answered by notions of public control. To the extent the system was controlled by the people, then it served their ends and had its authority properly situated. The nature and development of modes of public control varied from system to system. Three methods (non-exhaustive) are worth mentioning here: representation, public involvement, and access. All three access popular control of the institution in some way, though none are popular control in and of themselves.

Representation is the most obvious principle of public control that seems tied to parliamentary governance. The idea that the people are too numerous to conduct direct democracy led to the acceptance of representation as a democratic principle. While theorization about representation is varied, its links to public control seem secure. The spectrum ranges from the representative being empowered to make what she judges are the best decisions for her people to being a mere aggregator and disseminator of the common opinion(s) of those she represents. Despite those differences in notion, the link to public control remains the same. Representation is the means of using fewer individuals to conduct the business that concerns the entire populace, on behalf of that populace. Through the history of parliaments, the way in which

that was done varied, but the principle remained the same: our freedom and equality is insured by having an agent who is accountable to our will (to some extent) within the political system. Certainly questions of the public can complicate things—prior to women (or any other excluded group through history) having a vote the parliament was woefully lacking in democracy. Yet the notion of representation and voice was one that continued to be democratic in nature. The excluded demanded inclusion because they demanded accountability to their will in order to insure their own freedom and equality.

Public involvement plays a role in public control, simply by necessity. Without a marginally interested and active populace, public control is not realized. While some participatory theorists would suggest that this needs to be complete involvement, what seems salient about the principle is that the public is allowed equal involvement if they wish. Declining involvement rates may suggest that the people are prioritizing other activities in their lives. What matters is the opportunity for public involvement is secure for those who feel that their sense of control requires it.

Access is the principle where the notions of suffrage discussed before have the most impact. For public control to exist, the people must be able to access the system itself. This means formal inclusion (i.e. universal suffrage) as well as procedural inclusion in the system—having a vote that counts, being able to contact one's representative, or simply knowing the issues that are being debated at a given time.

Finally, discourse emerged as an important component of parliaments in democracy. As our notions of political behavior modernized, increasing concern was paid to the way in which we form our public decisions. Stemming back to J.S. Mill's notion of public discourse and the formulation of right ideas in *On Liberty*, and finding invigoration in participatory democracy and

critical language theory approaches, discourse increasingly became a part of many modern democratic notions. Thus, parliaments quickly became accorded with these principles. While not the people themselves engaging in discourse, the discourse of justly chosen representatives seemed to be a decent compromise for most.

In each case, the democratic principles that we attribute to modern parliaments come from an interplay between our theorization of democracy and changes in the institution (and social context around it) that move in democratic directions. I suggest that this process, when seen over time, can be thought similar to John Rawls' reflective equilibrium in a sense. Principles were brought to existing institutions, and the experience subtly (perhaps dialectically) changed both principles and the institution over time—developing into our current picture of parliaments with associated principles of democracy. Our ideas meet institutions, and they evolved in reflection of each other.

With this brief historical survey, in conjunction with the analysis of chapter three, we have a preliminary list of second-order principles to consider with the EP: legitimacy, public control (with its associated notions of representation, access, and public involvement), and discourse. Both groups of EP scholars discussed in chapter three consider these ideas, and place them to various degrees within the EP—though often accompanied by claims that they are sub-optimally realized.

The virtue of the adaptive approach is that it frees us from needing to have every possible second-order principle of democracy present in an institution like the EP at once. Examining the EP, the second-order principles of representation, access, public involvement, and discourse are met. Some of the central elements of parliamentary democracy that many scholars seek to observe in the EP are not present, notably: legitimacy and public control. Yet the adaptive

approach frees us from alarm at this point. As chapter two demonstrated, the lack of any particular second-order principles is both expected and acceptable in each institution or practice.

I want to stress that legitimacy and public control are not discarded by the adaptive approach. Instead, they lose their realization *in this case*. These ideas are part of the democratic tradition, having been a part of how states achieve the first principles of freedom and equality through electoral assembly (parliamentary) form. Yet when we make the move to the supranational arena, the circumstances changed. While still important ideas, they need no longer be required elements for the EP to possess if we wish to consider its democratic character.

Continuing with the adaptive approach, the reasoning behind the second-order principles is a necessary step. The adaptive approach reminds us that the reason to care about representation (for instance) is not that it is what familiar forms of democracy have always included. That sort of thinking is at the foundation of problems addressed in chapter three. Instead, the adaptive approach reminds us to think carefully about why representation came to be valued as a democratic second-order principle present in parliamentary bodies.

Through the adaptive approach examination of the EP is freed from any hanging assumptions that come with the nomenclature “parliament”, as they are merely second (or third) order principles which need not be present in all expressions of democracy. Freed from the requirement of looking just like parliaments as we’ve already known them, we can see where other elements such as rhetorical action based on democratic norms fit into analysis of the EP. The following graphic lays out the basics of what fits and what is missing in the EP.⁷⁴

⁷⁴ Astute readers may note the addition of a second-order principle here that I have not discussed in depth: rhetorical action via democratic norms. The case for this “new” principle will be made in the following sections—I merely include the principle here for completeness.

Second-Order Principles of Democracy found in the EP

Representation (MEPs directly elected by European constituents)

Discourse (Discussion and argumentation occur in the parliamentary forum)

Access (European constituents have nominal access to a European-level official)

Public Involvement (Provides an arena where the public can follow the decisions
being made by the EU)

Rhetorical Action via Democratic Norms (sections 4.2 and 4.3)

Second-Order Principles from State Conception of Parliaments

Legitimacy (Absent in EP)

Public Control (Absent in EP in this form, but present in some derivative principles,
namely Representation, Access, and Public Involvement)

Discourse (Present in EP)

Figure 7. Second-order principles and the European Parliament

A graphical illustration of these principles may be of value in this case. The figure below shows the overlapping nature of the principles between the historical state model, the EP, and what will be the central subject of the remaining parts of this chapter: what other principles—not tied to the historical model—that can be found when we refer from the weight of associations.

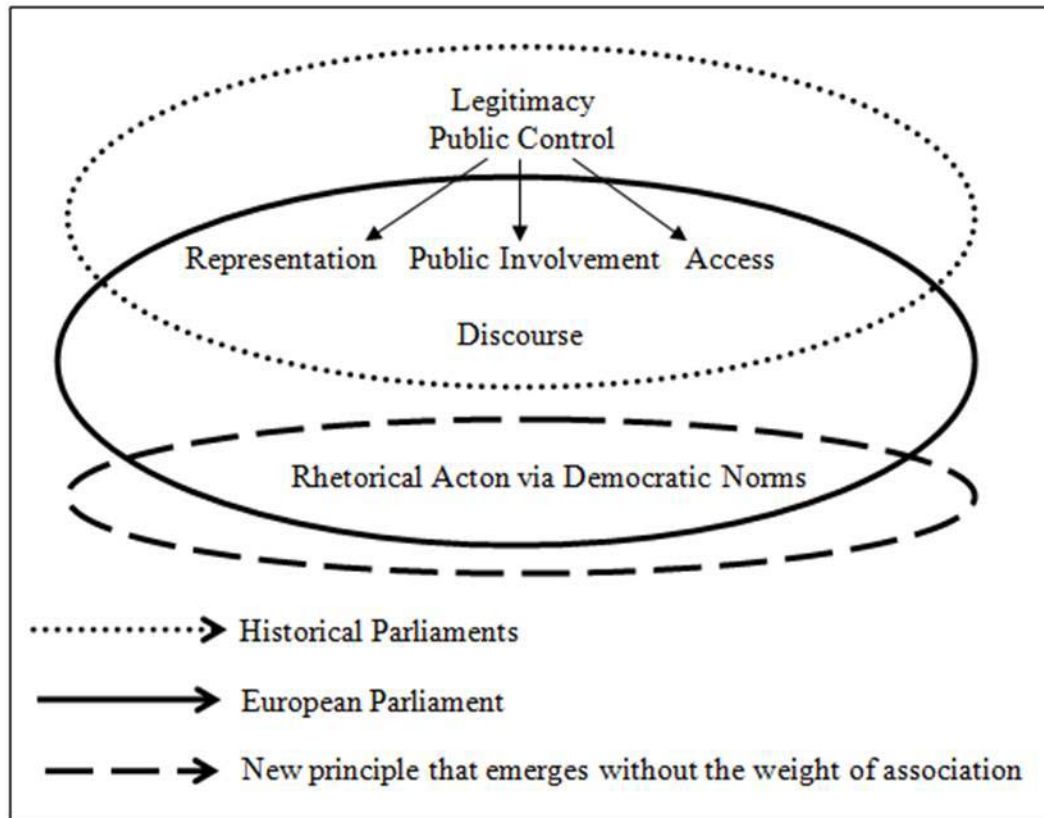


Figure 8. Relationships of second-order principles and parliaments

Note that these rings of principles are Venn in nature: the EP contains parts of the historical model, but leaves out other portions. If we were employing a thick theory of democracy to judge the EP, the fact that it misses certain principles would lead us to judge that it has failures in democratic character. Yet if we used a thin theory of democracy here, we would be left with a vehicle that looked at only one principle—leaving us with little traction to explore the ways in which the EP is *set apart* from the historical model. A thin democratic model would quickly find that the EP either has enough or not enough similarity to the state-bound historical model based upon its very basic features. Only the adaptive approach can navigate an institution like the EP in a manner that gives a flexible yet robust analysis.

Following the steps of the adaptive approach from chapter two, the final step is to ensure that the EP does not include any second-order principles that directly oppose the first-order principles of freedom and equality. The EP may also have some functions that are not tied directly to freedom and equality, such as efficiency. The only qualification is that such principles do not violate freedom and equality. In the case of the EP, I can identify no competing second-order principles that violate freedom or equality in a direct manner.

While some locate a democratic deficit in the EU stemming from the EP, the adaptive approach allows us two considerable advancements. First, it shows that the EP does not possess the particular bounded set of democratic qualifiers drawn from the parliamentary experience that many authors seek. Yet this does not mean that the EP is non-democratic—that perception comes from the weight of association. Rather, it works in both familiar and novel ways to enhance the democratic character of the Union.

4.2 PARLIAMENTARY FOREIGN POLICY

The preceding analysis has given us a sense of what second-order principles we may observe in the European Parliament. That list began the preliminary process of freeing us from the weight of association that comes with the concept of parliament. As suggested in the prior section, one area that could be obscured by the weight of association is the relationship between the EP and the foreign policy of the European Union. The example of the EP's foreign policy role shows both

the way in which the weight of associations plays out, and leads to insights about a potential new democratic second-order principle present in the EP.⁷⁵

Within the supranational governance structure of the European Union, the European Parliament's role in foreign policy and security policy is somewhat newly situated, yet clearly linked to the notions about parliaments carried by the architects of the EU. The role of a parliament in the external relations of a government was fairly well established, both in political thought and historical example. Clashes between foreign policy and parliamentarianism can be seen back at the beginning of the early modern phase of political theory, notably among the ideas of Thomas Hobbes and Baron de Montesquieu. Central to the argument for excluding parliaments from much of the foreign policy process was their corporate structure. Assembly structures (like parliaments) were seen as too diverse, too open, and too prone to factional squabbles. Security required strong decision-making power that could decide quickly in crisis rather than slowly in debate. Security and foreign policy required other practices that parliaments simply could not produce: an ability to act secretly and immunity from partisan clashes when the most essential issue—the state's security—was at stake. These trends were picked up by the early thinkers of the United States as well, becoming cornerstones of the separation of powers notions that composed early federalist thought.

These classical notions of the isolation of the parliamentary body from the foreign policy process becoming assumptions packaged with the idea of the representative body. They contrasted, to be sure, with other democratic principles over time—accountability, voice,

⁷⁵ This example of the EP's dealings in foreign policy is actually the first example that started me thinking about what would eventually become the adaptive approach. I took a seminar on European foreign policy, which seemed to clash with a lot of the assumptions in democratic theory that I was consuming at the same time about the way that parliaments behave (i.e. early Enlightenment calls for the virtues of mixed government because foreign policy needed executive rather than legislative control). In the other cases, the adaptive approach is more in the fleshed out process from chapter two—yet here the choice of case might be viewed as a topic arrived at organically.

participation, and transparency have become second-order principles that pushed from the other side of parliamentary inclusion in foreign policy. Yet on the main, oversight rather than direct policy implementation and generation has been the role which the assembly has found itself fulfilling in the foreign security process.

This displays the advantage that the adaptive approach brings. It pushes us toward first making sure where our own assumptions are affecting our choices in topic and principle. This initial “self-screening” challenges the reasoning behind ignoring the EP’s involvement in foreign policy. An area that may have been discounted out of habit (i.e. “parliaments don’t do foreign policy”) is now fair game for exploration. To be sure, the one limitation is that the people who generated the EP worked under the same assumptions about isolating a parliament from the business of security. Yet the EP’s unique position in a new system adapting to a supranational form of governance may provide space for innovation that solidified national systems may lack. The remainder of this section details the particulars of the EP’s situation with regards to foreign policy.

From an institutional perspective, the EP appears to be extraneous to the security portion of foreign policy. The only real role it has is playing the role of *ex post facto* information-getter, receiving briefings and conducting inquiries after community programs are in place. A slightly more active role for the EP emerges when looking at the Community-based portions of foreign policy (international development and trade), but that role is still tied to notions of how a national parliament interacts with the foreign policy process. Before placing the EP as an actor, it is essential to consider the peculiarities of the EU system in foreign policy.

Foreign policy in the EU is not easily captured, given the Union’s treaty basis. Some parts of foreign policy, most notably items such as defense and security concerns, remain in

more intergovernmental forums where the ministers of the member states make the decisions in consultation. These forums evolved from the harmonizing efforts of European Political Cooperation (EPC) into the present Common Foreign and Security Policy (CFSP) environment. Other portions of foreign policy-making, such as trade and some development programs, are situated elsewhere: within the competence of the supranational institutions of the Commission, the Council of Ministers, and the European Parliament. Because of this dual-nature of the Union's foreign policy, it is not surprising that an analysis of how the EP acts within that structure must consider each policy area distinctly. I treat each in turn.

The EP's role in the Common Foreign Security Policy (CFSP) is fundamentally "limited."⁷⁶ On other matters of external policy, the EP does play a role. But in CFSP, the EP plays a minimally involved role—most notably as a body informed by the Council Presidency of developments and initiatives in CFSP, and given a chance to ask questions regarding these briefings. Article 21 of the Treaty of the European Union (TEU) established this informed, questioning role. A negative view would look at the limitations of the information and question session, and the fact that often such information comes only after Member State consensus on policy, leaving little room for change. With this, the role of the Council Presidency is a critical variable. Some argue that the EP's influence in CFSP is dependent on the Presidency country of the Council and how much they endeavor to keep the Parliament informed.⁷⁷

The EP does have a limited formal role in CFSP. They debate issues of foreign policy, issue declarations, reports, and recommendations on the subject, conduct public interview sessions with issue experts and EU officials.⁷⁸ The interview process of public questioning is the

⁷⁶ Jørgensen (2002). pg. 223.

⁷⁷ Allen (1996). pg. 297.

⁷⁸ Stavridis (2003). pg. 3.

most public of these enterprises. However, the questioning process is considered of limited value by some. Hill (1983) suggested that “MEPs have worked hard to achieve their present right to question the President on EPC questions, but they rarely extract more than the kind of bland answers which diplomats are well-used to preparing for public consumption.”⁷⁹ With that, the obligation is to present the EP with “the main aspects and basic choices of CFSP,” rather than the full domain of the decision process.⁸⁰ This implies that even when informed, the EP remains not fully informed. Not only that, but the actions that the EP does make have been characterized as “non-binding scrutiny rights.”⁸¹ If anything, the EP’s role is *ex post facto* as Stavridis (2003) suggests—the EP is reactive to already-made CFSP decisions, often with the understanding that those decisions will not be modified, regardless of EP actions.⁸²

Despite the perceived weak role in security and defense policy, scholars do recognize that in other parts of the foreign policy, the EP does play a role institutionally. For economic (sometimes referred to as first pillar) issues that are also foreign policy (some international agreements and Enlargement treaties) the EP has a role by assent procedure.⁸³ For example, in 1987 the Single European Act (SEA) provided for veto power for the EP over agreements with third countries. Parliament began using this tool of force adding of human rights clauses (conditionality) to such agreements. EP was concerned explicitly that EU international agreements work to improve democracy around the world. This added a political element to the EU’s foreign relations that had been absent.⁸⁴ Another area that some scholars consider to be an emerging control of the EP over foreign policy is the use of budgetary powers to exert pressure

⁷⁹ Hill (1983), pg. 188.

⁸⁰ Hurd (1994), pg. 425.

⁸¹ Gavrilesco (2004), pg. 82.

⁸² Stavridis (2003), pg. 3.

⁸³ Jørgensen (2002), pg. 223.

⁸⁴ Holland (2002), pg. 120.

on Commission “to reform the operation of its external delegations.”⁸⁵ These budgetary powers apply mainly to areas of Community policy that are nevertheless foreign policy: trade and tariffs, commerce, and development aid.⁸⁶

The odd fit of the EP in the Union’s foreign policy is clearly a case of the weight of associations. While in other areas there are concerns about the democratic deficit of the EU, calls to democratize the Union’s foreign policy process—through increased parliamentary role—are virtually non-existent. This matches the suggestion that the approved role for the EP is drawn straight from the nation-state model. Some scholars argue that any oversight by EP would be “inappropriate,” be cause of a “total lack of precedent... in most national parliamentary traditions.”⁸⁷ Fundamentally, there seems to be the opinion that foreign policy is simply non-parliamentarian:

“National parliaments in almost all West European states had long found foreign policy a more difficult area in which to hold their governments to account than most aspects of domestic policy. Foreign policy and defence were traditionally considered matters outside and above the partisan domestic debate: directly linked to the preservation of sovereignty, and therefore to be entrusted to the executive.”⁸⁸

With a precedent of limited parliamentary influence at the national level, it is understandable that in the European Union the right of influencing foreign policy was not intentionally extended to the EP.

Compounding the matter, scholars such as Hill and Wallace (1996) rely upon the issue of sovereignty in explaining why the executive has traditionally been the seat of foreign policy. When moving above the nation-state level, sovereignty concerns become increasingly complex.

⁸⁵ Jørgensen (2002), pg. 223.

⁸⁶ Stavridis (2003), pg. 3.

⁸⁷ Howorth (2001), pg. 778.

⁸⁸ Hill and Wallace (1996), pg. 6.

If sovereignty trumps domestic debate *within* the nation state, then certainly it would seem that debate of sovereignty-domain issues by bodies exterior to the nation state are problematic. Fundamentally, scholars conclude that there is simply no interest in having democratic controls of the foreign policy process located at the Community level.⁸⁹

In summary, the purely institutional picture of the EP seems to explain why there is little interest and/or mention of the EP when it comes to foreign policy. Not only does the EP have no formal role, but it exists in a climate where no formal role is expected of parliamentary-style bodies in the first place. However, the formal realm is only one location where influence may be gained. The following section explores the other face of the EP—an informal shaper of the Union's foreign policy.

4.3 ENHANCING DEMOCRACY THROUGH RHETORICAL ACTION

Having seen the limitations placed on and expected for the European Parliament when it comes to foreign policy, it is important to note their origin: largely bound up in notions about parliaments stemming from state experience and sovereignty. This section seeks to break from those assumptions, by examining a way in which the EP does have a voice in foreign policy. And most importantly to the overall project, that voice can be a democratic one. The EP demonstrates power and the ability to be an actor in the foreign policy process, but in ways not traditionally considered to be indications of power. Most notably, the EP plays a key role in rhetorical strategies that affect Union's policies. Rhetorical action, norm-shaping, framing, and shaming (or

⁸⁹ Stavridis (2003), pg. 5.

“naming and shaming” as it is often referred to in EU documents) appear as strategies that: 1) the EP utilizes, 2) give some guiding power to the EP in foreign policy that it does not possess in terms of formal institutional design, and 3) can have democratic implications.

From a traditional or formal analysis, the EP’s role is informed but rarely consulted. Note that from this angle, the EP is not much of an actor—it is reactive and passive. However, this view misses crucial ways in which the EP is an actor in foreign policy: through rhetorical action. Rhetorical action is an idea that links strategic behavior with an idea of power being found in and through the use of normative ideas. Schimmelfennig (2001) defines rhetorical action as “the strategic use of norm-based arguments.”⁹⁰ In his formulation, Schimmelfennig looks at how actors use the standards which the EU has already agreed upon, and how arguments have been used to constrain or “entrap” actors who propose policy that does not affirm the ideals of the community. This particular argument is similar to the broader mechanic that I believe is the EP’s source of influence on foreign policy. This section will expand on the idea of rhetorical action, paying particular attention to how it is used by the EP.⁹¹ Furthermore, it will lay the groundwork for showing how that rhetorical action, when attached to democratic principles, plays a democratizing role on European foreign policy.

The prior section of this paper described the institutional actions that the EP is able to take regarding foreign policy—debate of issues, publication of reports and recommendations, and the public questioning of Union officials. These are the means of involvement that the EP has given its institutional position within the Union. For the purposes of talking about rhetorical

⁹⁰ Schimmelfennig (2001), pg. 48.

⁹¹ Note that Schimmelfennig’s analysis is largely about rhetorical action used by foreign ministers and heads of state. While there is mention of members of the EP (MEPs), the parliament’s use of rhetorical action remains under-explored. Schimmelfennig (2001), pg. 71.

action, knowing what the EP can do gives us a sense for what types of rhetorical action it is able to use.

Given the formal and institutional position of the EP, I observe that two main rhetorical strategies seem most likely to be employed effectively. These are the strategies of framing and shaming. While other means of rhetorical action may exist, these are the two that are most suited to the EP given its form, mandate, and self-image of its role in the EU. And if the EP is using rhetorical action, then it should mean that there are cases where such rhetorical action had an effect upon foreign policy.⁹²

Shaming: This mode of rhetorical action is about the public presentation of an actor not following some agreed-upon set of rules or norms. It is about showing the disjunction between an actor's normative commitments and behavior. The actor using the rhetorical strategy first identifies that another actor (whose actions they wish to influence) is acting contrary to some norm or rule that is considered fundamental to a particular audience (or that the audience understands as fundamental to the actors). The shaming actor then makes a public pronouncement detailing how the shamed actor did or does not follow the norms or rules that the audience holds. If the shaming is successful, the shamed actor then will change position to be in accordance with the established norms/rules. These are many nuances of the process just generalized. Who the audience is, what the norms/rules are and how they were agreed upon, and the publicity of the shaming speech act are all important variables.

In the European context, there seem to be a couple of salient features that define the shaming process in the Union regarding foreign policy. First and foremost, the declaratory and

⁹² If the EP is using a tool that simply doesn't work for the ends intended, then the inquiry should be not on how and whether that tool gives influence, but why an institution uses a tool that does not yield results.

treaty nature of the Union's accords mean that a number of "rhetorical commitments" have been advanced as shared by the Union and all the member states.⁹³ These commitments are the agreed-upon norms or rules to which future actions/rhetoric of actors can be compared. Most notably, statements about democracy, freedom, equality, and identity populate these rhetorical commitments of the Union.

A sense of European identity is the straightforward example of one of these commitments. Europe's treaties include the notion of a common identity that is European that should motivate all European peoples and states to join in the Union.⁹⁴ This commitment, enshrined in treaty, was used by Parliamentarians among others to influence foreign policy regarding EU expansion. On the question of making association treaties with external European states versus incorporating them into Union membership, members of European Parliament (MEPs) used shaming techniques to argue for wider expansion of the EU. Particularly, MEPs suggested publicly that the existing European Community was not giving membership to states that also had a European identity.⁹⁵ The "caught in the act" nature of this—of not living up to one's promises and ideas—has a potent influence and was integral to reaching a Europe of 25 members.

Rhetorical action akin to shaming relies upon a mechanism that Schimmelfennig (2001) describes as: "pre-suppos[ing] weakly socialized actors."⁹⁶ This describes situations where actors are not using the agreed-upon norms and ideas that they share as the justification for all action—instead other preferences are competing with the shared ideas. Thus, there have to be the shared

⁹³ Schimmelfennig (2001), pg. 66.

⁹⁴ Ibid, pg. 67.

⁹⁵ Ibid, pg. 71.

⁹⁶ Ibid, pg. 62.

norms to bring shame with, and the actors to be shamed must be shown (or characterized) as operating by the dictates of another norm or preference.

Another consideration is the audience of the shaming activity. When the EP was shaming the member states over European identity claims and admission to the EU, who was the audience of the shaming? Was it the citizens of the EU? Or the foreign ministries of the excluded European states? Or even the member states themselves? It seems unclear who the audience really is in the European case. The EP is a representative body, so in one sense it seems that the shame should come on governments by showing the people that their elected/appointed executive officials were not following the very language of their treaties. However, a strong case for the mechanism resting the shamed actor itself can be made. By recognizing that they made a mistake, perhaps shamed governments respond with contrition. The shaming mechanism seems clearer when applied between member states on this issue—one side uses the rhetorical action to gain bargaining leverage or a agreement from another state. When the EP is conducting the shaming, however, it is less clear what the target audience is, and where the mechanism for shaming truly lies.

Shaming seems to be a strategy employed due to the institutional position of the EP, rather than by some sense of “what our mission is” among MEPs. Because of its nature as a public forum, the EP is a prime location for public shaming (its semi-public forum is still one of the most open of the supranational institutions in the EU). The target audience may remain underspecified, but the publicity of the venue is obvious to the actor being shamed in the very least. Thus, shaming as a mode of influence seems to not only have some precedent in the EP, but also it seems to be a natural method chosen because of the institutional design of the parliament itself.

Framing: This rhetorical strategy is about influence over the way in which individuals see and understand an issue. In a rational choice framework, framing begins with the understanding that actors must make cost-benefit analyses when choosing options, and that those analyses are conducted in relation to some point of reference.⁹⁷ Framing is a way of presenting the point of reference in a particular way that makes the actor inclined to decide along specific lines (even if that decision is not objectively rational). More generally, framing is the notion that controlling the way in which a problem is viewed has an impact on how that problem is solved. European integration takes a very different image depending on whether the problem is framed as preserving national sovereignty versus empowering effective decision-making among members of a community.

Examples of the EP using the rhetorical action of framing when it comes to foreign policy are prevalent. An excellent example is the actions of the EP regarding Central American (particularly Nicaraguan) ties with the EU during the 1980s. Disturbed by human rights abuses in Nicaragua, the EP directly suggested that member state foreign policy be neutral toward the revolutionary government and foremost cognizant of human rights and democracy issues.⁹⁸ Around this policy stance, the EP generated policy positions on human rights, economic aid, area no-intervention, and democracy that were subsequently “pressed” on the other European Union institutions.⁹⁹

Even without a clear formal role, the EP served as a policy entrepreneur. In addition to resolutions about proper foreign policy toward Central America, parliamentary sessions became

⁹⁷ Maoz (1990), pg. 88.

⁹⁸ Smith (1996).

⁹⁹ Ibid.

a place where Central American heads of state and other officials could deliver public and “high profile” statements on the matter.¹⁰⁰ Due to the EP’s direct interest in this often marginalized geopolitical region for Europe, within 10 years the Council had incorporated the EP’s own policy largely intact. On this issue, the EP set the stage and defined the terms of how Europe would approach a particular set of foreign policies. Its initiation of the successful policy seems to show a direct influence of how framing—defining the Community’s Central American policy as having the dual objectives of human rights and neutrality—has been used by the EP to gain influence in an area where it plays no formal role.¹⁰¹

The EP is willing to act rhetorically through framing, even in realms where it does not have a clear institutional role. For another example, in the WTO bananas dispute in the early 1990’s, EP had “no formal right of initiative” yet it still spoke out on the issue—two Parliament committees developed reports that supported the position of the African, Caribbean, and Pacific (ACP) states that exported bananas.¹⁰² By siding with the ACP nations, the EP used the outsider status (provided by its lack of formal role) to try to change the debate from the basis of economic liberalization to one about maintaining historical ties and post-colonial responsibility. While it may not have a formal right of influence, the EP gains some leverage on foreign policy issues in this alternate way, shaping the “atmosphere” in which the EU determines its policy objectives.¹⁰³

While a role in foreign policy through framing seems apparent, explaining why the EP relies upon framing as a particular rhetorical action is more difficult. On the one hand, an explanation is that when the EP is engaged in framing EU foreign policy objectives it is a conscious effort on the part of MEPs to fill their democratic role—speaking on behalf of the

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Stevens (2000). pg. 409- 410.

¹⁰³ Woolcock (2000).

people for the concerns that should drive the Community's policy. There is some indication that MEPs see themselves as needing to play a role in security and defense policy. This has been explained as part institutional power struggle and part the "EU's self image and construction as a civilian power."¹⁰⁴ As a civilian power, debate and discussion of political priorities by representative of the people seem to be a more legitimate basis for foreign policy. Perhaps MEPs are reacting to this role, and actively seeking more democratic controls by at least defining foreign policy issues in terms of democratic and human rights issues.¹⁰⁵ Also, it is difficult to determine whether it is the MEPs being active policy entrepreneurs, or whether the nature of a legislative body (and accompanying committees on foreign policy topics) to strive to define the issues that should take policy priority.

So what can we draw from this brief analysis into the rhetorical action strategies employed by the EP? The first insight is clear: these rhetorical strategies would have been missed had the weight of association not been lifted prior to thinking about the EP. The adaptive approach, by releasing us from parliamentary assumptions, allows us to consider the small, seemingly incidental, actions of the EP as a complementary way in which it democratizes the Union.

The questions of the nature of EP involvement are interesting, but it is the content of the rhetorical action that holds promise for democracy. Rhetorical action is a means for ensuring that the principles a system espouses are indeed the principles which policy is based. This example shows that the EP's role in foreign policy is that of holding the Union's policies normatively

¹⁰⁴ Howorth (2001). pg. 778.

¹⁰⁵ I found no study that includes a systematic evaluation of MEPs and their explicit deployment of democratic principles as a means of democratizing the EU. Such would be a difficult measurement to obtain. Every MEP would likely be a savvy enough politician to "smell" the desired answer of democratic principles being a motivation, perhaps. Yet, this is one area where future empirical work built on the normative framework that the adaptive approach to democracy provides would be illuminating.

accountable. And that is a new wrinkle to the democratic picture. Parliaments have a number of ideas associated, but with the EP we can see another role. It's not about accountability to the people (in traditional representation), but accountability to the shared norms of the people. When those shared norms are democratic, then this function seems to be a part of democracy observable in the system.

One question that stems from this observation is whether this is all that new. Assembly oversight over executive moves has been a consistent part of the parliamentary tradition. From Locke and Montesquieu through the foundational thinkers of the United States, checks and balances have been viewed as a cornerstone of democracy. Rhetorical action could be classified as one mode of that checking, rather than some new form of power exclusive to the EP. Certainly rhetorical action has been used by representative bodies before the EP, and constrains in the same way.

The new innovation to note here, however, comes from a different angle. The essential element here is the flexibility in the institutional form of the EP that allowed this shift to happen. Despite its inability to formally participate, the EP still found its way to ensuring outcomes that satisfy the shared principles which the EU agreed upon—not coincidentally the very same principles which satisfy the fundamental first order principles of democracy: freedom and equality.

The innovation comes in the method of using the public space and the very language commitments agreed upon by the EU. Rhetorical action is used to bind the EU to other shared notions—efficiency, common identity, economic growth—which are not functions of the first principles of democracy. In fact, one could use rhetorical action to support accountability to any normative principle, including fascism, theology, depravity, or restriction. The trick in the

EU case comes from the debate detailed in chapter one: Europe's concern with its democratic identity. A perpetual malaise about the Union's democratic credentials seems fairly widespread. In some of these examples, we see the EP able to use that concern as a motivating tool to help reach policy outcomes that are consistent with democratic principles.

4.4 DEMOCRACY ON THE WHOLE: THE EP AS A PART OF THE EU

Chapter three referred to the European Parliament as the *institution of first resort* in treatments of European supranational democracy. While we can understand the factors that position the EP as a first resort, it is essential to notice that it need not be the institution of last resort. The weight of association that comes with the institution and name of parliament can be felt heavily. The more convinced we are that the assembly is the cradle of democracy at the state level, the more difficult democratic deficit scholarship on the EU becomes. Democracy is not contained within a single institution, nor within the functions of any one institutional experience. Foreign policy of the EP was just one example that proves particularly illustrative of the adaptive approach—it is not the only way that the EP is or might be democratic. While this applies to the state, the supranational level makes this point even more pressing.

As chapter two suggested, democracy must be viewed as having a fluid quality. The EU is neither wholly democratic nor wholly undemocratic, regardless of our analysis of the EP. The EP forms one cog of many overlapping functions which contribute to the system as a whole. To hang all our hopes on a parliament is simply problematic. And while another set of scholars emerges from the shadows of the EP's limitations to locate democracy elsewhere, the taint of the nation-state and the idea of parliament colors that action—my own work included. The adaptive

approach is about breaking free from the calcified hang-ups of democracy as I learned in a particular setting (the state). It is not easy to do. Yet as I hopefully demonstrated in this chapter, thinking that presses outside of traditional democratic roles for institutions can be helpful. The EP's movement in the informal space of foreign policy has had a democratic tone at times—a tone which would go invisible if we let stale notions wrapped up in institutional names color our thought.

This project works to lay out a system for approaching supranational democracy that guides scholarly thinking in this manner. In the paired sets of case chapters that follow, along with this one, only the tip of the research iceberg is showing. Whole new analyses of the European Parliament, the most democratic-looking of European supranational institutions need to be generated. With the adaptive approach, they can start from what is happening and find democracy (if present), rather than start from beliefs about a certain form of democracy and compare from that prejudiced perspective.

5.0 THE EUROPEAN COURT OF JUSTICE: AT THE JUNCTION OF CONSTITUTION AND DEMOCRACY

In the prior chapters, I considered the European Parliament its position as the first resort for democracy in the European Union. In this chapter and the next, I turn my attention to an institution that does not immediately come to mind when talking about democracy: the European Court of Justice (ECJ). Many of the worries that prompt the discussion of democratic deficit arise from the number and major role of non-majoritarian institutions in the functioning of the EU. These institutions—which the ECJ is one of—are a source of worry due to their isolation from popular control and other principles of democratic legitimacy that play into the worries of the democratic deficit.

The ECJ may generate some unease for other scholars and pundits concerned with the democratic credentials of the European Union (and by extension, the institutions of the EU). Yet from the standpoint of democratic theory, fretting about the links between court and populace are a recent arrival. Courts have fit or clash with democratic notions through time in various ways, leaving a far muddier picture of how a judicial structure such as the ECJ should be judged democratically. The current concern seems to stem from the same problems that have plagued other EU institutions in discussion of democratic deficit: notions of democracy stemming from the lessons learned in state context.

Further complicating the matter of thinking about the ECJ is the constitutional debate that has been ongoing in the EU for years. Wedded to potential concerns about the court's democratic character come a set of arguments—normative and empirical—about the constitutional situation of the Union. For some, the treaties form a quasi-constitution, for others the push is for a proper constitution to be ratified by the EU. The history of the ECJ, and its reliance upon treaties of the Union in constitution-like fashion, draws the institution of the ECJ squarely into discussions of European constitutionalism.

This chapter focuses on the nexus of these two arguments. On the one hand, the ECJ generates concern from some democratic vantage points as an insulated, non-majoritarian, non-accountable institution. Yet on the other hand, a continued persistence of constitutional debate—both treaty-as-constitution and European Constitution—has tendencies to elevate a certain notion of the ECJ with democratic overtones. I argue these two currents of discourse leaves scholarship on the ECJ in a bind.

This chapter addresses this split in discourse about the ECJ by clearing up some persistent problems in the judicial and constitutional discourses of the EU. I argue that the arrival of concerns about transparency and accountability of courts stem from the application of a generalized notion of democracy pulled directly from the context of the state. Concerns about accountability and transparency are system issues rather than the particular principles for considering courts, whose democratic function is one of guardianship and guarantees in a democratic system. By clarifying the form and function of a general model of courts, we get a better sense of what democratic principles are correctly applied to an institution like the ECJ.

As if these faulty applications of certain second-order democratic principles to the ECJ were not enough, the discussion of European constitutionalism brings in another faulty premise

for the ECJ. Constitutionalism, be it formal or informal, paper document or legal tradition, carries certain signifiers that observers associate with democracy. For some, pressuring for a European constitution or the treatment of treaty-as-constitution was a method they felt would solve the democratic deficit. The ECJ goes from being a potential concern of democratic deficit to being the preliminary author of the treaty-as-constitution, and assured of its democratic role in a potential European constitution. This swift transition of how the ECJ is viewed deserves careful inquiry at the least. Further caution is warranted for those who would assume that constitutionalism would directly cause democracy in the EU. Given these worries, I argue that our analysis of the ECJ is best conducted outside of any constitutional debate, in order to keep assumptions about democracy from slipping into the institution through that tenuous pathway.

Like the examples before it, this chapter works in tandem with the following chapter. Here, I will lay out the nature of the ECJ, and turn to explore the two problematic discourses clouding our democratic assessments of the ECJ. I start with a brief sketch of the form and function of the ECJ itself, to familiarize readers with the nature of the institution. Then, I consider some of the democratic questioning of the ECJ, and compare that questioning to a general history of the court as a democratic structure. I will argue that the historical and theoretically appropriate treatment of the democratic “footprint” of courts involves concerns about rule of law, equal treatment, and justice. Thus, applying concerns drawn from generalized democratic models such as accountability and transparency proves problematic at best.

Following that discussion of the democratic history of courts, I turn my attention to the second strand of argument for this chapter: constitutionalism. I argue that constitution, either in formal form or even in the treaty-as-constitution mold, formed a sort of magic bullet of democracy for some scholars. The notion emerges that constitution is the cure for the lingering

ailments of the EU, particularly any maladies of democratic deficit—and thus the ECJ gets named democratic in the process. I question these assumptions, and argue that constitution is not so easily equivalent of democracy in the European case.

The application of many generalized democratic second-order principles—drawn from the state context—simply does not give traction on the democratic nature of the ECJ. And likewise, the ECJ cannot be shoehorned into democratic status simply through the constitutional pathway. Thus, our evaluation of the democratic nature of the ECJ can only be found through a different approach: the adaptive approach, which is the subject of the following chapter.

5.1 FORM AND FUNCTION OF THE EUROPEAN COURT OF JUSTICE

The European Court of Justice has been the subject of many good treatments of its nature and role in the European Union, particularly the groundbreaking work of Karen Alter (1998), Eric Stein (1981), and J.H.H. Weiler (1981) among others. Indebted to those who can certainly explain the nuances of the court better than I, this section sketches the basics of form and function of the ECJ.

The Treaty of Paris in 1951 formally established the European Court of Justice (ECJ) in Luxembourg. In form, the ECJ is a judicial court structure. Composed of a group of member-state appointed judges and various support staff, the ECJ operates in similar design to traditional national courts. Currently 27 judges compose the court, a number that has increased with each wave of expansion adding new member states. The judges are appointed by common accord of the member states, which effectively lead to a long history of each judge being nominated by the

state of his or her national affiliation.¹⁰⁶ In addition to the judges, the court utilizes eight advocates general, persons whose task it is to assist the ECJ justices through the production of submissions and opinions about cases relying upon precedent or other principles.

After a long stretch of rapidly increasing case load, the member states agreed to the formation of a complementary body to the ECJ, the Court of First Instance (CFI). This court exists alongside the ECJ to ease case load on the justices, generating a different judgeship for cases of administrative disputes in the EU—the area that accounted for a high proportion of the increasing and time-consuming case load.

The ECJ is also unique due to its relationship with the national courts of the member states. The ECJ evolved into a forum that is closely tied to national courts and their cases, thanks to a number of instances where national courts referred cases to the ECJ. This relationship is reciprocal, as it both strengthened the ECJ and suddenly gave national courts a role in the community level.¹⁰⁷ This linkage takes a hierarchical shape, much in the familiar manner of a federal court system, where precedent and requests for rulings are passed upward to the more centralized ECJ.

More important than the basic form of the ECJ, the functions of the ECJ are under consideration. Evaluating the function of any institution is tricky due to multiple functions, and the ECJ is no exception. From arbitrator, source of jurisprudence, and outcome-provider to guardian, gatekeeper, and guarantor, many function tags can be applied to the supranational court of the EU. Cataloguing the functions of an institution is further complicated by the level of the function. Some functions are grand in scope, touching on foundational first-order principles of

¹⁰⁶ Delhousse (1994). Pg. 7. Specific concerns regarding the appointment system will be addressed in section 5.3 of this chapter.

¹⁰⁷ Ibid. pg. 43.

normative concern (court as guarantor or guardian fits this mode). These are the functions that are most salient for the inquiry at hand, because they are where the democratic credentials of the court will be assessed. Meanwhile, other functions are almost mechanistic in their nature (such court as source of precedent or distributor of case records), and are less of a concern to this treatment. While of interest, these mechanistic functions come from the arrangement of the institution and the duties that it performs as part of that arrangement.

Foundational Functions	Mechanistic Functions
<p><u>Source:</u> Supremacy and Direct Effect</p> <p><u>Functions:</u></p> <ul style="list-style-type: none"> • Enforcing treaty • Ensuring rule of law • Equalizing enforcement across borders • Monitoring and guaranteeing member state compliance • Guarantor of the contractual relationship between the member states 	<p><u>Source:</u> Administration, responsibility, institutional design</p> <p><u>Functions:</u></p> <ul style="list-style-type: none"> • Hearing cases and producing judgments • Conducting deliberations (secret) • Clarifying technical language in treaties • Publishing text of cases, including translation duties • Generating precedent • Facilitating justice appointment and duty assignments • Overseeing Union administrative disputes (via the Court of First Instance)

Figure 9. Foundational versus mechanistic functions of the European Court of Justice

The best method to address the foundational functions of the court (those with the normative underpinnings) comes from the treatments of the court in legal scholarship, stemming from the two principles of Community jurisprudence: direct effect and supremacy.

Understanding these two principles of how the court has come to influence the community generates a clear picture of the function of the ECJ in the EU.

While the effects of these two principles of jurisprudence are complex, their descriptions are deceptively simple. Direct effect is merely the principle that the provisions of the international treaties that form the EU do not need any special action on the parts of states to apply to the domestic legal order of the member states. This notion couples neatly with Supremacy, the principle that in the case of a dispute between the treaties that compose the European Community and the legislation of a national parliament, the treaties supersede any national legislation.

Direct effect and supremacy were not granted to the treaty overnight, nor were they perhaps even intended in the 1951 treaty forming the ECJ. Instead, these two principles of ECJ jurisprudence emerged over time as the ECJ got involved in various community and national disputes. Perhaps the most critical case in that development was the *Van Gend en Loos* decision in 1963 (case 26/62). Through the dispute of a Dutch company over the raising of customs duties despite treaty prohibitions of such raises, the ECJ established the groundwork of these two principles: that individual Europeans had the rights to the treaties that their member states had agreed to. This decision was to have far ranging implications, and is the lynchpin for allowing direct effect and supremacy to generate the foundational functions of the ECJ.

Membership in European treaty includes an agreement that the Commission and the ECJ are competent in overseeing matters of disputes over treaty. From the beginning, the Commission has been the institution of primary competence in this regard. Should a state shirk its duties in the treaty, the Commission is intended to drive the inquiry. The ECJ forms the end point of the process initiated by the Commission. Yet in experience, the court has a bigger role

than even its own rulings would suggest. In the *Star Fruit* decision (case 247/87) the ECJ clearly established that the Commission, not the court, was the institution that should actively pursue conflicts between treaty and national law.¹⁰⁸ However, despite the Commission's responsibility in this manner, that responsibility has shifted largely to the ECJ. Part of this came from the reluctance of the Commission to actually pursue its enforcement and monitoring role. Invoking sanctioning a mere 16 times prior to the year 2000, the Commission has seen most of those proceedings be settled outside of court rather than in formal mechanisms of enforcement.¹⁰⁹ This left a gap which needed to be filled—and the ECJ stepped in. European Court Judge Robert Lecourt expressed the situation best in his often-cited remarks: “The court could not but be struck by the extreme vulnerability of the Community's legal order if it could only rely on sanctioning through the censure of a long and insufficient infringement procedure.”¹¹⁰

With the Commission's lackluster filling of the enforcer role for the treaties, the *Van Gend en Loos* case opened the door for the ECJ to become the main mechanism of treaty enforcement in the EU. The notion that EU law could be drawn on in domestic disputes made its way into the actions of national courts. Private litigants in national courts began drawing upon EU treaty and directives to justify their cases. Then, as mentioned before, the ECJ found itself being referred cases from member state courts for various reasons. As referrals continued, so the jurisprudence of supremacy was reinforced. European treaty became considered hierarchically ordered above national law.¹¹¹ This sparked a revolution in EU legal scholarship, focusing on the reasoning for national courts transferring this ordering to the ECJ and European law, as well as the member state reactions to that phenomenon.

¹⁰⁸ Delhousse (1994). pg. 18-19.

¹⁰⁹ Alter (2001). Pg. 11.

¹¹⁰ Lecourt (1991). Pg. 360.

¹¹¹ Alter (2001). Pg. 2.

Very quickly, direct effect and supremacy went from dubious juridical principles to the foundations of European jurisprudence. Scholars and judges alike marvelled at how these principles, which were often denied in the early decisions of the ECJ, became commonly accepted and followed by national legal orders as well as those of the EU—and which have been further enforced by additional articles of European treaty.¹¹² And through these two principles, the foundational function of the ECJ became clear.

The ECJ became the central agent for keeping the states accountable to the treaties they signed.¹¹³ Supremacy and direct effect give the court a means to not only ensure that states comply, but also to ensure equal enforcement across the internal borders of the EU. While EU directives leave space for “choice of form and methods” by which the member states can fulfill their obligations, the ECJ’s position leaves it as the arbitrator to ensure that the methods chosen do fulfill obligations should they be challenged (Article 189 [249]).

Note in particular that the ECJ serves as a guarantor of rights and obligations incurred by the member states. EU directives are aimed at states, not private individuals—they set out what obligations the states have in regard to both their citizens and to other states (case 152/84 *Marshall*). Thus the enforcing of obligations (and rights generated by those obligations) has the ECJ monitoring and guaranteeing member state compliance to the treaties they signed.

In effect, the ECJ ensures the rule of law between the member states as contracting parties.¹¹⁴ Garrett and Weingast (1993) described the technical aspects of the court clarifying language as “filling in incomplete contracts.”¹¹⁵ Their choice of terminology is telling, as it points to a final functional role of the ECJ. The EU, with its treaty-based origin, continues to be a

¹¹² Lecourt (1976). pg. 307.

¹¹³ Delhousse (1994). Pg. 22.

¹¹⁴ This notion is discussed briefly here as it will receive considerable treatment in chapter six.

¹¹⁵ Garrett and Weingast (1993). Pg. 198.

system of contractually bound parties (member states). Originally, the legal system of the EU was designed to protect the sovereignty of the contracting states—in effect, to preserve the independence of the contracting parties.¹¹⁶ Thus, the function of the ECJ as arbiter of contracts and enforcing agreed-upon obligations becomes salient. It continues to enforce that sovereignty in the sense of ensuring that each contracting party equally fulfills its agreement.

These are the form and functions of the ECJ which should be accessed in our democratic assessments of the institution, as they seem most likely to be at the core of the institution's behavior. Yet, as the next two sections show, other principles of democracy have sneaked into assessments of the ECJ with pernicious effect.

5.2 A SHORT HISTORY OF THE COURT AND DEMOCRACY

The prior section examined some of the particular nuances of the European Court of Justice. However, in one central area the ECJ has received the same treatment as all other institutions of the European Union: worries about the democratic deficit. The ECJ, as part of the system perceived as lacking in democracy, has been dragged into the democratic deficit mire from time to time. For many works, this takes no larger form than placing the ECJ alongside other non-majoritarian and non-transparent institutions such as the European Central Bank. This throw-away example usage of the ECJ would likely be harmless, were it not indicative of a general flaw in democratic analysis that is subtly coloring some of the detailed studies of the ECJ as well.

¹¹⁶ Alter (2001). Pg. 16.

Treatments of the ECJ seem to pose certain question marks for democratic thinking that is drawn from the nation-state experience of democracy. Similar to the pitfalls of some democratic analysis considered in prior chapters, the same flaw appears with the ECJ. Pundits and scholars alike too easily take principles derived for other institutions in other settings, and apply them to judge the democratic impact of the ECJ. And in this, the ECJ is doubly-harmed. Not only are principles sometimes forged in the state experience of democracy, but they stem even from non-judicial sources. For instance, assuming that a court must meet the same qualities of democratic participation as an elected assembly is a recipe for disaster—a disaster only complicated when a supranational court is judged by the democratic principles that stem from national-level parliamentary notions.¹¹⁷

Two particular areas seem most likely to draw the ECJ into the democratic deficit concern. The first is the perceived distance between the court and the people (or citizens or *demos* in certain formulations) of Europe. The second is a worry about the procedural aspects of the court lacking certain democratic qualities. As I explore these two strands of complaint below, the problem becomes clear: these are not fallacies of the ECJ but rather obtrusive second-order principles of democracy being applied to an institution that they simply do not fit.

First, some critiques of the ECJ hover around the distance between the ECJ and its link to the population of Europe. Principles of accountability, access, and participation play a central role here. Often times, these critiques come packaged with concerns about the ECJ as a creative judiciary that makes new laws through its rulings. The argument is that law-making is the task of representative assemblies, and thus an institution that is not directly accountable to the people

¹¹⁷ Mercifully, most of the quality work on the ECJ is insulated from this type of thinking... an improvement over the rampant mistaken applications of democratic notions to the European Parliament covered in chapters three and four.

should not be involved in that process. This thinking is typified by Renaud Delhousse's (1994) statement: "In a system that sees itself as democratic, it is not easy to find justification for creative judiciary (law-making judiciary)"¹¹⁸ To the extent that the ECJ appears active and creative, so worries about its links to the people increase. At the national level, the thought is that the populace is due laws made by a body of its choosing. Creative judiciaries seem to offend not by the nature of the decision, but the fact that the official "making law from the bench" is not the empowered representative of a legislative branch. While some work has striven to show that non-representative institutions in supranational settings can play a responsive and even participatory role, such arguments are in the minority.¹¹⁹ The ECJ remains subject to frequent concerns about its involvement in building European law without a perceived democratic right to do so. This is further complicated by the independence of the ECJ, as accountability has become the default benchmark for democracy in non-elected institutions in an increasingly democratic deficit-worried Europe.¹²⁰

The second democratic critique of the ECJ also links to accountability, but in a different way. These critiques criticize the ECJ's procedural and compositional elements, worrying that the court's system of appointments and closed discussion are contributors to the democratic woes of the Union. These concerns start with the frequently referenced worry about the independence of judges on the ECJ. Remember that the procedure for selecting judges is one of national nomination. In effect, but not required, the court had an unwritten rule of one justice per member

¹¹⁸ Delhousse (1994). Pg. 117.

¹¹⁹ Kuper (2004).

¹²⁰ Elgie (2002).

state.¹²¹ This policy has led to a watchful attitude toward the court, with scholars continually looking for signs of member state tampering with the judiciary through their national justice.

The pressure of member states may be felt in various ways. One example is the tenure of Justice Manfred Zuleeg, the German appointee to the ECJ in the early 1990s. Many attribute the critiques that Chancellor Kohl had for the ECJ rulings as being particularly aimed at pressuring Zuleeg.¹²² When his term of office was not renewed in 1994, it seemed to be a punishment for not ensuring the court ruled in German national interests. Due to experiences like this, additional informal measures have been adopted by the ECJ—most notably, utilizing an informal rule controlling which judges are given the lead role in given cases. Any judge from a country that is a party to the case is not given a central role in the trial proceeding for that case.¹²³ Informal practices like these have left the ECJ in a curiously precarious position. Scholars of the ECJ point out that as it stands, member states easily could pressure the ECJ, yet have largely refrained from doing so.¹²⁴

Further complicating matters, the measures taken by the court to insulate itself from pressure from the member states can raise certain democratic question marks, particularly among those who seek to apply participatory and accountability principles of democracy to the court. In sheltering itself from undue member state pressure on justices, the court uses secret deliberations and produces case decisions which are corporate in nature. This leaves space for a justice to decide against her national government without worry that her comments will be made public and thus jeopardize her appointment to the court. While some rumors do leak out—for instance, the story that the Spanish justice was instrumental in ruling for strict compliance by Spain with

¹²¹ Delhousse (1994). Pg. 7.

¹²² Ibid. pg. 12.

¹²³ Brown and Kennedy (1995). Pg. 54.

¹²⁴ Delhousse (1994). Pg. 118.

Union environmental directives—this method insulates the justices to a degree. However, the problem here is one that loops back full circle to the prior concerns. The solution to one supposed problem of democracy (non-independence) involves treading on another frequently-cited democratic principle in the EU: transparency.

The basic claim of both of these critiques comes from the same source. There exists a perspective in work on European institutions that heavily favors the specific second-order principles most often cited in the democratic deficit debate (detailed in chapter one). The message is that Europe lacks accountability, legitimacy, participation, and transparency. Thus, scholars carry these specific second-order principles as they examine European institutions, and apply them often unconsciously to their subject. These system-wide complaints have become the particular criteria for every institution within the Union, whether that institution is rightly judged on those principles or not. This flawed application of principles is a notably recent phenomenon, which further credits the role of the democratic deficit model influencing other scholarship on the EU. To properly treat a court structure in the EU, a better starting point than the democratic deficit is to look at how courts have fit into democracy in different ways over time.

The history of courts and democracy is complex, and deserving of a full treatment in its own right. Yet a basic overview of the relationship of the court to democratic theory demonstrates both the recentness and peculiarity of the democratic fears above being leveraged upon courts. Instead, the history of the court in democratic societies points our attention to a different set of democratic factors—factors that are found more in the foundational functions of the ECJ than in the mechanistic functions where the prior worries are centered.

While glaringly obvious, the entry point to this discussion is the fact that courts pre-date democracy and democratic ideas considerably. Thus, the history of courts and democracy is one

of democratic ideals being theorized and installed in societies containing courts. Courts were not something that were theorized as a component of democracy, and thereby added to the social and governmental system. Already, then, we have our first notion about how democratic theory should approach judicial structures. The court, being an institution co-opted into democratic regimes, often gets less or negative attention from theories of democracy. The adaptive approach reminds us that an institution need not be all-or-nothing, and the court can serve as a great example of that despite its seeming non-democratic origins.

Looking at early modern theorists and their work on democracies and government organization, we quickly recognize certain patterns of including judicial structures into democratic theory. Early notions drew on the central principles of freedom and equality for their democratic insights, but with a notable focus on the role that the system of governance played in people's lives. Limited democracy became the core principle, where the rights and liberties of individuals were shielded from the absolutist power that monarchy (and later, all government) possessed. And here is where judicial structures found their home in democratic theory. Courts and judges were buffers, guardians, protectors, and balancers of the fragile system that was ever-ready to swallow the individual's freedom and equal standing.

Charles de Secondat, Baron de Montesquieu's (1748) reflections on the judicial role in political organization (democracy and monarchy) play an essential role in the development of courts as democratic institutions. Shaping both continental democratic thinkers and the federal architects of the United States, his work posed the essential role of courts in the separation of powers. Courts protected liberty of citizens by checking abuses by the governmental structures that would come quite easily should executive, legislative, and judiciary be contained

in a single entity.¹²⁵ In addition to protecting the citizens, this role prevented the decline of the system as a whole, ensuring that the rule of law and the rights and freedoms of citizens were maintained over time.

While others came prior to Montesquieu and after, his seminal work set the tone for the way in which courts were to be included in our democratic conceptions. Liberal democratic notions grew out of the origins of limited democracy, and even Rousseau's republican model of democracy drew from the same well of ensuring separation of a judiciary in order to preserve the people from any will a government may wish to impose over the general will.¹²⁶ Codified both in the Federalist documents and in the early perceived successes of the United States' constitutional system, courts increasingly fell into their role as a part of the system that was there to shelter rights and freedoms against the potential for abuse by government.

Along with these notions, it is important to recognize the role that the social contract model of social organization and Enlightenment thinking added to the development of courts in this democratic role as guardian in limited government. The need for the court was one of insurance against the central government. That comes prefaced on the notion of individual liberty and rights directly from Enlightenment thought. Thus, under the social contract notion, our citizenship in the system was one of mutual agreement, carrying contractual obligations for the government and our fellow citizens. Judicial structures emerge as the central forum where the protection of those contractually-defined freedom and equality took place, both in early democratic theory and continuing into modern democratic thought. In current rights-based

¹²⁵ Montesquieu 1748 (2002). Pg. 151-152.

¹²⁶ Held (1987). Pg. 59-60.

democratic theory, the role of courts continues to be linked to the interpretation of rights and insurance of equality and freedom in the system.¹²⁷

This short look at the history of courts in democracy provides a general overview. One central element hopefully comes clear. The classical democratic role for courts is not the current one that certain scholars seek to find in the ECJ. Courts were not forums of participatory engagement nor subject to transparency or accountability requirements. Instead, courts had a different function in the democratic character of state systems: a role as guardian of rights, protector against hegemonic authority, and enforcer of the rule of law.

Notice how this fits with the prior functional exploration of the ECJ. The foundational functions of enforcing treaty and rule of law, equalizing enforcement for all citizens across borders, monitoring for state compliance, and guaranteeing the contractual role between the member states falls more in the realm of the classical democratic criteria for judging courts. Yet the critiques of the ECJ, inspired by democratic deficit thinking, tend to focus their attention on the mechanistic functions of the ECJ: its composition, working, and procedure.

The following chapter will address the question of situating a democratic perspective of the ECJ in full. For the purposes of this chapter, the essential recognition is that current judgment of the ECJ seems to fall on its mechanistic elements, when the history of courts and democracy suggest that a court's democratic involvement falls more on the foundational functions provided by the judiciary. Thus, a new look at the ECJ—which my adaptive approach to democracy can provide—must start with the foundational role of the ECJ as a structure whose role comes more from what it does than how it functions as an institution.

¹²⁷ Ibid. Pg. 324.

5.3 GRANDFATHERING THE ECJ INTO A DEMOCRATIC ROLE: EUROPEAN CONSTITUTION AS A “MAGIC BULLET” OF DEMOCRACY

In 2005, French and Dutch referendums rejected a proposed formal Constitution for the European Union. Leading up to the rejection, Constitution was touted as the democratic solution to the woes of Europe. And afterward, continual pressure for Constitution as a solution to democratic deficit remained, supported by assuring statements that EU would be okay in the meantime thanks to the informal constitution it already had in its treaties. Hidden amidst these trends is a subtle message about the ECJ as well. If constitution was a magic bullet of democracy—one change that would suddenly transform the entirety of the Union—then the ECJ would clearly be one of the beneficiaries. Already, the ECJ’s role in creating the treaty-as-constitution was undeniable, and thus once a constitution was in place to solve the democratic deficit, any worries about the nature of the ECJ as potentially undemocratic would evaporate.

I want to briefly question these assumptions, arguing that constitution is not such a simple solution for democracy as some painted it. Furthermore, no matter what the constitutional basis of the EU, I argue that the ECJ must be independently considered from a democratic standpoint. No matter what would come from a formal constitution, the ECJ still needs to be considered on its own merits and functions from a democratic standpoint. Once the ECJ is disentangled from the mere existence of constitution, scholarship on the supranational court of the EU can proceed.

One of the common reasons given in favor of constitutionalism for the EU is that formal constitutionalism solves the democratic deficit.¹²⁸ The idea is fairly straightforward, focusing

¹²⁸ Skach (2005). Pg. 151

mainly on the notion of securing a form of legitimacy for the system. A constitution would meet certain notions democratic legitimacy and thus reduce the perceived democratic deficit.¹²⁹ The perception seems to be that taking a step beyond the bindings of treaty to the obligations of a constitutional document would allow for that injection of additional legitimacy into the system. Even studies questioning the benefits of constitutionalism for the EU have pointed out that “the one purpose of the constitution is to ensure democratic legitimacy in the future decisional processes of Europe.”¹³⁰ The very process of agitation for constitution has been judged by some as a *prima facie* indicator of democracy.¹³¹ As Andrew Moravcsik (2002) expressed in typical fashion, the problem of Europe was that it had too many Madisons. There was a multitude of scholars, policy-makers, and citizens agitating for a European constitution, all under the guise of ensuring democratic legitimacy for the EU.¹³²

Thus, the rejection of the proposed European constitution was difficult to navigate for many concerned with the democratic qualities of the EU. By putting all their democratic eggs into the constitutional basket, so to speak, its defeat caused some to increase their concern over the democratic deficit. More, however, fell back to a compromise position for their democratic and constitutional hopes: the treaty-as-constitution. Scholars had argued for some time that the modern mode of constitutional construction was finding the right format to provide democratic legitimacy to the system.¹³³ Thus, the time, conditions, or format simply was not right for a formal constitution to add democratic legitimacy to the EU. Instead, other less formal pathways would have to suffice for the time being.

¹²⁹ Guérot (2001). Pg. 13.

¹³⁰ Weiler (2002). Pg. 571.

¹³¹ Wiener and Della Sala (1997); Nicolaïdis (2004)

¹³² Moravcsik (2002). pg. 604.

¹³³ Weiner and Della Salla (1997). Pg. 597.

Insightfully, Jan Erk (2007) pointed out that the failure of the first constitutional attempt was not a rejection of democracy, but a conflict between an existing treaty-as-constitution and the formal constitution which was promoted.¹³⁴ The treaty-as-constitution model became the refuge of democratic hopes for many, given the defeat of the formal constitution. And with that comes a new perspective on the ECJ. The ECJ gets drawn into these notions thanks to its role in shaping the current system of treaty obligations into constitution-like fashion. Many rightfully view the ECJ as having built a “constitutional type structure” which “blurred” the parts of the EU that would make it similar to any traditional international order.¹³⁵ While not a complete solution to democratic deficits, the informal constitution became a safety net that caught many who got their democratic hopes dashed by the 2005 referendums.

Despite these trends, I argue that the constitution as democracy-bringer notion deserves considerable scrutiny. And thus by extension, the ECJ’s democratic qualities should not be established via simple association with a constitutional process in the EU. What constitutionalism would bring to the EU is not an overnight solution to democratic problems, but a new and potentially different set of circumstances which would still need to be democratized. The question is what changes constitutionalism would bring to a system that is currently treaty-based.

The difficulty with some parts of the European constitution debate was the ease with which constitution and democracy were equated. It is important to remember Giandomenico Majone’s (2001) reminder that “‘constitutionalism’ and ‘democracy’ are historically and conceptually distinct ideas.”¹³⁶ Scholarship is starting to point out some of the barriers between a

¹³⁴ Erk (2007). Pg. 634.

¹³⁵ Delhousse (1994). Pg. 37.

¹³⁶ Majone (2001). Pg. 57.

European constitution and solution to the perceived democratic deficit. For instance, a novel approach appears in Jan Erk's (2007) insightful work on the manner in which language itself creates a barrier between the implementation of a constitution and a mythical overnight transformation of the system to democratic legitimacy. However, the specifics of the European case are not the only reason that constitutions are not instant indicators of democracy. Giovanni Sartori (1962) reminds us that a constitutional document is merely a means to a social end—a set of principles with a “correlative institutional arrangement.”¹³⁷ Constitution may historically link to notions of limited government and restrictions of arbitrary power, but that comes from the settings in which it was employed. In the EU case, constitution may lead to an increase in democracy, but it does not do so simply by virtue of being a document entitled “constitution.”

In this way, I argue that scholarship on the ECJ as a democratic institution is better advised to stay out of the European constitutional debate. The easy assumption is that if a constitution instantly generates democratic legitimacy, that the ECJ will simply be packaged into a democratic role by association. Even the treaty-as-constitution thinking can fall afoul of this assumption. Yet the links of the ECJ to the nature of the EU treaties are essential to our judgments of the institution itself. Therefore, what is needed is an approach that can manage the difficulties of the competing ideas that swirl around the ECJ: constitution and democratic deficit. Using the platform constructed in this chapter—giving attention to the ECJ's foundational functions and employing a caution against simply assuming that constitutionalism shoehorns the ECJ into democratic status—my adaptive approach will reconsider the ECJ as a democratic institution in the following chapter. By watching the foundational functions of the court,

¹³⁷ Sartori (1962). Pg. 855.

understanding its historical role as an arbitrator of democracy, and relaxing the need to consider treaty as constitution, a novel approach to the ECJ as a democratic institution is possible.

6.0 DEMOCRACY VIA SOVEREIGN FICTIONS AND THE EUROPEAN COURT OF JUSTICE

The prior paired chapter provided three elements of groundwork that the argument in this chapter is built upon. First, it detailed the basic form of the European Court of Justice (ECJ) and more importantly the functions that the ECJ appears to fill in the system of the European Union. Then some new concerns about the ECJ that stem from the democratic deficit were shown to be misplaced, focusing more on the mechanistic structure of the ECJ rather than the foundational functions of the court that are more consistent with its democratic impact. Finally, the linkage between the ECJ, democracy, and constitutionalism were considered. While a formal constitution may lead to democratic improvements in the EU, the assumption that democracy is a direct and automatic outcome of constitutionalism was challenged. And more important to our focus on the ECJ, I argued that the ECJ's merits need to be considered independently of constitutional discourse, lest the court be too easily judged democratic by association alone.

From those points, the stage is set to apply my adaptive approach to the ECJ, to better assess the institution's democratic character. I argue that the ECJ should be considered in democratic light while minimizing the constitutional discourse surrounding the institution. Instead of thinking that the court is democratic via constitution, I argue that a case can be made for a certain democratic role for the ECJ from its position as a supranational court presiding over international treaty alone. By focusing on treaty rather than treaty-as-constitution or constitution,

the adaptive approach frees us from many of the statist democratic deficit notions that plague studies of the ECJ while at the same time suggesting a new view of the ECJ: as a guarantor of contract.

I argue that this contractual role for the ECJ depends on its relation to treaty, not to constitution or constitutional treaty—due primarily to the way in which states (and the elites that compose them) differentiate between treaty and constitution through their notions of sovereignty. To the extent that the ECJ remains an arbiter of treaty, the beliefs (perhaps fictions) of sovereignty held by state leaders play into a particular democratic situation. Conversely, to the extent that it moves away from treaty and toward constitution, those beliefs about sovereignty are changed or challenged, and that unique role is lost.

To be clear: this does not mean that constitutionalism moves away from democracy. Instead, it swaps an existing reasonably democratic process (ECJ as guarantor of contract) for an untested democratic process: Euro-constitutionalism, which although some believe will be a magic bullet of democracy, is not necessarily a guaranteed fix for democratic concerns. From the vantage point of the adaptive approach, neither treaty nor constitution is necessarily “better”. Instead, each brings certain democratic elements that we may evaluate. In the end, the status quo of ECJ as arbiter of treaty clearly contains second-order principles that link to the first-order principles of freedom and equality, and thus meets reasonable democratic standards in the adaptive perspective. Scholars and policy-makers of the EU have something to gain out of revisiting their assumptions about the ECJ and reconsidering the way in which its role toward treaty enhances the democratic character of the Union.

The structure of this chapter will be as follows. I first turn to the adaptive approach, which I use to consider the various second-order principles of democracy in the case of the ECJ.

Showing that some of the traditional ones, especially those that figure prominently in worries about democratic deficit, are problematic in the case of courts, I turn to exploring what other principles may be useful using the groundwork laid in chapter five. I argue that the foundational functions of the ECJ fit with the general model of courts. This suggests that the second-order principles of rule of law, guarantee, and obligation prove most salient for consideration of a supranational court structure like the ECJ.

From this point, I turn my attention to the way in which the ECJ's ability to function as a guarantor of obligations works particularly well with the way in which sovereignty is considered by state leaders. I argue that the guarantor role is not only democratic, but works through treaty where there are mutual beliefs about the sovereignty of states. These mutual beliefs are contractual in nature, with the ECJ filling the role of a guarantor of contractual equality. Thus the ECJ plays a dual democratic role: ensuring the obligations of states in terms of freedom and equality to the citizens of the EU, while at the same time providing an equality-preserving role between states as contracting parties. I conclude with a brief look at what change would bring, and how moving from treaty and sovereignty in this case would change democratic evaluations of the ECJ.

6.1 LOCATING SECOND-ORDER PRINCIPLES WITHIN THE COURT

Much like the prior paired chapters on the European Parliament, I treat the European Court of Justice as an example case where my adaptive approach can provide new insight both into democratic theory and the institutions of the European Union. In this case, using the adaptive approach sheds light on democratic qualities of the ECJ both unexpected and often-overlooked.

Instead of starting from some pre-formed conception of democracy—such as those packaged with democratic deficit concerns—the adaptive approach begins by examining the institution and what second-order principles of democracy are present or absent in the case of the ECJ.

I argue that the common standards that worry democratic deficit thinkers lose their usefulness when applied to the case of the ECJ. Instead, principles that are closer to the foundational functions of courts in general and the ECJ in its specific context are present: rule of law, guarantee, and obligation. Furthermore, the adaptive approach also provides a unique position to evaluate another motivational factor in the case of the ECJ, namely, sovereignty. Instead of rejecting sovereignty as out of place in supranational space, the adaptive approach gives new evaluation for the way in which the idea of sovereignty plays on the minds of those who administer states. Furthermore, this particular fiction of sovereignty actually proves useful for establishing the current democratic aspects of the ECJ.

So we begin with the first step of the adaptive approach, identifying what second-order principles are present in the ECJ while being comfortable with the fact that not every principle of democracy need be used in this situation. Luckily, the discussion in chapter five has done some of the initial work for us. A host of democratic ideas, stemming from the literature on democratic deficits, has been applied to the ECJ in ways that are less than satisfactory. The judicial structure of the ECJ sets up some initial barriers to certain democratic principles. For other paradigms of democracy, this causes a problem. If we must hold to a strict rule of what principles a democratic institution carries, the difference in the ECJ from the more familiar state sources where we have drawn such principles from can produce untenable friction.

Democratic second-order principles such as accountability, contact, contestation, discourse (at least public in nature), participation, responsiveness, and transparency all prove less

useful when applied to a judicial structure like the ECJ. Such principles have their place, but are mistakenly leveraged if used to consider the court. The second part of the adaptive approach is especially important here. This poor fitting of principles to institution does not mean that the ECJ is not democracy, just as it does not mean that we are working with non-democratic principles. Rather, they are principles of varied application. The adaptive approach frees us from needing to see them present in every institutional nook and cranny of the system of governance which we study—a pattern that is unfortunately too frequent in democratic deficit literature.

The adaptive approach proves flexible yet robust when certain principles seem less useful in a given context. The previous chapter suggested that the history of courts and democracy points toward a different set of democratic criteria that are applicable to judicial institutions. Here the rigidity of other perspectives is outshined by the adaptive approach. Given an institution, the adaptive approach can better zoom in on what democratic aspects are actually occurring within that institution. By referencing our theoretical foundations without deciding upon one single set of second-order principles that are applicable universally, our treatment of specific situated and contextual institutions is enhanced. We can consider the democratic qualities of the ECJ in a robust and flexible manner, rather being forced through the thin theoretical strainer of a rigid theory.

So what are the second-order principles that are more applicable to the case of the ECJ? I have suggested that they revolve around rule of law, guarantee, and obligation. But how do we reach the reasoning behind this list of second-order principles? The following sections push on the ECJ, both on its general form and its unique contextual situation. By conducting this essential third step of the adaptive approach, a more powerful democratic analysis of the ECJ emerges.

6.2 THE COURT IN ABSTRACT: AN AGENT OF EQUALITY

Courts pose a multi-layered puzzle for democratic theory. The reasoning for courts can be a thoroughly democratic one, even if the institution of the court can seem to lack certain second order principles that have become shorthand for democracy. This is the problem that my adaptive approach to democracy is perfect at resolving. Remember, a central strength of the adaptive approach is the way in which it relaxes any perceived need that every second order principle of democracy be present in a given institution. Furthermore, the adaptive approach gives the leverage to see how we come to expect certain second order principles, and why those principles become incorrectly applied to institutions such as courts. A court's lack of transparency or accountability to the public, for instance, is not as problematic from a democratic view as one might think—as long as the court is being evaluated from the adaptive vantage point.

As I demonstrated in chapter five, the court's role in democracy (in the nation state) was traditionally one of guaranteeing the agreed rights and functions of the political system. Three interesting principles that are linked to the general model of a court can be teased out of that role: rule of law, guarantee, and obligations. Yet the question is: how do we reach those three principles from an idealized conception of a court?

The rule of law is the easiest to confirm, as it has consistently appeared in various models of democracy. In short, the rule of law says that the existing laws are being applied faithfully and impartially. When those laws are democratic, the rule of law ensures that the system is fulfilling the rights and liberties it said it would provide. Rule of law applies to both individuals and to the system, making sure to that whatever principles the system is founded upon are met. Courts, accordingly, have the central role in rule of law. When rule of law is challenged—i.e. there is a discrepancy in behavior on the part of some party—court forms a site

of redress. Thus, the judicial structure promotes the second-order principle of rule of law through its functioning.

The trick here, and for guarantee and obligation, is that the system be one that is committed to the first-order principles of democracy: freedom and equality. One could have a set of laws, and a court to enforce the rule of law, yet that court may not reach democratic outcomes. Rule of law is democracy-enabling only as a second-order principle. It must be balanced on top of the principles of freedom and equality. In the case of the European Union, this qualifier seems to be met. The one thing that the EU does not lack is language about freedom and equalities in the documents and principles that guide the system. These are coupled with the legal traditions of the European states that compose the EU, where principles of justice and legitimacy are drawn from the milieu of freedom and equality that were established in the state systems where European jurisprudence is drawn from. Thus, there is a touchstone by which rule of law works to democratic ends—by enforcing the basic principles of the system.

Now turning to guarantee and obligation, it is helpful to disentangle the purposes (foundational functions) of a court from the mechanistic functions of a court. Courts, having their origin outside of democracy, can in principle pursue any set of outcomes based off of common principles and laws. A law with extremely non-democratic outcomes could still be effectively enforced via the mechanistic functions of courts. In a way, these functions have a non-normative content. They can be set to whatever purpose law directs. Thus, we must turn to the ways in which courts receive the principles that they reference in order to examine their democratic credentials.

Two main sources come to mind that can provide the principles that a court utilizes: from the law the court works with and the traditions of jurisprudence used by the court. For a court

structure to act on principles of democracy and equality, the law needs to have its basis in some statement or notion of those principles, be it from a constitutional document, shared cultural understanding, legal tradition, policy outlook, or other source. Courts existed long before legal equality existed. If the laws push toward inequality, social hierarchy, etc., then the court would simply reflect those things. Rule of law would still ensure that the unequal rules are applied evenly to all. But even application does not equate to equality. A court may apply the same principle to all slaves or to all slave owners under law, yet we could not say that the court was promoting equality in a democratic fashion. In the case of the EU, however, a clear commitment to these principles can be found in law, treaty, directive, and document.

The second source for viewing a court as a guarantor of equality is the mode of jurisprudence employed by the court. Various jurisprudential traditions exist, and there is some variation on how equality and freedom figure as basic principles of each. Legal scholars may balk here, but perhaps certain forms of jurisprudence could be judged more democracy-enabling than others based upon their emphasis on equality. Here we can look at the link between the EU and its member states for guidance. Traditions of jurisprudence come from the member states, where suitably democratic state structures can be presumed to exist. Thus, the traditions of jurisprudence that the ECJ drew upon (discussed briefly in chapter five) were yielded from traditions with the basic constellation of freedom and equality in place. In the ECJ, these different traditions of jurisprudence were synthesized, and new forms of jurisprudence appeared that fit with the EU system (and the principles of freedom and equality which were embraced in the foundations of the Union). While ECJ jurisprudence challenged some legal and political

traditions, such challenges were composed with a clear preference for equality in application and justification.¹³⁸

In this way, we see the principles of the ECJ come into focus. As a court structure, its goal (foundational function) is to promote rule of law, which carries an internal ethic of equal application. This notion of equality of application of the laws combines with the basic principles of equality and freedom as they appear in both national settings and in the documents and ideas that composed the EU. The ECJ thus can be seen as a participant in a particular dual-pronged role of equality seeking. It seeks to ensure equality between European citizens, despite the obstacles of national borders, while at the same time enhancing the equality of obligation of the member states that are party to the treaties which it oversees.

We can view the court as a guarantor of obligations, which carries the linkages to our first-order principles of democracy. This guarantor role is the function that seems to be especially democratic. By ensuring rule of law, equal enforcement, and equal protection, courts maintain the equality of a system of governance. Thus, with equality as one of the two first-order principles of democracy, we can begin to see the court's role in democracy—as an agent ensuring that one of our first order principles is maintained.

Thus we see the perfect fit for the adaptive approach to democracy for the case of courts. Democratic principles that are too functional seem to grade courts poorly, even while those courts may enrich the democratic character of the system. My adaptive approach allows us to move past the format of the court and focus on the role of the court. Recall from chapter two that the adaptive approach frees us from needing the entirety of democracy in a system to be held in one particular institution as well. Instead, we continually evaluate parts of systems for the ir

¹³⁸ Alter (2001). Pg. 25.

democratic qualities, to get a sense for how and in what ways democracy is at work in a given system of governance as a whole. For the ECJ, that role is as a guarantor of obligations and monitor of the rule of law for both the people of Europe and contracting member states.

6.3 THE ROLE OF SOVEREIGN FICTIONS AND STATES

So having drawn some second-order principles from an idealized notion of courts, we can turn to the European Court of Justice (ECJ). In the ECJ case, the court is situated to perform a democratic role along the lines of these principles. While the court's functioning and mandates bear the distinctive impression of the unique international system that is the EU, the three principles of rule of law, guarantee, and obligation are both present in the court and connect the actions of the court to the first-order principles of freedom and equality.

The form and function of the ECJ was addressed in the prior chapter where I distinguished the different functions of the ECJ as foundational or mechanistic. As the previous chapter suggested, some of the second-order principles championed from democratic deficit perspectives had some links to the mechanistic functions of the court. Yet those concerns were limited in fashion and left unclear methods of solution—the process of making a judicial structure more participatory with the citizens of Europe would seem difficult at best. Instead, my inquiry into the history and ideal nature of courts has suggested that it is the foundational functions of the ECJ that bear its democratic credentials. It is in the court's role in guaranteeing treaty compliance, ensuring equality of application across member state borders, and in providing a guarantor role for the treaties of the member states that the functions of the ECJ meet

with second-order principles of democracy, as the revised figure from chapter five suggests below.

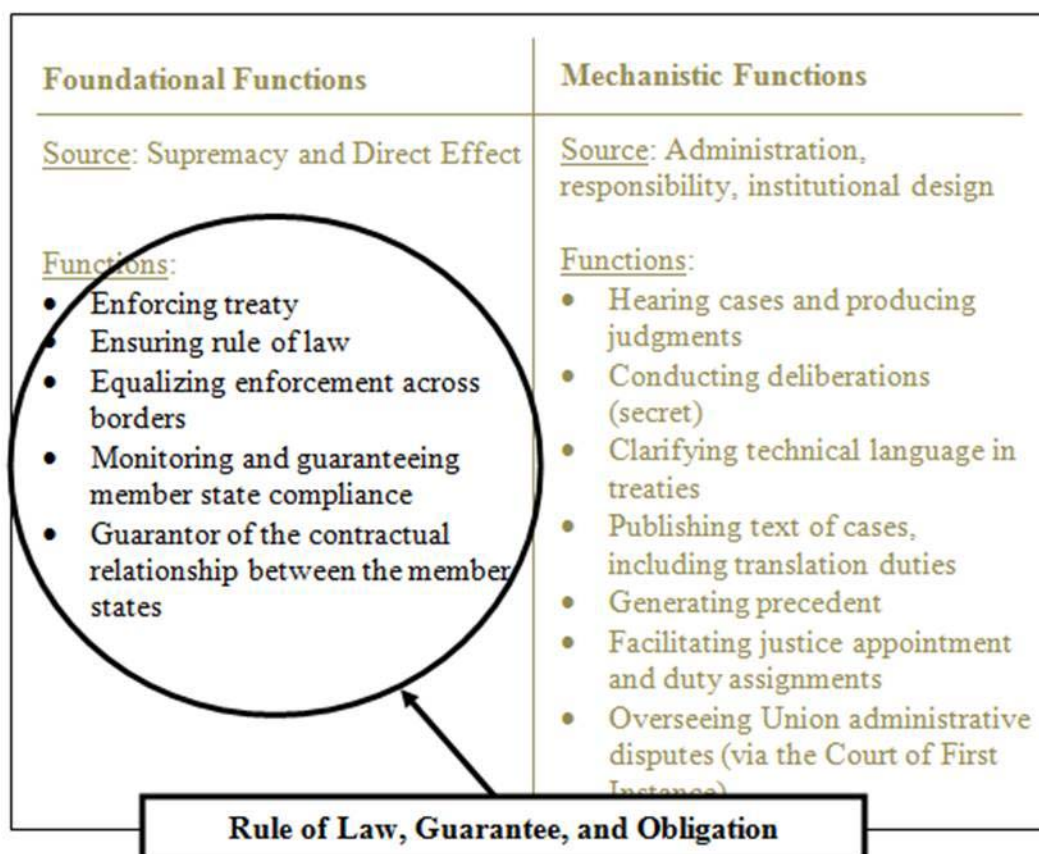


Figure 10. Locating principles of democracy within the foundational versus mechanistic functions of the European Court of Justice

While rule of law is straightforward, the other notions of guarantee and obligation require further unpacking given the specifics of the ECJ's unique institutional position. In particular, I turn to an examination of perhaps an unlikely subject in a chapter on courts: sovereignty. I will endeavor to show that sovereignty is a critical element in understanding the ECJ's use of guarantee and obligation to further the first-order principles of freedom and equality in the EU.

Given that sovereignty as a concept has proven to be contentious and expansive in the literature of both political theory and international relations, I begin with a simple point. *States*

arrived in the EU with a sense of sovereignty. Here I use the term “states” as convenient, if horribly non-specific, shorthand. The state is composed of countless actors which conduct its business, all of whom cannot be assumed to be of one single mindset. Yet for my argument, I will be talking about a general outlook common to that of leaders, policy-makers, and many citizens of the state. Thus, while not ideal, I will often refer to the term “state” as if it were an actor in its own right instead of a composite actor in the international policy space. Yet to save a paragraph of typing with each mention, the moniker “state” will have to suffice.

With this in mind, I repeat my simple point: *states arrived in the EU with a sense of sovereignty.* Here I am making an explicitly psychological argument, not a theoretical one. Regardless about how we may feel about the countless debates on whether sovereignty exists, does not exist, or ever existed in the international sphere, one thing remains factual rather than conjectural. The idea of sovereignty has crept into the mindsets of leaders, policy-makers, scholars, and the general populace, despite the effect that globalization may or may not be having upon that notion. Thus, it seems clear that states arrived in the EU with a sense of sovereignty—carrying a bundle of assumptions about an idea called sovereignty that have a psychological impact upon the state. Whether or not it exists is less important than the fact that *states have acted as if it exists.* Thus, we can say that states have acted in ways consistent with sovereignty, even if that idea itself does not exist.¹³⁹

What is important from the standpoint of the EU, is that the states creating and joining the EU carried (and still carry) concerns about the maintenance of their state power and ability to

¹³⁹ Should this seem too much, compare to the case of religious faith. An observer may look at a man practicing a different religious faith than she does, and think: “Your God, gods, and/or idea do not exist.” Yet that same observer would have to recognize that the religious practitioner is behaving in a predictable manner based upon his faith. Thus, his actions would be consistent whether or not the idea he patterns his actions upon exists in Truth or not. The same seems to hold true for sovereignty—whether it exists in principle or not does not change the fact that as an idea with historical influence, states have behaved in a manner consistent with the principle. And like religion, the debate over the existence of sovereignty is important to carry out in places other than this research project.

retain that power. These fictions of sovereignty (in the sense of a story believed by the actor) pattern the behaviors of the member states. Not only that, but these patterns are notably predictable thanks to their common source. And it is these fictions of sovereignty held by the states which caused the integration scholarship of the EU to be so stunningly interesting. As the European Coal and Steel Community morphed into the European Community and subsequently the EU, common agreement through treaty became a central tenet of the process. The European state, all carrying various notions about sovereignty, began tying their systems in closer and closer fashion through integration—yet at the same time clinging in various degrees to the fictions of sovereignty that they began with.

Thus we see in the EU the central fountain of good research topics for years to come: a situation where states carry various assumptions about the existence and need for sovereignty while at the same time performing actions which clearly erode any “real sovereignty” or “true sovereignty” the states may or may not have had in the first place. In effect, this created not a crisis of sovereignty but a crisis of psychology in state leaders, citizens, and academics. States were left with a catalog of beliefs and desires from sovereignty, yet found their situation to be one where those notions were being challenged.

Thus, for a state to retain its *sense* of sovereignty (as sense may have been all it really was in the first place), a different source of feeling powerful and in-control needed to be found. Most importantly, the feelings of sovereignty are relational, as any power relation. From Thomas Hobbes to Michel Foucault, we are reminded that power is a commodity that relies upon our assessment of others. For states to retain their feelings of sovereignty, they needed to feel empowered relative to their fellow member states.

With these fictions of inviolable sovereignty pressing on the leaders' and some scholars' minds, member states face a problem. States were clearly wedded to the EU process, especially by the time that sovereignty concerns began to be fully felt. Thus, despite the claims of some scholars, exit is not a particularly realistic or pleasant option for states already so closely tied.¹⁴⁰ And at the same time the people who compose the member states and act on their behalf continue to carry assorted beliefs about sovereignty.

At this point, we can finally turn to the ECJ's role in this detour into sovereignty. The essential shift that allows states to remain in the EU while maintaining the veneer of the sovereign fictions is ensuring that the rules they agree to will be followed by all other parties as well. Thus, the role of treaty—and guarantees of the obligations imposed by treaty—becomes of paramount importance. The member states, by virtue of their concerns about sovereignty, roughly approximate a contractual situation that breathes the democratic connections into the second-order principles I discussed above.¹⁴¹

¹⁴⁰ Weiler (1991). Pg. 2412.

¹⁴¹ And here is an additional area where the assumption of states as solitary, single-minded actors is put to the test. To treat them as contracting parties is problematic, unless we make the following assumption in addition to our distinctions about sovereignty: leaders and policy-makers prefer decisions that they perceive are in the interest of the entire state. Thus, they can be considered to act in the interest of the state as a solitary actor, allowing the contractual comparison to work. There is nothing new about these assumptions, but again my goal is to be honest about the potential fault lines of my treatment.

6.4 CONTRACTS, TREATY, AND THE ADAPTIVE APPROACH TO THE ECJ

Here our notion of the European Court of Justice's role arrives at familiar ground for the political theorist. The situation of enforcing treaties where the parties to those treaties desire equal enforcement is contractual in nature. The member states, thanks to the fictions of sovereignty that they maintain, behave roughly in the manner of independent autonomous parties. The intergovernmental treaties that create the European Union, like all treaties, are a form of contract between the party states. And thus, we reach a point where the standard notions about behavior and motivations of contracting parties can be employed.

The question of compliance looms large here. States that care about sovereignty would seek to secure their feeling of independence and power. In a contractual situation, our fears of the contract imposing conditions upon our own behavior (limiting autonomy, thus sovereignty) are eased when we are assured of similar compliance by the other parties to the contract. If we are certain that others will be held to the same limits, then our restrictions in behavior become more tolerable.

In the case of EU treaty, the ECJ emerges as the mechanism by which equal enforcement of contractual limits is enforced upon all the contracting parties. The ECJ clearly considers its role to be one of monitoring the parties of the treaty and guaranteeing their compliance to the obligations they accepted through treaty. This outlook is reinforced by the nature of EU directives, which are aimed at states rather than private individuals (case 182/84 *Marshall*). Thus the very judicial procedure of the ECJ arbitrates the equal application of laws among parties engaged in a contract.

Looking more closely at the situation, it is the particular notions about treaties that come with the fiction of sovereignty that reinforce this system. Essential to remember is that the

system of sovereign states has generated a set of norms about how those states are to approach treaties. For many states, treaty is placed hierarchically over national law. The Dutch constitution, for instance, squarely elevates the obligations of treaty over national law.¹⁴² Similar provisions exist in the French system and the Italian system with its transfers of treaty.¹⁴³

The ECJ's own actions, as well as those of the judiciaries of member states, have only further solidified this. Part of the battle was in changing jurisprudence in member state judicial systems. One notable principle that the ECJ worked to reduce was the principle of honoring the most recent law passed first.¹⁴⁴ That notion of jurisprudence was recognized as a conveniently easy escape for member states from treaty obligations. As discussed in chapter five, cases such as the *Van Gend en Loos* decision and the supremacy principle reinforced the notion that community law causes conflicting national law (even if made later) to be "set aside" as "treaty commitments must be honored."¹⁴⁵

However, the process of keeping the ECJ as a guarantor of the contract embodied in treaty between member states has both limits and challenges. The ECJ's extent of enforcement does not extend to all areas where the first-order principles of freedom and equality need to be guaranteed. The German national court's "Maastricht Decision" forced the issue of the ECJ's competency, ruling that it only has oversight in agreed treaty concerns, not on anything deemed "outside" competences.¹⁴⁶ Thus the guarantor role of the ECJ in enforcing obligations in a manner consistent with democratic principles is limited in that sense.

¹⁴² Alter (2001). Pg. 23-24.

¹⁴³ Delhousse (1994). Pg. 43-44.

¹⁴⁴ Alter (2001). Pg. 23-24. *Lex posterior derogat legi aprioro* is the principle of jurisprudence described here.

¹⁴⁵ Delhousse (1994). pg. 41.

¹⁴⁶ Weiler (2001). Pg. 221.

Other difficulties also arise with this particular conception of states as contracting parties and the ECJ as the guarantor of that contract. Especially problematic are moments when we observe states attempting to get away with non-equal behavior. Critics may quickly jump to recent concerns about differential treatment of states when it came to obeying the deficit limitations of the Stability and Growth Pact. While Portugal received one standard, France and Germany seemed to be able to get away with running deficits in excess of the agreed amounts. While this is problematic, the response to these actions was indicative of a new mindset in the EU. The Commission worked to solve these issues without the ECJ because everyone recognized the imbalance in the system, and opted to work to coerce France and Germany back into line rather than threaten ECJ action where the equalizing solution may have been too strong for some Eurocrats to stomach.

The trick here is that the system's threat has become informal in these areas which are the common portions of the economic pillar of the EU. Informal, rhetorical processes were employed in this case. The mere fussing over French and German infractions of the stability and growth guidelines can work to ensure the equality of the system. Applying the labels of "being bad" or "unfair" to France and Germany in this case may not have corralled their immediate actions, but brought them back in line over the long run. This is not a drawback to my argument, but rather it shows the level to which member states, policy makers, and scholars have internalized the notion of equal contracting member states.

When it comes to ECJ decisions against states, the states' acceptance of the ECJ's guarantor role is the status quo. While incidents of state resistance to ECJ rulings do occur, such protests against equal enforcement of treaty are isolated and rare.¹⁴⁷ In addition, the nature of the

¹⁴⁷ Delhousse (1994). Pg. 118.

relationship between the member states is not static over time—it has evolved along with the integration process of the EU. Over time, the ECJ has become more restrained and offered fewer challenges to state behavior.¹⁴⁸ This is not a shocking revelation. The member states are now “civilized” within the system, just as long-term contracting agents become able to self-enforce most of the tenets of their contract.

The very practice of contracting causes the states to habituate to following the agreed-upon rules of the community. Confidence in the system being one of equal enforcement and maximum liberty while under obligation breeds compliance in state behaviors. This is similar to the proposed evolution of social contract models: we start out single, sovereign, self-interested, and selfish. Then we learn that our interest as sovereign individuals is in the system working, so we learn that compliance is the ideal strategy for maintaining the maximum amount of our own liberty.

At this point, I feel obligated to address perhaps the biggest critique to my argument in this chapter. The critique is perhaps best stated by Karen Alter (2001), who writes:

“Nor did national governments welcome the transformation of the European legal system. It is often argued that if the member states created an international legal system for the EC and did not reverse the transformed ECJ’s expansion of the system, then at some level they must be satisfied with how the European legal system is working... This does not mean that states wanted national courts to participate in enforcing European law against their governments... There are also clear indications that legal integration proceeded despite the will of national governments.”¹⁴⁹

In short, she claims that we cannot treat member states as wanting the system of the ECJ that they have and questions theories that claim otherwise. This poses a considerable challenge to my

¹⁴⁸ Ibid. pg. 148.

¹⁴⁹ Alter (2001). Pg. 26.

argument, as it is predicated on the notion that a state's sovereign fictions will lead it to seek out and/or appreciate a guarantor of contracts like the ECJ.

While Alter is correct that states may not have expressly wanted the ECJ in its current form, I do not agree that member states would wish to reject the current system. Instead, my argument is bolstered once more in reference to the contractual situation. Integration, especially in the ECJ, was not clearly telegraphed to the member states as the process occurred. The process was slow, incremental, and varied in pace. It may be the case that one morning, the leaders of the member states woke up and realized that the ECJ was more powerful than they would ideally like it to be. Yet the process that got the states to that point was difficult to step into and change. States did get involved at points where they had clearly defined objections to specific parts of the process. However, by the time the architecture for the ECJ as a guarantor of treaty was in place the member states were too wedded to the system to actively oppose it. Thus, Alter's point focuses more on observing the way in which states reached a point they may not have liked, rather than directly challenges my argument that states reaped some benefits from the ECJ system as it evolved.

Given this read on the ECJ as a guarantor of contracts, we can turn to the democratic links. I suggested earlier that guarantee and obligation were the two principles that would be illuminated by this discussion of the ECJ. Guarantee is clearly a principle that developed in the ECJ over time, with it picking up the need to provide guarantees of agreed-upon treaties and rights. Note that this guarantor role operates at two levels, both of which tap into democratic first-order principles. On the one hand, the ECJ pursues guarantees of rights and privileges which the European system of law promises to the citizens of Europe. It insures that the member states

carry out what they owe to the people, which guided by the agreed-upon basic rights and liberties put forth in the treaties, play a role in securing freedom and equality for citizens of the Union.

On the other hand, the ECJ pursues a direct form of equality-enforcement through the contractual enforcement of the treaties between member states. It guarantees equal compliance, which feeds into the second principle of obligation. The ECJ is uniquely situated to pursue equality across the internal borders of the EU. By overseeing obligations of member states, it ensures that the obligations are met throughout the Union. The rights, protections, and policies that apply to a Spaniard apply in the same way to a Czech. More than many institutions in the EU, the ECJ has a direct role in equalizing and harmonizing policy as it is felt by the citizens. When a citizen feels unequally treated, their redress can be found through judicial channels, where the ECJ—and the national courts below it—enforce the standard of equality across the Union.

In this view of the ECJ, I have demonstrated both a different look at the ECJ as an institution as well as the strengths of the adaptive approach at navigating the difficulties of varied institutional design. The flexible yet robust qualities proved invaluable here. It provides a strong notion of a way in which the current treaty system fits democratic notions (i.e. is equality enhancing on multiple levels). The contracting parties' situation is one particular to the EU, yet our discourse on the courts' role in democracy can be applied to other instances of supranational courts. The role of the ECJ as guarantor of obligations and rule of law were specifically pursued. The adaptive approach showed the ways that the ECJ may not fit some of the standard democratic deficit principles of democracy, yet has clear linkages to the first-order principles of freedom and equality.

Second-Order Principles of Democracy found in the ECJ

Rule of Law (Maintains the system of agreements the EU is built upon, which promote freedom and equality as basic principles)

Guarantee (Dual-role of guarantees: guarantees that states follow their promises to each other, and by extension to their citizens)

Obligation (Ensures that the obligations of states are equally applied, even across member state borders)

Second-Order Principles absent in the ECJ

Transparency (Secret meetings and composite rulings)

Participation (While citizens may bring cases, true participatory interaction is absent)

Accountability (No direct popular accountability as currently arranged)

Contestation (Informal rules of justice selection lead to consensus paneling)

Figure 11. Second-order principles and the European Court of Justice

6.5 VIEWING TREATY AND CONSTITUTION AS DEMOCRATICALLY DIFFERENT

The prior sections showed the way that the adaptive approach allowed us to find democratic elements inside the European Court of Justice as observed. However, I want to stress that this is not an absolute endorsement of the status quo of treaty-as-contract in the European Union. The prior chapter discussed the fact that constitutional notions have been variously tied to democratic possibilities of the Union. Thus, my argument that treaty premises on state conceptions of sovereignty—with the associated notions of identity and independence—may seem to detract from constitutional possibilities.

I argue that the preceding analysis should not impact our judgments about what a constitutional process would mean for democracy in the EU. I remain skeptical of claims that the

constitution provides *automatic* democratic legitimacy. However, that does not rule out the fact that over time and through adjustment, a constitutional document could have democratic qualities. Rather, I argue that a switch to a formal constitution is not patently more or less democratic in principle. The adaptive approach has found democratic qualities in the system as it stands, and thus a change to constitutionalism—having many ties to the current institutional make-up—would likely carry some of those principles as well as perhaps uncover new second-order principles. Calls for constitution as a democratic *requirement* for the system are not needed. Particularized arguments from the adaptive approach about constitution would be much more helpful: arguments that suggest a certain second-order principle of democracy that would appear in a constitutional system that is absent in the current treaty system. The adaptive approach shows the democratic qualities possessed now, and could demonstrate alternative qualities that would be brought by other modes of organization.

The adaptive approach is unique in letting us analyze the democratic elements of a system. Yet it is an approach for analysis, not a normative justification of one particular system. In this chapter, I argued that the current treaty system of the ECJ, whether proto constitutional or not, has one particular method of encouraging equality in the system by relying upon states' notions as contracting sovereign parties. And that translates the court into its guarantor of equality role where it actively meets the first-order principles of democracy (and thus in the adaptive approach is a source of democracy in the EU).

What the adaptive approach is unable to suggest is whether a European Constitution or the maintained status quo of successive treaties guarded by the ECJ is somehow “better” normatively and democratically. The constitutional notion would change the ways the states interact with the system, potentially disrupting their sovereign fictions past the point of no return.

But that is not necessarily a bad thing. The adaptive approach would simply need to be re-applied to any constitutional regime and new (or perhaps same) second-order principles of democracy be located and explored.

However, the contrast does bring out one important point. With a constitution, the mindset of states would gradually shift from *us together* to *we*, and thus the sources and pressures that drive for equal treatment across the union would change. If the Union relies on some vestigial notions about sovereignty to keep states abiding by treaty, then we should seek out what mechanisms would replace those should that sovereign sense be lost. Such an inquiry would be well-founded with or without constitution, as the increasing togetherness of the EU is making it harder and harder for strict sovereignty notions to be maintained by state leaders. As Nicolaïdis and Howse (2002) reminded us, “Where the democratic deficit in Europe looks more serious, is where one imagines Europe as itself a political community, rather than a structure of intergovernmentalism.”¹⁵⁰ Thus, we must be mindful of the way in which the shift in perception away from sovereign fictions will affect the behavior of parties in the EU—especially in the unique arena of the European Court of Justice.

¹⁵⁰ Nicolaïdis and Howse (2002). Pg. 780.

7.0 DAPHNE: DEMOCRACY AND THE EUROPEAN ATTAINMENT OF WOMEN'S RIGHTS

In 1996, the name Marc Dutroux and the horrid details of his crimes spread across European news channels like wildfire. This Belgian man was arrested for having kidnapped, tortured, and sexually abused six girls, four of whom he murdered as well. Dutroux was suggested to be linked to child prostitution rings, with testimony of gang kidnapping and assaults being provided by the surviving victims. Along with this heinous set of crimes came an outpouring of European attention to the issues of violence, sexual exploitation, and trafficking of children. And from this catalyst of public opinion, the European Union achieved a community-wide program to protect women and children from violence that raises particular interest for those concerned with the democratic nature of European institutions: the Daphne program. Daphne is a program designed and funded by the European Commission with the express intentions of reducing violence, increasing harmonization among EU Member States along a particular policy area, and protecting the most fundamental human rights of women and children. And Daphne serves as an interesting case of how democracy and its second order principles can be realized through unexpected pathways in the European Union.

The previous cases were presented as paired chapters, yet this chapter contains the entire treatment of Daphne. As mentioned in chapter one, this is deliberate. In the cases of the European Parliament (EP) and the European Court of Justice (ECJ), they had received

considerable treatment in the existing democratic deficit literature. Thus, the chapters took a necessary “their approach, my approach” sort of format.

With Daphne, existing scholarship about the program has been either descriptive (what the program does) or evaluative (whether the program works). Because there is no existing literature making claims about Daphne as democratic (or non democratic), there is no need for the split format of the prior chapters. Here we have a reasonably clean slate—there are no existing studies that attribute certain second-order principles to Daphne that need to be considered.

Another difference from the prior cases is the nature of Daphne itself. While prior chapters dealt with European institutions like the EP, Daphne is essentially a heap of funding with a name. While particularized requirements for that funding causes the unique character of Daphne to be of interest, this is a different sort of institution than the EP, the European Commission, or other foci of this project. Daphne is interesting because of the way in which the EU explicitly pursues a decentralized, organic structure to secure those things which are usually demanded to be provided in a unified, comprehensive manner: human rights.

Given these differences, why address Daphne in the first place? Daphne provides a good case for the adaptive approach to democracy in a way that other institutions do not. The prior chapters explored two extremes: a case that was assumed to be democratic (the European Parliament) and a case that is assumed to be unrelated or tangential to democratic questions (the European Court of Justice). Daphne gives us an *unexpected* case to consider, where a familiar democratic second-order principle, human rights, is operating in a somewhat unlikely place.

This chapter begins by examining the basic environment that formed the issues and conditions that Daphne was created from. Then I detail the construction of the Daphne project

itself, and the evolution that the institution has experienced in its 10-year history. Building on the historical account, I tease out what the intentions of Daphne's creators were, as well as how it is currently evaluated by the European Commission and scholars. It focuses on their model of organically creating community-wide similarity in violence programming through a decentralized process of tying purse strings to best practices. This forms the essential frame of reference for any democratic inquiry into the program.

This chapter is primarily concerned with assessing Daphne as a source of democracy in the European Union. Daphne's democratic credentials are initially hidden beneath the veneer of its institutional design and the issues which it confronts. Yet the adaptive democracy approach allows us to consider Daphne in a different light than traditional democratic appraisals. Not only that, but the adaptive democracy approach also provides a means of escaping the tensions between the program's intentions and its institutional design. From that discussion, the argument clarifies to become a question about the nature of providing universal rights. It briefly questions whether universal rights need a system of universal provision. Put differently, can a disparate group of NGOs working in conjunction with a common source can provide the level of human rights protections that a system of Europe-wide governance feels obligated to ensure? And how does the concern that freedom and equality require uniform and comprehensive protection affect our thinking?

The adaptive approach to democracy highlights the way that pursuit of human rights becomes the essential virtue of Daphne. The program funds projects that directly improve the lives of Europeans subjected to gendered violence, and in a way that is guided by the core ethic of freedom and equality. The adaptive approach, in this case, highlights a different pathway to the familiar second-order principles. Prior chapters were about finding new principles in old

places. This chapter highlights a standard democratic principle—human rights—found within an unexpected and under-explored location. Daphne is not better or worse than other European institutions when it comes to democracy, merely different. It is that difference adds to the milieu of democracy in the Union, and allows us to view Daphne as one component of democracy being met on the European scale.

7.1 DAPHNE: HISTORY AND PURPOSE

Daphne developed like many European institutions, in a gradual and evolutionary fashion. When talking about Daphne's conceptualization and development, two factors are essential to consider. First, globalization and the process of economic integration in Europe set the stage for the concerns that initially sparked Daphne's creation. Second, early steps toward gender mainstreaming and the use of European-level platforms for the advancement of women's rights were rapidly expanding. These increases in women's rights planning were a transformative force which generated a proliferation of non-governmental organizations (NGOs) that could expand Daphne far beyond its original motivations. Each will be considered in turn.

Europe of the 1990s was undergoing massive economic integration. As markets opened, so did the flow of trade and commodities across borders. A full catalog of the benefits of this integration can be found elsewhere. Attention here is paid to the more unpleasant elements of economic integration and openness. Illegal operations and commodities also benefit from globalization, and the particular brand of globalization that Europe was experiencing (economic union) was no exception. One particular category of commodity that proved a concern for European officials was human trafficking. From sex workers to forced prostitutes to exploitable

children, the opportunities for cross-border exploitation increased alongside the beneficial elements of integration. Peter Mameli (2002) described the process with regard to sex workers: “As markets have become more open and fluid through globalization processes in the 1990s, the mobility of sex workers in the European Union (EU) has increased dramatically, creating a migrant class of sex worker that can be found operating to some degree in any EU country.”¹⁵¹

Citizens, politicians, and media sources became increasingly aware of these new concerns—particularly transnational movements of children and exploited or enslaved women, as opposed to “volunteer” migrant sex workers.¹⁵² The call to do something about this arrival of persons who individuals felt needed protection was felt both locally and Europe-wide. National law enforcement became more attentive to these concerns. At the European level, steps were also taken. Pursuit of trafficking human beings in the EU fell to Europol in 1994 (being specifically delegated to the Europol drugs unit), with mandate of documenting cases and developing strategies to combat the rise of trafficking.¹⁵³ This activity was designed to provide expertise and coordination to member-state law enforcement for investigating these types of cross-border concerns.¹⁵⁴ In addition to law enforcement, other projects were developed to address human trafficking and forced prostitution concerns. These initiatives include the Incentive and Exchange Programme for Persons Responsible for Combating Trade in Human Beings and the Sexual Exploitation of Children (STOP) as well as the Transnational AIDS/STD Prevention Among

¹⁵¹ Mameli (2002). pg. 70.

¹⁵² If there were no economic incentives for sex work, it is unclear how many women would volunteer for that vocation instead of pursuing other career paths. Thus, economic incentives could produce forced participation (lacking means other than one's body to survive and make that kind of money) rather than a woman “freely” choosing to be a sex worker. Thus, I use the term volunteer with hesitation. It remains a useful category for differentiating women forced into sex work from women who made a semi-autonomous and/or justified choice to become a sex worker. However, I do not wish to suggest that a position on whether sex work can truly be freely chosen (or not) is addressed in this study.

¹⁵³ Mameli (2002). pg. 71.

¹⁵⁴ Ibid. pg. 73.

Migrant Prostitutes in Europe Project (TAMPEP).¹⁵⁵ In all, the European Union seemed to be taking cross-border trafficking and protection seriously when Daphne was conceived.

At the same time of these increased concerns about the mobility of threatened or exploited individuals, efforts to secure the rights of women were being pursued on the European stage. As the development of the Treaty of Amsterdam continued, gender mainstreaming was being promoted as a practice which could change EU and Member State law to better respond to the protection of women's rights, particularly in economic endeavors. Likewise, gender rights advocacy groups were increasingly looking across borders and to the European Community to generate change. NGOs responded to the increased integration of the Union by making the European level a focus of their efforts in addition to local, regional, and state-based endeavors.

From this background, the push to Daphne began with public outcry against heinous acts of violence and exploitation that had been appearing in the news. Many point to the Belgian “Dutroux affair” as an essential motivator of early public concern which helped motivate Daphne's start.¹⁵⁶ Following these events, European meetings began to be held to address the concerns raised. One of these meetings, the Stockholm Congress against Commercial Sexual Exploitation of Children began the process that would end in Daphne. The Stockholm Congress was essentially an informational and awareness-raising event, designed to disseminate data on the threat of commercial sexual exploitation. In response to the meeting, the European Union held its own meeting on April 11, 1997. The meeting consisted of 30 NGO representatives, European Parliamentarians, Commission members, and a number of law-enforcement officials. Their goal was to address the problematic statistics about sexual and gendered violence raised by

¹⁵⁵ Ibid. pg. 72, 75.

¹⁵⁶ European Commission (2003). pg. 9.

the Stockholm Congress.¹⁵⁷ The European Commission felt that the 1997 meeting began a process of thinking “how European-level cooperation and exchange could function and where the focus of efforts should be placed.”¹⁵⁸ Following this meeting, the European Commission quickly began its own actions to combat gendered violence and exploitation through a process that they dubbed “the Daphne Initiative.”¹⁵⁹

The Commission described Daphne’s initial structure and purpose as a means of collaboration on projects to address and advise methods of dealing with the types of violence that the April meeting discussed. The Daphne Initiative was “attached to the Commission’s services in charge of justice and home affairs and fundamental rights, this one year funding line would be used to support modest projects (up to ECU 100,000 in the first year) that would bring together NGOs from at least two Member States to cooperate in research, data collection and analysis, good practice identification and sharing, training, exchange and networking, awareness-raising and information campaigns, direct action to support victims of violence, and the production of tools for policy and practice, such as guidelines and protocols.”¹⁶⁰ With this structure and funding in place, Daphne began funding projects almost immediately.

While Daphne was born in response to the commercial sexual exploitation of children, the initiative’s focus was quickly expanded. When 1999 was declared the European Year Against Violence Against Women, Daphne’s efforts expanded to include a Union-wide zero-tolerance for violence against women (modeled after a highly successful Scottish zero-tolerance initiative in

¹⁵⁷ Ibid. pg. 5.

¹⁵⁸ Ibid. pg. 5-6.

¹⁵⁹ The name Daphne comes from Greek mythology, where a woman escaped Apollo’s desire to rape her by transforming herself into a tree.

¹⁶⁰ European Commission (2003). pg. 6. Note that Daphne has a number of distinct phases. This statement refers to the Daphne Initiative, not to be confused with the phases of the Daphne Program that would follow.

1992).¹⁶¹ This switch and/or expansion of Daphne became characteristic, as it quickly incorporated a much heavier focus on women's rights. The European Commission felt that as Europe heightened its awareness of migration and women's rights, Daphne funding lines moved from protection of sexual exploitation of children to fill those areas as well.¹⁶²

The success of the initial Daphne initiative became clear as 1998 and 1999 saw it renewed with increased budgets. From this platform, Daphne was transformed into a continuing program of the Union. Expressly linking to the Union's public health actions (citing Article 152 of the Amsterdam Treaty), the European Commission established the Daphne program as the successor to the Daphne initiative.¹⁶³ The first Daphne program was funded for 2000-2003 (with total funding of 20 million Euros), and had its mandate extended to cover regional cooperation with candidate Member States in Eastern Europe and Turkey.¹⁶⁴ Daphne II followed as a second phase measure, with an increased budget (50 million Euros) for 2004-2008. Daphne III is already under planning and discussion today. The environment of women's rights NGOs and the climate for these programs seeking support at the European level caused much of this exponential growth for Daphne.

Not everything has been smooth sailing, however. Expansion to fund projects between Member State-based and candidate country-based groups proved to be a complication with the Daphne program. Daphne found need to streamline proposals with the steps that the candidates were taking, as EU-funded programming had to be in line with the diplomatic progression.¹⁶⁵ While such cross-national endeavors have always remained at the core of Daphne, the timing and

¹⁶¹ Appelt and Kaselitz (2000). pg. 16.

¹⁶² European Commission (2003). pg. 13.

¹⁶³ Appelt and Kaselitz (2000). pg. 4.

¹⁶⁴ European Commission (2003). pg. 6.

¹⁶⁵ Ibid. pg. 15.

politics of including NGOs and government agencies from non-Member State countries generated clear limitations on what sort of projects could be funded, and which needed to change their focus or method. With the expanded EU today, this concern is lessened as many projects find that their candidate country partners are now Member State partners. However, opportunity remains for interaction with groups exterior to the Union.

Having established the history and development of Daphne, what remains essential to my endeavor is to question the purpose and intentions of Daphne. Initially, it was perceived as an answer to a concern about a particular class of activities that the people of Europe found despicable. Yet as Daphne expanded, it became clear that deeper touchstone principles were motivating its actions and continuation.

The purpose that Europeans placed with Daphne is harder to tease out, especially because different people ascribe different purposes. Yet some commonalities can be isolated. I identify three main purposes that are identified both by members of the EU itself as well as other outside observers judging the intentions of Daphne. They are a desire to protect against all forms of violence, the goal of concerted action and harmonization, and a European-level sense of responsibility for human rights.

Daphne is a project that is steeped in concern with violence in all forms. Daphne grew out of initial children's protection roots, recognizing that violence against children and violence against women are significantly connected. From day one, the face of Daphne's foe has been violence against those who are viewed as likely to be exploited. Interestingly, this concern with violence quickly became more than just a worry about protection from physical harm. The European Commission has included psychological violence alongside physical violence in its

protections and definitions of violence.¹⁶⁶ Psychological violence became the issue because of its centrality in the nexus between violence against women and violence against children. Participants in Daphne recognized the commonalities between these forms, and thus moved to address them. Even Union forums have recognized that they have a role to play in protecting against this type of violence. EU institutions, especially the European Parliament, have increased their view of psychological violence being a harm that disproportionately affects women in the economic arena.¹⁶⁷ Daphne symbolizes Europe's concern that violence affects quality of life (health, economic, and in abstract), and thus the desire to combat violence has remained essential to the Daphne agenda.

The other purposes of Daphne come bundled with the attention to violence and the roots of the debate in the effects of globalization. Violence becomes an issue that spans borders of Europe. Discussion and Commission documents have emphasized the role that cooperative action and harmonization play in the purpose of Daphne. Anita Gradin was the Commissioner whose portfolio included efforts to prevent trafficking and exploitation of children when the Daphne Initiative was produced. She clearly expressed that the European Commission respected the Stockholm Congress against Commercial Sexual Exploitation of Children's assessment that this problem required concerted international, regional, and local action, and that the EU had a "responsibility" to participate in that "concerted action."¹⁶⁸ Likewise, harmonization of law was stressed by all parties in the creation of Daphne, a factor which the Commission clearly understood as a goal for the project.¹⁶⁹ The purpose distills into the belief that the Eurozone

¹⁶⁶ Ferrari (2004). pg. 8.

¹⁶⁷ Ibid. pg. 4.

¹⁶⁸ European Commission (2003). pg. 5.

¹⁶⁹ Ibid. pg. 6.

should conduct a common effort against the problem of gendered violence and violence against children.

That common effort becomes further apparent as the language of human rights becomes clear in Daphne literature and programming. Daphne's focus on violence placed it in two areas of European-level concern: health and human rights. It found its initial home in the public health realm, but the creators of Daphne also stressed the linkage to human rights. The decision to establish the Daphne program for 2000-2003 included explicit usage of rights-based language to justify the creation of Daphne, calling for "the right to life, safety, freedom, dignity and physical and emotional integrity."¹⁷⁰ This language has served as a consistent reminder to the Commission and to Daphne participants that the purpose of these activities is to ensure the protection of rights. Daphne is consistently articulated as a Union activity designed to explicitly protect and promote human rights. This purpose can be understated with the strong focus on violence, yet human rights are clearly a strong motivator for the program.

This three-fold purpose of combating violence, harmonization, and protecting human rights of all those inside European borders becomes particularly interesting when compared to the mechanics of how Daphne actually works to accomplish those goals. The following section concerns itself with the "how" of Daphne's operation. It also begins to engage the looming question that remains about Daphne. Why do we get Daphne—a particularized, decentralized, and multi-form practice—as a response when the purpose includes goals that nominally suggest comprehensiveness and overarching legislation, perhaps at a Europe-wide level? Some European traditions, particularly Sweden's, may begin to explain the shape of Daphne by citing views that the state has an obligation for funding groups engaging in public awareness campaigns and other

¹⁷⁰ Ibid. pg. 19.

costly yet community-improving endeavors.¹⁷¹ This is the standard line that explanations for “why Daphne in this fashion” receive. Yet the question remains why the procedure does not initially seem to fit the purpose—why does a program designed to ensure universal rights manifest in a particular and localized manner.

7.2 DAPHNE IN PRACTICE

This section explores the method by which the Daphne Initiative and Programs work, to set the stage for how the features of this practice can be understood in the context of the purpose ascribed to Daphne. By showing the nature of Daphne, we can get a sense for how well it may be meeting the purposes invested in it—a question of effectiveness. The crux of the objection from before was that the purposes do not match the nature in abstract, so it is important to see how those purposes are supposed to be met with the system as it is. Can the bottom-up structure of Daphne actually meet the goals that it sets for itself? After providing a brief analysis of how Daphne works, this section will address the prevailing judgments of scholars on the benefits and flaws of the Daphne model of pursuing violence reduction, harmonization across the EU, and protection of human rights.

Daphne is a framework of oversight and funding for disparate projects operated by local authorities, volunteers, and NGOs. Applications are submitted by groups in search of funding to conduct projects to reduce violence against women or children. These applications are evaluated, with those funded being accepted because they meet the criteria that the creators of Daphne,

¹⁷¹ Appelt and Kaselitz (2000). pg. 10.

essentially the European Commission, have set. Daphne selection criteria include the basics of all good funding proposals such as innovation, cost effectiveness, and the promotion of best practices.

In addition, two particular selection criteria should be noted. The Commission asks that proposals also include transnational exchanges and provide “added value at the European Union level.”¹⁷² With these, the intentions seem clear. Daphne is intentionally arranged to have its funded efforts work across the internal borders of the Union. These may either be in terms of populations served by the project or in terms of increased understanding of violence against women and children as a cross-border phenomenon. “European-ness” has developed into an explicit requirement for selection, as the Commission explicitly recognized that isolated local work alone was not the intention of this endeavor.¹⁷³

In Daphne’s 10 years of evolution, the program has developed a particular form of oversight in addition to simply providing a trans-national source of funding. As the reports on successes and failures of funded initiatives were reported to the Commission, the Daphne institution effectively learned from its mistakes. Later in the Daphne process, the Commission began articulating its own role in this learning process. Looking at the success of the Daphne initiative and programs, the Commission suggested that their role was one of a disseminator of good practices. Their intention is that good practices filter upward and are shared thanks to the unique exchange and funding structure of Daphne.¹⁷⁴ In effect, Daphne has realized that it can be essential to a flow of inventive and effective ideas and practices. This is the source of the “good practices” moniker that dominates literature on the subject. Encouraging good practices, in this

¹⁷² European Commission (2003). pg. 10.

¹⁷³ Ibid. pg. 16.

¹⁷⁴ Ibid. pg. 8.

institutional usage, refer to a particularized chain of institutional learning. Daphne begins collecting and correlating good practices which in turn become guidelines for funding disseminated to groups who are seeking funding.¹⁷⁵ Thus, no centralized set of procedures exists for how the European Union should approach gendered violence, yet the Commission and some practitioners feel that harmonization can occur. As more groups compete for Daphne funding, so more groups learn the “good practices” that are required for a group to gain that funding, and thus similar tactics and approaches are promoted across the Union. Yet this method avoids the difficulty of starting from an initial idealized format for how practice must be conducted. Instead, it is organic and developmental. The learning process creates a web of common protection that is sustained without explicit common law and common activity.

Good practices are not the only thing that the Daphne system develops. The development of a “Daphne language” was also recognized among program participant interactions.¹⁷⁶ These shared understandings of issues and terminology became essential to the work, as groups recognized that harmonizing begins with shared nomenclature: when someone says “violence,” “vulnerability,” or “human rights” it is essential that the meaning is the same. This linguistic bridging of borders and cultures is an essential triumph that many in the Daphne program tout as displaying the transnational effectiveness of the Daphne system.

According to some scholars, Daphne has also had an impact on legislation, despite hurdles to that process. Daphne initially found its action purposefully removed from policy change and legislative activity.¹⁷⁷ Yet the Commission recognizes that the initiative has inspired some policy changes. Programs funded by Daphne gained support from local governance

¹⁷⁵ Ibid. pg. 49.

¹⁷⁶ Ibid. pg. 16-17.

¹⁷⁷ Ibid. pg. 47.

agencies merely through having the decisiveness of the “European Commission” label.¹⁷⁸ And linkages to government are not the only means of changing policy. The policy and legislation that the Commission identifies as linked to or inspired by Daphne is numerous and varied.

- Adoption of the 2002 new Community Action 97/154/JAI which includes all forms of contemporary slavery
- A new Sex Offense Bill in the UK
- Inclusion of protections against domestic violence in same sex partnerships under German law
- Ability of women to go to courts and apply for abusive offenders to leave their abode under new German force protection laws
- Adoption of violence indicators and new national action plans to prevent violence against women in Denmark
- Establishment of a national free hotline for victims of trafficking and systems of social assistance of trafficked individuals in Italy
- Amendment of the UK Mental Health Act to clarify notions of consent for women with learning disabilities
- Allowances for Roma children in Belgium to continue schooling despite their legal status

Figure 12. Policy influenced by Daphne, according to the Commission¹⁷⁹

Member-states have also acted on their own to combat violence against women during the lifespan of the Daphne program, including Austria’s *Protection from Violence Act* (1997), Sweden’s *Gross Violation of a Woman’s Integrity* legislation (1998), and the UK’s *Living Without Fear – An Integrated Approach to Tackling Violence Against Women* strategy (1999).¹⁸⁰ All of these developments have been linked to Daphne in some measure. Yet this accolade can be problematic. Daphne’s causal relationship to such programs must be assessed prior to celebrating the ability of Daphne to drive legislative change.

¹⁷⁸ Ibid. pg. 14.

¹⁷⁹ European Commission (2003). pg. 48. Note that the Commission is quick to place limitations on just how much legislation Daphne affected. This list includes items where Daphne caused “promotion of the circumstances favoring legislative/regulatory change.” Daphne remains consistently more effective when describing the real gains that its funded initiatives and organizations have made in individual lives.

¹⁸⁰ Appelt and Kaselitz (2000). pg. 27-35.

The Daphne project is not all accolades, however. A number of scholars have pointed out the limitations and drawbacks to the current system of violence reduction, harmonization, and human rights protection. For many, the main flaw in European prevention of violence is a lack of comprehensiveness.¹⁸¹ Daphne suffers this drawback as well. Despite Daphne's system of encouraging best practices, it is often viewed that too many people slip through the cracks. If no NGOs or agencies from a Member State apply to Daphne in a given year, then the threatened people of that state would find themselves lacking. Comprehensiveness also suffers through differential implementation from Member States. Violence in specific structures such as the workplace show differences in national enforcement and response very clearly. European response to gender-based harassment (including bullying and "mobbing") is varied thanks to differences between member-state implementation. States have shown differences in attitude as well as procedure for implementing protections of women in the workplace, varying from generating specific new legislation to widening scopes of existing protections or non-legislative measures such as promoting workplace codes of conduct.¹⁸² Member states that pursued specific new legislation to protect against gendered bullying in the workplace include France, Belgium, Denmark, Finland, Sweden and the Netherlands. Other member-states, including Ireland, the UK, Germany and Spain, chose a different strategy. They concluded that entirely new legislation was not needed for concerns about non-violent harassment, instead opting for expanding the scope of existing protections.¹⁸³

Another complaint is that Daphne's response to violence is not direct enough. Daphne projects are accused of only touching the edges of the problem. Violence is such a pervasive

¹⁸¹ Appelt and Kaselitz (2000). pg. 8.

¹⁸² Ferrari (2004). pg. 12.

¹⁸³ Ferrari (2004). pg. 12.

problem that money and discussion forums alone do not suffice for many observers. For them, protection requires more than just Daphne, needing a legislative backing of punitive laws in addition to the support offered by Daphne-funded programming.¹⁸⁴ European violence prevention programs often address only secondary sources of violence, rather than the social structures that are “primary” sources of violence.¹⁸⁵ Yet primary sources are difficult to tackle, being the sorts of things identified as the essential cultural and social modes of organization themselves—radical upheavals of social order that have long been identified by feminist thinkers yet continue to prove distasteful to the ruling power elites (male and female) of political systems.¹⁸⁶ To the extent that violence is part of the system itself, then systemic change (state-level or higher) is needed. For scholars like Appelt and Kaselitz (2000) ceasing gendered violence must become the essential concern of governments, as that is the only reason that “far-reaching changes in state structures [can] commence.”¹⁸⁷

Finally, there are the European Commission’s own judgments of Daphne to consider. While largely positive, the Commission has noted some limitations to the effectiveness of Daphne. Most notably, they remain concerned that some transnational partnerships are tokens simply to meet the Daphne criteria.¹⁸⁸ Token partners would lead to a very hollow harmonization through the best practices model, as exchanges would not be leading to a change in all countries. Yet the Commission has not taken up the slack in pursuing other modes of harmonizing the prevention of gendered violence, modes that would deviate from the contracted-style procedure of Daphne’s funding to generate good practices. The Commission consistently deflects

¹⁸⁴ Appelt and Kaselitz (2000). pg. 11.

¹⁸⁵ Ibid. pg. 8.

¹⁸⁶ Ibid. pg. 6.

¹⁸⁷ Ibid. pg. 11.

¹⁸⁸ European Commission (2003). pg. 13.

discussion of stronger harmonization, instead citing technical difficulties such as the inability to form a single telephone violence helpline that could span the entire Community.¹⁸⁹ Yet they clearly recognize that Daphne developed a community who felt that the program should move from short-term funding opportunities to, in their words, “a comprehensive response to this EU-wide problem.”¹⁹⁰

7.3 DEMOCRACY AND “BOTTOM-UP” PROTECTION

The prior section detailed the varied responses to Daphne and its ability to meet its goals of comprehensive coverage of protection from gendered violence. Yet for the adaptive approach, questions remain. My question is less about effectiveness than about making a democratic analysis. Daphne is designed at promoting protections against gendered violence, a component of human rights protections. Before diving into the adaptive approach, one concern needs to be raised. As was discussed in the prior sections, Daphne’s structure is one of “bottom-up” protection: allowing local groups to compete for funding to protect the victims of gendered violence as it is occurring in their own communities, in ways that vary across the different groups. I have argued that this protection is one means by which the European community is working to protect the human rights of Europeans. Yet that hides a subtle tension when it comes to the question of democracy: does bottom-up protection fit with freedom and equality, two values that are universal requirements of democracy?

¹⁸⁹ Ibid. pg. 9.

¹⁹⁰ Ibid. pg. 17.

There is a sense that because freedom and equality are universal requirements that institutions that access these principles must themselves be uniform or comprehensive. At least in terms of the bounded polis, democratic institutions have often been described as reaching all citizens. Suffrage movements, voting expansions, and the removal of barriers to voting (i.e. poll taxes) were all conducted in the names of expanding the universality of citizenship for democracy within a bounded/territorial system. How can the requirements of comprehensive protection be reconciled with an institution whose entire approach is a bottom-up procedure of localized, subsidiary, and varying protections?

The Commission's own descriptions of Daphne's mandate complicate matters. As discussed before, they feel that common treatment and protection from violence is owed to all within the European Union who are or may be threatened. Yet Daphne remains the primary European-level vehicle for ensuring that common treatment. And Daphne's nature and resultant programs are anything but common. Daphne remains a system of funding localized efforts to combat specific patterns of violence in specific and limited target subsections of the Union. The Commission can comment about the shared learning going on, but the skeptic will point to the limitations of the program.

In particular, the conceptual sticking point with Daphne seems to be that its language and intentions betray a universal-leaning goal for the protection of human rights through limiting violence. Yet the program remains not ably specific, compartmentalized, and localized. The problem comes with envisioning alternatives to Daphne, and treading the waters of what ideal-form solutions can be reached regarding human rights as protection from violence. If human rights do matter to the European Union, then we may begin to apply an external standard of

judgment to the issue. The process may start from the normative side, considering the ideal manner of providing human rights protections against violence.

Human rights claims often carry a component of universality to the argument, evident in their name alone. Thus, ideal practices for protecting of human rights funnel down the path of thinking that measures must be taken that apply to all—the uniform and comprehensive access to freedom and equality concern. It may come to address a subset of those who need protection from a specific problem, but the emphasis remains one of ensuring that all are nominally under the protections of the program. This leads to a basic proclivity within the normative framework of human rights—the default setting seems to lean toward an *all-covered* approach to governance. This is not a necessity of human rights thinking, merely a tendency that can arise naturally due to the nature of the argument. And from an all-covered position, it is not too difficult to see that appeal may be strongest for institutions and procedures that protect human rights from a top-down, universal coverage standpoint.

While my nuanced account of Daphne has some room for seeing signs of some top-down elements, Daphne's nature remains stringently a bottom-up, grass roots, incomplete patchwork of coverage. In a given funding cycle, some member states may receive the attention of multiple initiatives, while others have no Daphne funded programs accepted. This gains more complexity with the European Union's goal of harmonizing procedures across states. While other protections that have been linked to economics have been instituted from the top down, protections against gendered violence—with their enormous and recognized impacts on economic participation of women—remain differential across the Union.¹⁹¹ These differentials may lead to further questions of Daphne's effectiveness at fulfilling its goal of securing human rights through

¹⁹¹ Ferrari (2004). pg. 4.

protecting against violence, especially if the assumption is that comprehensive and uniform coverage is the proper method for such protection.

The first reminder, as always with the adaptive approach to democracy, is to ask whether these concerns stem from state-derived views of democracy. Is uniform application of rights a concern in the case of the EU, or a concern that arose from bounded, territorial sovereignty conceptions? The adaptive approach to democracy allows for the relaxation of some of these worries. While they may have origins in the territoriality of the state system, concerns about universality of coverage can be components for some expressions of democracy. An adaptive democracy allows us to disentangle the notion somewhat by allowing for other second order principles to do the work with certain cases. For some institutions, universality may be a central concern. Yet the adaptive approach to democracy reminds us that it need not be central to our conceptions of the Daphne program's democratic nature. Particularly in the case of the EU where there are multiple layers of human rights protections in place. A citizen is not relying upon the EU alone for their right to freedom from gendered violence. They also deserve that protection from their state.

The flexibility of the adaptive approach means that we need not get stuck on the fact that not every locality will have the same exact protections via the Daphne program. In addition, bottom-up or concentric circles of human rights protections may also be judged to work better if we merely shift our requirements for what "working better" means. Practical implementation yields data that is hard to ignore: Daphne has made a positive impact in the lives of women across the European Union. It may not be all women, and it may not be conducted through universally available conduits, but individuals have benefitted from the program.

In the following section, I use the adaptive approach to consider the Daphne program. We can get a read on Daphne and what it brings to the Union through the adaptive approach to democracy. Instead of being hung upon notions of uniformity—or any other complicating factors—the adaptive approach to democracy avoids the problem of viewing Daphne solely in terms of its success or failure at accomplishing its institutional goals. Instead, it approaches the question of whether Daphne provides a source of democracy to the Union. This in turn gives us insight into what Daphne does—in particular what is novel about the Daphne program—which gives a better evaluative point for those wishing to appraise the practice to begin from.

7.4 THE ADAPTIVE APPROACH TO DEMOCRACY AND DAPHNE

This section engages in the adaptive approach to examine the democratic nature of the Daphne program. As should be familiar by now, the central ethos of the adaptive approach to democracy is that it can be flexible and robust. The adaptive approach, when applied to Daphne, can account for the complex and unusual nature of the practice. At the same time, the adaptive approach provides the normative power to demonstrate that the Daphne program adds a layer—albeit different in appearance—to the democratic nature of the European Union system as a whole. This section begins by applying the adaptive approach to democracy in the manner developed in chapter two. I address second-order principles that are both present and absent with Daphne. Through the adaptive approach examination of Daphne is freed from any universalist drives, as they are merely second (or third) order principles which need not be present in all expressions of democracy.

The adaptive approach to democracy frees us from the need to feel that every principle is necessary at once to think about an institution or practice as a source of democracy. Second-order principles can be mutable or unique in new circumstances. And the adaptive approach to democracy begins with inquiry into the second-order principles at work in Daphne.

<p>Second-Order Principles of Democracy found in Daphne</p> <p>Subsidiarity (Empowering NGOs to generate the protections that the system of governance promises to ensure—as opposed to direct action by EU agencies)</p> <p>Human Rights (Focus on security of body against gendered violence)</p> <p>Contestation (New mode of contestation through <i>best practices</i> model)</p> <p>Second-Order Principles absent in Daphne</p> <p>Participation (Daphne is elite-steered by Commission)</p> <p>Discourse (Discussion occurs, but no formal discourse in classic sense)</p> <p>Accountability (No mechanisms that blame the program for lapses)</p> <p>Contestation (In traditional, electoral and factional senses)</p>

Figure 13. Second-order principles and the Daphne program

The Daphne program is notably different than the other institutions that my project has dealt with. At the very least, it has far fewer functions than the European Parliament, the Council of Ministers, or the European Court of Justice. It does not meet many *prima facie* tests of what democratic institutions have looked like in the past. Because of this difference in form, starting with the second-order principles that are less useful in the Daphne case seems appropriate. After establishing what Daphne is not, then I will turn to what Daphne is with respect to second-order principles of democracy.

Non-electoral and not participatory in any usual fashion, Daphne is a centrally-administered line of funding for specific projects controlled by the Commission. Many of the familiar second-order principles of democracy that have been mentioned in prior chapters do not

fit the Daphne case at all: rule of law, contact between citizen and governance, toleration, and protection (in the manner of Madison) are not a part of the Daphne landscape. In the case of certain other second-order principles—participation, discourse, accountability, transparency, and contestation—Daphne also fails to meet the general criteria. Yet with these principles, what it is not doing can be equally valuable to explore as what it is doing. Thus, I will explore each in turn.

Participation and Discourse: Daphne proves interesting with respect to these, because the program does have strong channels of communication and feedback that are important to its democratic potential. Yet the basic criteria of participation and discourse as usually given are not fulfilled. Instead, Daphne is doing something that can be viewed similar to these two principles, but does not exactly rely upon either of them. Participation is neither the reason nor the vehicle for Daphne. The intention is not involvement of citizens in the decision-making that effects them, nor is it a means of allowing citizens to develop and build their civic skills (a goal certain strains of participation theory hold in high esteem). NGOs and researchers submit proposals and network for funding and programmatic purposes, not to develop and enhance the community process. Certainly some influence through participation of funding-seeking agents occurs, but this is a by-product of the system rather than the goal itself.

The same holds true for discourse. Certainly a discourse occurs in the space between the commission deciding on “good practices” and organizations generating programs and adapting to the good practices stemming from prior rounds of Daphne funding. However, I intentionally stress the lower-case usage of discourse. This is not Discourse writ large in the manner of the discursive theories of Habermas and Dryzek. It is merely a process of exchanged communication with a learning element. Funding seekers interacting with each other and the Commission do not approximate some normatively empowering speech community nor follow a set of productive

rules of engagement and dialog. The good practices approach of the Commission is quite interesting, and the implications of the procedure for democracy will be explored more fully later in this section. But the good practices approach does not replicate discourse or participation.

Accountability and Transparency: I lump these two second-order principles together because each seeks to realize the first-order principles of freedom and equality in similar ways. Yet neither of these is present in Daphne in a democratic sense. Daphne is not a system of keeping government abuses in check, or of keeping policy-makers attached to citizen interest. The Commission, however, is invested in upholding the principles of accountability and transparency. Thus the focus here on Daphne as its own institutional practice makes these principles an issue. The Commission itself is careful to monitor the Daphne program, publish the funding records and annual reviews, and pressure participating funded organizations and researchers to do the same. Yet this fits into the Commission's practices, not Daphne alone. Thus attributing any accountability or transparency assurances to Daphne is giving the credit to the wrong institution.

Contestation: Contestation in the manner of Schumpeter or Dahl—electoral competition or elite competition for position—is certainly not present within Daphne. Yet actors seeking Daphne funding do compete. And furthermore, that competition is harvested to improve the outcomes of future programs and the initiative in general. Thus classical democratic contestation can be ruled out, but an alternative notion of contestation will be revisited below.

The interesting thing with the selected second-order principles that are less useful when considering Daphne is that their benefits are somewhat provided, but via a different pathway. Through its “good practices” mechanism, Daphne does yield some benefits that discourse can bring to democracy. The mechanism is one of refinement through involvement, repetition, trial,

and error. Discourse is helpful to democracy by refining the values of voters into more agreeable central ethics for how governance should proceed. The Commission's promotion of internally-learned good practices is a similar source of refinement. Yes, the process is guided by the aims and analysis of the Commission. However, ideas about how to best promote the human rights of those threatened by gendered violence do change and develop. As the ideas transfer from agent to institution and back to future applicant agents, a refining process occurs. Good practices of one organization become requirements sought from others. There is a notable organic feel to this—the Commission guides a controlled evolution of the Union's practices through Daphne.

This is a form of discourse and contestation. The good practices mandate and its effect on the funding of future Daphne programs forms a *new contestation* of sorts. It is institutional learning and value transmission, but it also forms a struggle of ideas about what is best for the community. Like J.S. Mill's classic notion of competing ideas in the public space, Daphne provides a financial incentive that generates a similar contestation of ideas for the title of good practice. The Commission serves as a guiding hand and the arbiter of prevailing opinion, and the system has less spoken than discourse theorists may wish, but the pathway taps into the goals of the Commission: to discover and implement the best approach to gendered violence policy via a decentralized system of practice (value) transmission.

Having considered what is not present with Daphne (or what is present but different), I now turn to the second-order principles of democracy that can be seen in Daphne. A concern for human rights is definitely present. Difficulties of earlier sections aside, Daphne certainly *pursues* human rights regardless of how we might judge the outcomes of that pursuit. And it is that pursuit that serves as the essential criterion to notice. Institutions may spawn from documents, treaties, and constitutions that promise or guarantee human rights. Yet the transition from

principle to institution is never exact—every institution in the world that cares about ensuring human rights could do a far better job than they have done. What we care about with institutions is that they have the commitment to human rights. There needs to be a sense of striving to realize human rights that stems from the institution—a sign that the institution will continue to evolve, change, and push for the principles it was created to ensure.

Human rights are another second-order principle embodied in Daphne. The motivation behind Daphne's concern with protection against gendered violence is not some paternalistic notion of protecting the weak. Instead, violence is abhorred because it degrades individuals' abilities to live the full life guaranteed to them by their system of governance (both member state and supranational, thanks to the EU's use and reference to human rights in its treaties). Thus, the basic principles of freedom and equality are accessed when people are not denied their human rights. It can also be stated in the positive: we can observe freedom and equality in a system to the extent that people enjoy their human rights.

Daphne, as an institution, is arranged in a way to increase the ability of European citizens to see that all of their human rights are met. The program itself is not a human right. Rather, its funding is Commissions' method of supplementing existing protections of human rights—or addressing areas where there are some failures in protection. Daphne as an institution possesses the second-order principle of human rights because its actions are entirely conducted in pursuit of guaranteeing human rights to a category of people who lack them due to gendered violence.

Pursuit is the often-forgotten piece of the puzzle which really shines with the Daphne case. Democracy definitely includes a concern for human rights under its umbrella, given that human rights as a second-order principle seek to realize the first order principles of freedom and equality. Yet human rights are not a feature of any institution. Compare this to accountability.

Accountability is a description of the nature of the institution. Yet we don't describe an institution as possessing human rights as a quality. Instead, human rights, as a principle of democracy, guide institutions. They define a target which the institutions seek to attain. Thus we seek freedom and equality gained through human rights when an institution pursues human rights as realized in the lives of individuals. The discussion of the prior section dealt with human rights needing a best mode of provision. I argue that the diversity of institutions and life make any single best mode too limited in scope. I encourage attention to pursuit—a matter of intention as well as practice. Here we see a new means of judging an institution's addition to what makes a system democratic—if the institution pursues the second-order principles we care about, in addition to displaying second-order principles (i.e. being internally ordered along the second-order principles identified).

The other second-order principle that is present with Daphne is subsidiarity, with its links to federal arrangement, grass-roots organization, and/or regionalism. Subsidiarity is not always associated with democracy, but with the adaptive approach if a second-order principle links to freedom and equality then it has to be considered—when they work, they work. In this case, subsidiarity is not federal in nature, which is its usual appearance. Subsidiarity in this case is bound into the structure of *competition* in the Daphne program. Instead of chancing an oversight system that produces a universal guideline for how gendered violence will be prevented, the Daphne program finds its success in its localized, distributed nature. There may be similarities in gendered violence in all places, but that does not mean that the solution for Poland is the same as for France. Culture is intimately bound up to notions about gender, and thus gendered violence. Thus, programming that occurs at the local level may have an advantage that community-wide approaches do not.

Subsidiarity may not always appear as a second-order principle of democracy. Looking for the “right level for administration” does not always entail democratic criteria. But in the case of Daphne, the principle does seem to be connected to our first-order principles more explicitly. Feminist theory has long pointed out that equality may require differential treatment at times. Law regarding maternity leave has to respect both women who want to have children and who don’t, those who adopt, and even men. The actual procedures for making the situation equal may vary for each of these groups. The same holds true with gendered violence. In a culture where psychological abuse is more prevalent than physical abuse, ensuring equality and freedom may need a different pathway than a culture where the physical aspect of gendered violence is the most prevalent issue. On a case like Daphne, the principle of subsidiarity is a reaction to this understanding as well as to other concerns (efficiency being an important one as well).

The adaptive approach to democracy seems to serve well in the case of Daphne. It shows certain second-order principles linked to freedom and equality at work in Daphne. Yet it allows us to be adaptive across second-order principles. Daphne’s pursuit of human rights, and by extension freedom and equality, gives a place for the program in the milieu of European-level democracy. Meanwhile, the adaptive approach gives us the flexibility to understand participation and discourse in new ways, and allow for other principles to be less useful without affecting our final judgments of the institution.

The reasoning behind the existing second order principles is the lynch pin. Recall the story and intentions of the Daphne initiative. The program is founded with a desire to improve human rights, the equality of all citizens, and the freedom of individuals from gendered violence. This is not an institution that stumbled onto the provision of democracy. Daphne was purposefully constructed to help fulfill ends that enrich and enhance the democratic character of

the Union. Daphne is seeking freedom from gendered violence—assurance of a liberty that is lacking for some individuals in Europe. The other components of Daphne do not violate the two first order principles of freedom and equality. Some second-order expressions do fall by the wayside. Equal treatment, a second-order principle of equality, is a looming question with Daphne's patchwork system of funding. But the adaptive approach relaxes the need to see every expression of the first orders met. This inquiry gives us a sense for how Daphne can be placed in the constellation of components of democracy in the EU, despite it not looking exactly like the others. Daphne is exactly how we should see democracy in a complex world: continually striving to make the world increasingly free and more equal. In this case democracy is not rules, promises, elections, or involvement. It is in the spark of desire, intention, and *pursuit*.

8.0 FROM THE EU CONTEXT TO THE GLOBAL DEBATE: NEW PATHWAYS FOR THE ADAPTIVE APPROACH TO DEMOCRACY

This project began with a concern about a gap in theory—an apparent gulf between democratic scholarship on the EU and the emerging theoretical positions of global democratic theory. The adaptive approach to democracy is a pathway to forging connections over that gap. The task that remains is answering the lingering questions posed by the introduction. How do we transition from asking “is the EU democratic or not” to a mindset that asks “how is the EU democratic”, a shift that is especially important given the circumstances of globalization and its effect on our conception of democracy? How can scholarship on the EU discuss democracy without resorting to recycling old state-based notions of the idea, and instead focus on the new possibilities for understanding *institutions* that the adaptive approach brings? And how can global democracy theory benefit from the adaptive approach to democracy when it comes to institutions other than the EU (the WTO, the IMF, and other “unlikely places” where statist notions do not fit)?

As I will expand on in the following sections, the conclusions of this work are threefold. First, I argue that the question of “how is the EU democratic” is one which can greatly benefit from the adaptive approach to democracy. In contrast, over-arching questions of “is the EU democratic or not” motivate most accounts of democratic deficit. I argue that while the latter question may be of some interest, much more can be gained by focusing on the first question of “how”. I will briefly argue why the focus on how institutions are democratic yields useful insight

about those institutions in a way that “is or is not” questions about democracy in the EU might overlook. By switching to an approach that focuses on how, we can see how second-order principles of democracy can manifest in many different ways. This allows for our accounts of the institutions to be both robust and flexible, making space for many institutional possibilities. This simple switch in the language of our inquiry represents the thinking of the adaptive approach to democracy that this study has laid out.

Second, I address the way in which the gap between scholarship on the EU and global democratic theorization can be narrowed. The adaptive approach demonstrates that no matter what the institution that we are looking at, our process of how we think about it democratically can be structured in the same way. The goal is to find an adaptive viewpoint, one that identifies what is going on in an institution and how that may or not connect to first-order democratic principles. The global democracy literature can learn from the case of the EU the pitfalls of how clinging to rigid or state-based notions of democracy limits our subsequent consideration of supranational institutions. With that, scholars of the EU can draw from the work on global democracy to locate both a) new second-order principles that might be more appropriately situated for cases of supranational democracy and b) see how other theories have successfully navigated a move away from state-centric concepts that have plagued talk of democracy in the context of the EU.

This gap in literatures leads toward a third conclusion that is worth addressing: where the adaptive approach to democracy goes from here. What remains is to think about what sort of specific questions and cases are best for helping to bridge the literatures. To that end, I turn to a varied approach: building on both internal EU functions and supranational institutions that could benefit from the adaptive approach paradigm. The watchword of this section is: exploration. The

limits of the current document have kept the adaptive approach somewhat confined in topic and exploration. The key is the idea that not all democratic functions have to look the same or be located in the similar places across institutions. Applying the adaptive approach to additional cases will help solidify that, as new pathways of democracy are uncovered and the old familiar standards of democracy are shown to either apply or to be less useful in particular supranational cases. Any institution becomes a valid site of inquiry through the adaptive approach, which hopefully can lead to finding ways in which the second-order principles of democracy are working in new ways in new and under-explored (or over-explored) institutions. And this thought process can also help with the design of new institutions, as architects of governance could think about new ways of capturing the core qualities of democracy without being limited to carbon copies of old state-based institutional formats.

Again, the goal of this project was to develop a way of studying supranational democracy that was both able to address the EU but not limited to the EU context, and that was able to recognize new modes of democratic practice as well as the deployment of traditional democratic principles—whether those traditional ways worked as they did in states or in changed fashion. The adaptive approach gives the researcher studying supranational governance a paradigm that escapes the dangers of either-or thinking, and that leads away from assuming an account has to be thin or thick—toward a new way of thinking about institutions. In doing so, I have hopefully shown that the adaptive approach is indeed up to the task I engaged.

8.1 “IS THE EU DEMOCRATIC OR NOT?” VERSUS “HOW IS THE EU DEMOCRATIC?”

The democratic deficit literature, not to mention a great deal of punditry and discussion of the EU, desperately seeks a definitive answer to the question “Is the EU democratic?” Yet this question is not the question that my research is asking. I suggest that a different question is much more important to begin with: “How is the EU democratic?” The difference in the two may seem slight, but given the discussion of the adaptive approach that subtle distinction is a critical one. Of course that does not mean that the question of “is or is not” should be left completely by the wayside. It provides a different focus to one’s research, motivating more over-arching theorization about institutions as to how they function together, questions of sufficiency, and other concerns. And in a nice way, the answers to questions of “how is the EU democratic” could usefully inform the kind of overall judgments that other studies choose to ask.

So why is the question “is the EU democratic or not,” if such a common question in literature on democracy in the EU, not at the forefront of the adaptive approach? First, because it simply was not the question that motivated the research. But more importantly, the adaptive approach is simply not designed to give much leverage on questions of that sort. At the heart of the adaptive approach is the recognition of democracy as mutable, flexible, and fundamentally diverse. Even the same second-order principles in similar institutions can still have very different links to the first-order principles of freedom and equality. Tiny changes in the institutional structure, the attitude and behavior of those citizens and officials interacting with the institution, and any consensus about the purposes of the institution can have profound effects.

The adaptive approach, as a bridge between thin and thick theorization, actively rejects implicit (and sometimes explicit) dichotomous thinking. The very posing of the question: “Is the

EU democratic or not?” sets up a difficulty that the adaptive approach can help avoid. Democracy is more like a continuum than a democracy in the adaptive approach, though even a continuum can be problematic. A continuum would still have some tipping point, some moment where we would say that the line lies more to one side than the other. We could transform the question of “is the EU democratic” into the query: “Is this sufficient to call the EU a democracy?” It may not be enough for some to see democratic principles at work within a system, the natural instinct may quickly lead to concerns whether enough principles are present. This falls too close to the approach of worrying whether enough boxes have been checked off on the list of democratic principles, which is against the intent of adaptive thinking. The response to such a question must be “Sufficient for whom?” Whose view of sufficiency is implied when asking if the EU is sufficiently democratic? The citizens of the EU? Scholars of the EU? Myself? The answer will change when we alter whose concerns about sufficiency are at stake, or which particular continuum of democratic principles we happen to be looking at. And more importantly, what assumptions are they making about democratic principles that answers of sufficiency will be determined upon? Is having to wrangle with those issues of sufficiency really worth the investment of time, when we could instead be getting right to the nitty-gritty of *how* the institutions of the EU link to various second-order principles of democracy.

Forcing the adaptive approach into giving an answer to “is the EU democratic or not,” would provide new pitfalls for the method. In particular, the fallacy of composition must be addressed—the danger of using a number of small insights to color our judgment of the system as a whole. Take the example of voting as participation. If we observed a system of government where thousands of voting opportunities were given to decide certain ballot measures, it would still be undemocratic if the system as a whole had only a single ruling party that determined

which measures were to be decided by vote. The number of observations of democracy at a micro-level cannot combine to allow us to judge a system of governance as democratic on the whole.

While the adaptive approach may at first seem to lead down this line of thinking (taking individual institutions and locating the way each links to democratic ideas), it is insulated from this concern through care in the type of judgments that the approach allows. The adaptive approach to democracy is not additive in nature. It does not tally up numbers of second orders as evidence for conclusions about the entire system. Instead, it encourages comparison of the principles found to the first-order principles of freedom and equality (a check to see if the system pursues democratic ends or other ends) and to an ever-growing and ever-changing list of second-order principles (a comparison to all the various documented expressions of democracy that have appeared over the long evolution of the term). Thus, when making a judgment about whether the EU is democratic, care must be taken to avoid additive thinking and instead work within the adaptive ethos.

Another concern that the adaptive approach brings to the question of “is the EU democratic or not” is that judgments made about the EU is that they will always be formed on the basis of limited exploration. Other practices in the EU may house anti-democratic elements, based upon principles that ultimately clash with freedom and equality. Other institutions may hold pieces of the puzzle, and thus current judgments will only be made pending that further exploration. In the case of this project, the Council of Ministers is a most notable example—for many, the nature of the Council may be the central determinant of the EU’s democratic status because of its central role in guiding the system as a whole. Yet this limitation is shared by all work on political institutions. There is always another wrinkle, another case, another practice that

can potentially modify the conclusions that we draw. In this way, the adaptive approach to democracy is no different than any other theory. The conclusions drawn are not absolutes, but simply based as best they can be upon what has been documented and described. Thus to make an all-or-nothing, *is or is not* kind of judgment based on limited information is a leap that can be avoided by simply asking different questions.

In this way, the adaptive approach is much more comfortable with its motivating concern: “How is the EU democratic?” The focus of the adaptive approach has been to let the institutions of the EU show what they have to offer democracy. The adaptive approach does not try to carry a particular lens about democracy to the institutions that are considered. It does not present a choice between forcing an institution to fit a given set of principles or writing that institution off as “insufficiently democratic.”

Instead, the adaptive approach to democracy focuses on considering what elements of a given institution match up to the first-order principles of freedom and equality. Those matches—the ways in which the institution connects to the first-orders—are the second-order principles of interest which the adaptive approach seeks to evaluate and understand. It is about *mapping* an institution, in a way. Showing where the institution fits in the current debate (the provisional list of second-order principles) *as well as* where the institution may work democratically in a broader scope of democratic functions and ideals.

Chapter two generated a provisional list of second order principles: participation, accountability, contestation, and human rights. With a picture of democracy as fluid in terms of second-order principles over time, we can identify the salient principles of the time in which the institution is evaluated. The principles are not the end-all of the concept but merely the most likely second-orders given the idea of democracy that is being utilized by both theorists and the

architects of the institutions of the EU. This provisional list represents the current trends—the components that seem important to scholars *right now*.

The important thing to draw from the exercise is not that the institutions of the EU have enough “matches” on the list—that is thinking that trends toward the over-all evaluations of the Union. Rather, the focus should be that each institution engaged the list of second-order principles in new and interesting ways. Each of the institutions examined in this study contained some second-order principles that were: a) on the provisional list; b) found those second-order principles to be plausibly linked to the first-order principles of freedom and equality; c) turned up additional second-order principles linked to freedom and equality; and d) found that some of these second-order principles were working in different ways than expected within those institutions. Chapters three and four showed how participation (through representation as well as public involvement) formed an essential connection between the EP and the maintenance of freedom and equality in governance at the European level. This paired with new notions about discourse and rhetorical action, which provided a new twist on an old democratic standard: contestation. Through these insights, these chapters on the EP demonstrated how the core ethic of the institution is tied not only to two of the provisional second-orders, but also how the second-orders that were located functioned as an extension of the first-order principles of democracy.

Chapters five and six demonstrated how even the court, seemingly removed from democratic concerns, had its links to the first-order principles. Not only that, but these links came in ways familiar to the items on our provisional list. While the chapter focused on obligation and guarantee as independent second-order principles, together they form a particular pathway of accountability that uses freedom and equality as their touchstone. Thus, these chapters

demonstrated how the ECJ, in curious fashion, helps the EU secure another principle from the provisional list. Finally, chapter 5 even completes the provisional list by demonstrating the possibilities of how an economic-focused system of governance such as the EU can find itself supporting freedom and equality through the second-order principle of human rights, even if that principle is met in somewhat different fashion than we might expect when using the term “rights”. Thus, we can see that our provisional list is indeed captured by the system. Participation, accountability, contestation, and human rights are all located within the institutions of the EU. Not only that, but there remain a host of other institutions within the EU that still may provide these second order principles *and others*.

Through these chapters, I have shown the way in which the adaptive approach sheds particular light on the pathways of democracy within various institutions. These are robust, flexible accounts of democracy. They take democracy where it can be found, in what ways it exists. It makes space for new possibilities: new institutional variations, new second-order principles, and most importantly: new considerations and research about the institutions of governance that affect citizens’ lives.

Given these considerations, what can we say? True to form, the adaptive approach provides a shift in not only what we’re looking at, but *what we are looking for*. The adaptive approach is not about seeing democracy in black and white, yes or no terms. Instead, it pushes us to see democracy where it happens and how it happens instead of trying to find it in some particular pre-theorized form. Yet the examples provided do find enough similarity with the provisional list second-order principles to conclude that there is democracy in the EU, at least along those principles. What is more, there are other second-order principles that are linked to freedom and equality that the EU possesses, deepening the way in which its institutions touch the

core basis of democracy. Certainly, there may be un-mentioned institutions where things move in less-than-democratic ways, or at least places where the links to freedom and equality can be strengthened. Yet this study has shown three distinct places within the EU that democracy is flourishing in its own way, both expected and unexpected.

This view of EU democracy will certainly refine over time. As more elements of the EU are subjected to scrutiny and the adaptive approach to democracy, the emphasis may change. More stories about “how” the institutions of the EU connect to democratic second-order principles will be made. New and different modes of democracy—additional second-order principles that directly encourage freedom and equality within the European system of governance—may appear, while others become minimized. Such is the way of the adaptive approach.

An important final consideration here, is the fact that asking “how is the EU democratic” may assist those who want to ask the question “is the EU democratic or not”, even while the adaptive approach itself resists taking that road of inquiry. Upon enough research and consideration, enough mapping of the institutions of governance and how they impact second-order principles, some utility for asking overall judgments may be found. Both questions of “is the EU democratic” and “how is the EU democratic” will continue to be raised by scholars, policy-makers, and citizens of the EU. The more that the latter is answered, a process which I think the adaptive approach is uniquely suited to, the more material will exist that can aide those who prefer to ask the former.

8.2 BUILDING LINKS IN LITERATURES THROUGH THE ADAPTIVE APPROACH TO DEMOCRACY

Inquiry into the adaptive approach began at the gap between two literatures—the EU democratic deficit worries and the reluctance of some global democratic theorists to focus upon the EU. From this discussion emerged the difficulty of judging an institution or system of government as democratic (or lacking democracy) without reference to state-experience-informed principles. When trying to solve that difficulty, a paradigm emerges that poses a dichotomous decision between notions of thick and thin scholarship. To describe these new and different institutions, where our existing principles are limited in applicability, the traditional method was to either treat the new institutions thinly or thickly. Either we go the thin route, which enables us to talk about a lot of things in comparison despite needing to strip down our concepts greatly in order to allow the new and different institutions to be comparable. Or we had to proceed thickly, spinning a detailed conceptualization of the democratic qualities of an institution that left it fundamentally non-comparable to traditional forms of democracy as well as other supranational institutions.

The adaptive approach, however, solved these difficulties by essentially cutting the Gordian knot—the dichotomous paradigm that seems to play its influence on theorization is not a dichotomy at all. Our theorization can be both robust and flexible at the same time, as long as we are careful to recognize and discard the paradigms about comparability and democratic essentials that stem from the comparative approach and the state origins of democratic thought.

The adaptive approach to democracy does this by referencing the complex history of democratic notions in the first place, and the way in which our conceptions of democracy change over time. With this recognition, coupled with deployment of family resemblances notions from critical and political theory, the adaptive approach to democracy gains its ability to be robust and

flexible at the same time. Instead of treating democracy in an institution as requiring some specific constellation of features, instead it looks at the overlapping nature of modern globalized supranational governance—where multiple institutions, agencies, and actors are having effects on the lives of citizens. Not all democratic qualities are going to be realized in a single institution, nor need be present in at all in every case.

Instead, the adaptive approach to democracy settles on a system of first- and second-order principles of democracy. The two first-order principles, freedom and equality, are the essential ideas from which democracy springs. The adaptive approach recognizes that all other principles that have been valued over the history of democracy are second-order to these first principles. Furthermore, what second-orders are valued and why they are valued have changed considerably as opinions about democracy and the context of states and society have changed.

These changes are what gave the approach its moniker in the first place: adaptive. Democracy is a concept that has been recognized in various ways over various times—the only singly unifying factor seems to be that at each moment the principles of the system seemed to reach toward ensuring the basic freedom and equality of the citizen. Thus, to insist on particular qualities of democracy as being universally necessary in all institutions is difficult at best. Rather, the adaptive approach encourages us to examine practices, policies, and institutions in depth to see what second-order principles of democracy may be present (or absent) in those institutions. Thus the focus shifts from having an absolute rule for what makes a system of governance democratic or not, to how particular institutions are linked to (or removed from) democratic principles.

With this ethic of looking at particular parts of systems to see how they are democratic, rather than trying to force every institution into a cookie-cutter mold of specified democratic

principles, I explored three cases in the EU: the European Parliament (EP), the European Court of Justice (ECJ), and a Commission program called Daphne. Each of these cases came with prior scholarship that spoke to the democratic worries, problems, and/or needs. For the EP, the weight of associations that the term parliament brought to the table pressed democratic consideration to a particular set of second-order principles. For the ECJ, a similar process suggested a minimal role of courts in the democratic qualifications of a regime. And with Daphne, universalistic approaches to human rights seemed to clash with the particularized enforcement mechanisms of the program.

With all three, existing consideration seemed too prone to making the mistakes that the adaptive approach transcends. For each, holding a particularized set of principles as the necessary elements of democracy that must be present in all things we are supposed to call democratic lead to difficulties in thinking creatively about the institution. In the second chapter of each pair, I demonstrated how the adaptive approach to democracy was able to better tease out exactly what second order principles were (and were not) being realized in each institution. From this, both new principles were found and old, traditional (state-based) principles proved less useful. Thus, where democratic complaints would be lodged under the prior approach, the adaptive approach enabled a closer look at just what was going on in an institution and how we might view that as linking to the principles of freedom and equality.

Much of the prior consideration has been focused specifically on the benefits that the adaptive approach brings to scholarship on the EU. Yet the initial genesis of this project came from a gap between the global democracy and the democratic deficit/EU literatures. Thus, by way of concluding, I will discuss the ways in which the adaptive approach can bridge the gap

between these literatures and provide traction for both comparative EU scholars and global democratic theorists alike.

In my introduction, I pointed to the reluctance of many global democratic thinkers to engage the EU directly. Certain EU-addressing works like that of Michael Goodhart (2007), Thomas Pogge (1997), and others stand out in sharp relief to the larger field of global democratic theory which often avoids the complexity that the EU brings. While simple complexity may always deter some theorists, my application of the adaptive approach to democracy—when paired with others—demonstrates the richness of theoretical value that the EU brings to questions of democratic governance at the supranational level.

At many points throughout this work, the adaptive approach to democracy has provided a means to break with the pitfalls that comparative political treatments can carry with them when applied to an institution like the EU. Yet the EU is not alone in being a space where the supranational institutions of governance can be too easily judged by biased or state-informed notions about democracy. The phenomenon of globalization leads us to recognize all sorts of institutions which have an effect on our lives that are not our familiar state authority. Thus, the same sorts of questions that spawned democratic deficit concerns arise in similar fashion for all other sources of supranational governance: is it legitimate, is it representative, is it transparent... is it democratic? Again, the essential motivating factor throughout is the assumption that people benefit from democratic rule and thus seek to ensure that all sources of authority in their life are democratic. The global democracy literature reminds us that the phenomenon of globalization simply made many of us realize the sheer number of supranational authority sources—sources of governance—that impact our lives in addition to the traditionally supreme authority of the state.

And in this light, democratic worries about the EU and other supranational institutions are not so different. All are situations where our old ways of thinking about democracy were almost entirely informed by the state context. Thus moving out of that context, those old conceptualizations can leave paradigms about what we might expect in the global institutions lurking in pundits' and researchers' minds alike. After all, just as sovereignty-conscious diplomats created the EU, so the architects of all other supranational governance can be assumed to share that similar background.

These sorts of problems are already being addressed by global democratic literature. Where the adaptive approach brings a fresh angle is its ability to be both flexible and robust by rejecting and thick versus thin paradigms. Our theorization about global institutions does not have to be either thin enough to apply to all or so thick that only a specific case can be addressed. Just as the adaptive approach to democracy opens space to look at the EU's complex form, so it can just the same work on other systems of governance at the supranational level.

As the democratic foundations of the state are challenged, so the theories that we have drawn from the state experience need to be flexible. And in order to assure ourselves that these new forms of governance that appear to us are not reductions in the democratic character of the system, we need a robust consideration of democracy to measure those changes. This situation is ideal for the adaptive approach—whether the institution studied is the EU, supranational organizations, or even states themselves. Anywhere that our assumptions about democracy are being tested, the adaptive approach can find purchase.

The adaptive approach also frees us from concerns about finding the right levels at which certain processes of governance are carried out. Federalism and subsidiarity as modes of arranging governance are interesting in prospect, but can come packaged with notions that there

are some ideally correct level at which certain functions of government are located. The adaptive approach to democracy frees us from the need to find some mythical “right” place for each function of governance. Instead, the consideration turns to seeing how different functions emerge in different places—both expected and unexpected—creating a web of democratic factors.

8.3 NOW THAT WE HAVE THE LINKS, HOW DO WE GO ABOUT TIGHTENING THEM?

Ordinarily, the term expansion in the European context is about adding new member states to the EU regime. However, here I am more concerned with the final thoughts on the adaptive approach to democracy: how it can be expanded to particular new areas of research and what final analysis of democracy in the EU can be made through this different approach to theorization. What cases are most helpful in giving new insights to both EU studies and to global democratic theory? These are the spaces that can yield the most new second-order principles or familiar second-orders working in either familiar or different ways.

The initial first area where I plan on using adaptive approach to democracy is the other institutions and practices of the EU. Democratic questions and insight would likely appear with adaptive treatments of the Council, the Commission, the Committee of the Regions, the European Central Bank, and the Ombudsman—and that is only the tip of the iceberg. Given that this project stemmed from questions about the democratic character of the Union as a whole, expansion of the investigations across the EU seems an ideal complementary endeavor. What would be turned up in such a process can only be speculated at from this point. Given the

Union's democratic constituency and the language of the documents that define its institutions, I do not think it is unreasonable to expect that a large number of institutions will have some democratic second-order principles at work. That may not make them all explicitly democratic on their own merit (recall the checks in the adaptive approach), but all told this inquiry would paint a more elaborate picture of just where democratic principles are being met in the EU and in what ways.

In addition to expansion within the EU, the other main deployment of the adaptive approach to democracy seems to be taking its method and viewpoint out into the global arena and applying it to other supranational and international institutions. Much of this may involve taking the adaptive approach to unlikely places. Bodies such as the WTO, IMF, or international courts (i.e. the European Court of Human Rights) are often judged as removed from democratic concerns and controls. The adaptive approach is ideally suited to examine such institutions. It would allow a closer investigation of just what principles are being realized by these institutions. These unlikely places for democracy may be perfectly suited for the adaptive approach, with its ability to break down the level of analysis a step, so see if there are democratic processes or portions to the institution, even if it fails certain sets of traditional democratic qualifiers. We may find more democracy than we would expect through such an analysis.

A third set of practices and institutions seems a likely candidate for the adaptive approach as well. The transnational organizations and movements literature presents yet another source of supranational activity, one to which many hopes for democracy in the globalizing world are attached. Such organizations and institutions range from formal structures like the Trans-Atlantic Business Dialogue (TABD) and Trans-Atlantic Labor Dialogue (TALD) to cross-border social movements such as Greenpeace International and the transnational land mine campaign. The

adaptive approach seems particularly useful in these cases as a way of perhaps slowing some of the democratic optimism that gets heaped onto this type of institution. Once again, old notions about discourse, participation, voice, and representation seem to be at play in democratic judgments of transnational bodies. As the adaptive approach does best, it can interrogate the second-order principles at work in these institutions, and question whether they are democratic in origin or merely the remains of statist notions about citizen involvement in governance. This would provide a more stable theoretical foundation from which to consider such organizations.

With these areas of future research roughed out, all that remains is the looming question about what sort of final analysis about the democratic character of the EU that the adaptive approach to democracy can provide. While making such a pronouncement would be the easy path, the adaptive approach to democracy simply does not enable sweeping benchmark judgments of that sort. There is no definitive ruling that says whether the EU is democratic or not. Rather, the adaptive approach clarified what democratic foundations and principles are being met, where they are being met, and how they are being met in three particular EU institutions. Likewise, the adaptive approach to democracy found new arrangements and their associated second-order principles by which the first-order principles of freedom and equality are being realized in the EU.

This project set out to say something more about the way we think about democracy, and how shifts in perspective help our subsequent evaluations of an institution like the EU. The adaptive approach to democracy provides a tool for scholars to put their own assumptions and biases under increased scrutiny. The EU is not so simply a case as having too much or too little democracy. Rather, we must continue to view it as an evolving system where democracy is engaged at multiple levels and in multiple ways. Yet we should take heart, as the central message

of the adaptive approach to democracy is that the democratic future of supranational governance, such as the EU, is complex, multiple, and most importantly, discoverable.

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