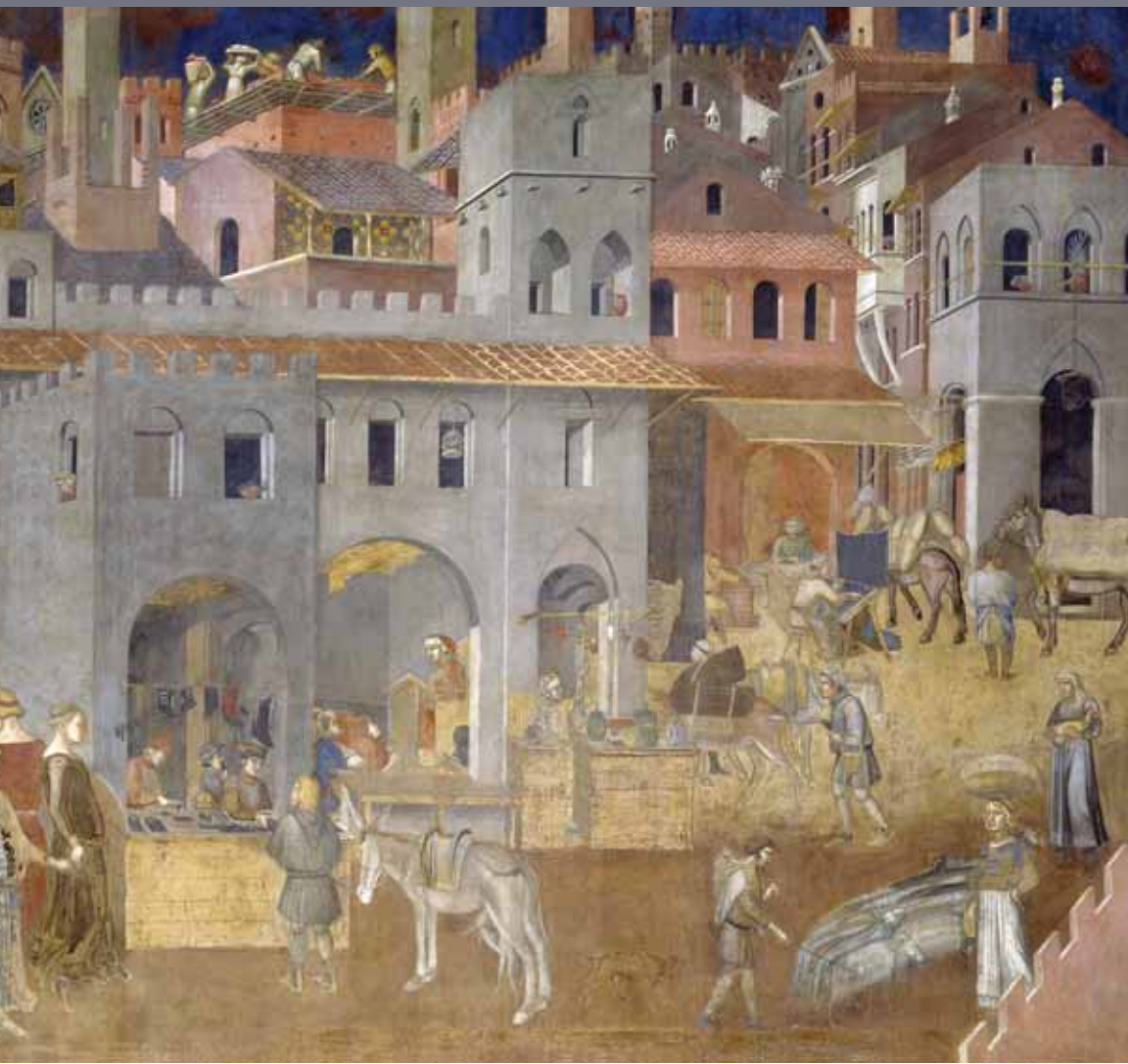
Global Democracy and Sustainable Jurisprudence

DELIBERATIVE ENVIRONMENTAL LAW

Walter F. Baber and Robert V. Bartlett



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To
Evalena Baber
and
Catherine Bartlett

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A Preface to Global Democratic Anarchism

In *Democracy in America*, Alexis de Tocqueville frequently mentions a singular advantage that the democrats of the New World enjoyed over those of the Old. Americans had no monarchic past to slough off on their way to democracy. This advantage manifested itself in the structural looseness of American institutions and in the absence of any large entrenched elite that might resist the idea of popular sovereignty. Thus it was possible for Americans to "have arrived at democracy without suffering through democratic revolutions, and to be born equal instead of becoming equal" (S. Wolin 2001, 119–127). The advantage enjoyed by Americans was more than tactical. Having avoided the social traumas that Old World wars of revolution involved, Americans never found it necessary to overcome the implacable hatreds among different classes that slowed the development of democracy in Europe. To put it succinctly, America's democratic revolution didn't cost very many Americans very much.

As we witness the emergence of what Jürgen Habermas characterizes as a postnational constellation, one might be forgiven for wondering if the advantage has shifted away from Americans (Habermas 2001b). Having become, by so many measures, the world's privileged class, will Americans yield gracefully to a movement toward democratization at the global level? Might it not be that citizens of the Old World, who suffered so grievously at the hands of nationalists during the last century, will prove far more open to new forms of transnationalism that empower individuals and groups at the expense of sovereign states? In an era when the democratic impulse begins to erode both national boundaries and structures of arbitrary authority within human institutions, are the citizens of the world's last "superpower" destined to be the rearguard of the old world order? We have written this book for a global audience, but early in the twenty-first

century its arguments and proposals may fall on less receptive ears in the United States than elsewhere.

In 2005, we published a book entitled *Deliberative Environmental Politics*. Our limited objective in that volume was twofold. First, we wanted to describe what we took to be areas of conceptual consistency between deliberative democracy and the imperatives of environmental protection. Second, we wished to identify institutional innovations and political trends that at least suggested that the areas of conceptual consistency we had described were not sterile ground.

In this volume our objective is similarly limited. It is to indicate that theories of political deliberation offer useful insights into the "democratic deficit" in international law. Our discussion of international institutions and procedures is not intended to be comprehensive. It is intended only to suggest that there are approaches to the problem of global environmental protection that require nothing more than a new conceptual orientation and a renewed sense of the possibilities of cosmopolitanism. Here, as in our earlier work, we focus on the environment because it provides the most nearly universal human interest that can be described with any level of precision.

We also advance a proposal for institutional innovation not because we conceive of it as the only (or even, necessarily, the best) approach to the problem of developing transnational environmental consensus, but rather because it is necessary to start somewhere. We have made no claims, and have none to make, about the content of the decisions people would reach on environmental matters—we do not claim that juristic democracy would resolve all or part of the environmental problematique or even that any choices made will necessarily be better choices environmentally. As in every realm of human endeavor, bad choices *can* be made by the most democratic of processes, although there are good reasons—and evidence—to suggest this will happen less often and the bad choices will be less bad than when made by nondemocratic processes. Moreover, we assume that the capacity of any polity to recover from what turn out to be environmentally substantive mistakes will be enhanced if decisions are made in processes that create social capital rather than spend it. We only assert that environmental norms with genuinely democratic lineage, if they could be developed, would be well worth having.

Our argument in the book proceeds as follows. After exploring the necessary characteristics of a meaningful global jurisprudence, a jurisprudence that would underpin truly effective international environmental

law, we back up and reconsider the possible theoretical foundations for that jurisprudence in realism, pragmatism, and deliberative democracy. Building on this analysis, we suggest a conceptual framework for international politics and law that offers the prospect of workable, democratic, and environment-friendly rule-governed behavior within a system of global politics that is likely to remain (and perhaps ought to remain) anarchic in important respects. Specifically, we suggest the development of a global environmental jurisprudence based on democratically generated norms. We propose a concrete process for identifying and generating global environmental norms for translation into international law—law that, unlike all current international law, can be universally recognized as both fact and norm because of its inherent democratic legitimacy.

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Toward an International Environmental Jurisprudence: Problems and Prospects

It has become commonplace in the environmental community to hear people wonder whether now, at the dawn of the twenty-first century, humankind will finally develop the intelligence necessary to ensure our survival as a species (Caldwell 1998, 5). As compelling a question as this often seems, it misses the most essential point in a variety of ways. First, the twenty-first century, like the centuries that preceded it, is an entirely human construct of no ecological significance. Now is no more opportune a moment than any other for the development of a new relationship between humans and their environment. Second, the survival of humankind as a species is no more important ecologically than the turning of a calendar page. Third, it is far from clear that the essential challenge to human survival is a shortage of intelligence. From the perspective of evolutionary biology, it may be that humankind is already too smart for its own good. Indeed, the noted biologist Ernst Mayr has argued that, judging by the empirical record regarding species success, it is clearly better to be stupid than to be smart (Chomsky 2005, 1). Our ability to use what we know should be more central to our concerns.

So how might the environmentalist's question be appropriately rephrased? Assuming that our focus will continue to be human survival, regardless of nature's indifference to that issue, we might pose the following question. What changes in our collective behavior are required if the biological preconditions of our continued existence are to be satisfied and how are those changes to be brought about? This formulation of the problem has several distinct advantages.

First, an emphasis on behavior allows us to focus our attention on human agency. Our actions, for better or worse, are willed events. They are subject to our control to an extent that other environmental variables of-

ten are not. Placing our own actions at the center of our environmentalism puts humankind's fate in our own hands (to the greatest degree that is possible). In addition, a focus on willed action has the salutary effect of preempting excuses for environmentally unsustainable behavior as the unavoidable consequence of impersonal systems such as nations and markets (Hiskes 1998). In other words, it allows us to hold one another responsible for environmental protection.

Second, attending to the biological preconditions of human survival, as broad a topic as that is, will lend our environmentalism a measure of focus and a sense of urgency that other approaches often lack. Perfectly valid concerns for issues like animal rights and ecological amenities such as pristine wilderness have shown only a limited capacity to seize the imagination of the general populace, even in the wealthiest and most literate countries where appeals on their behalf might have been expected to resonate. If protection of the environment in the developing world is any part of our agenda, our emphasis must move even more strongly to those matters that impinge directly on the health and welfare of humankind as a whole (Porter, Brown, and Chasek 2000, esp. chap. 5).

Finally, concentrating on the methods by which the environmentally necessary changes in human behavior can be brought about will help to prevent what is necessarily a conceptual enterprise from becoming entirely detached from reality. Our concern for a theoretically sound understanding of the ethical issues we confront and the ecological challenges that we face cannot so preoccupy us that we neglect the question of the institutions and resources that are necessary to implement any decisions we are able to formulate. Effective knowledge of what our survival requires and the will to use that knowledge must still be supported by political power in some form (O. Young 1994).

Our task, then, is immodest in the extreme. It is to outline an approach to collective will formation, the development of applied policy expertise, and the creation of institutions and the marshalling of political resources that can be appropriate to the protection of the environment on a global scale. This approach must constitute an international environmental jurisprudence, not only an explanation of what the law of the global environment should be, but also a theoretical construct to aid in its interpretation and implementation.

Will Formation—Policy Prerequisites

It is necessary to address a threshold question, the answer to which will guide our subsequent analysis. Is it even possible to construct an environmental jurisprudence at the global level? No one doubts that treaties can be negotiated between nations to advance the cause of environmental protection. But is it really possible that an international environmental consensus, amounting to a collective determination to follow a shared course for reasons held in common, can emerge from our disjointed and competitive system of global governance?

One view of international law, perhaps the dominant view, is that it can never really be law in the proper sense. The "law obtaining between nations is not positive law" because "every positive law . . . is set by a sovereign person, or sovereign body of persons" (Austin [1832] 2000, 201, 193). Any effort to conceptualize an international polity must, therefore, recognize that "the universal society formed by mankind, is the aggregate good of the particular societies into which mankind is divided; just as the happiness of any of those societies is the aggregate happiness of its single or individual members" (294). This perspective on international law provides a foundation for the "realist" analysis of international affairs generally, which emphasizes that the only significant actors on the world stage are nations, which pursue their own interests always and in all things (Morganthau 1978).

The fundamental insights captured by the realist viewpoint are appealing because they explain a great deal of what we think we know about international politics generally and international environmental affairs in particular. It makes sense of the fact that, whereas it is often considered a moral duty to be informed about world events, one is not normally expected to do much about them (Belshaw 2001). Moreover, the inherent limits of democratic discourse seem to argue against its use at the international level. A shared sense of community obligation, absent beyond the boundaries of the state, is often thought to be necessary to overcome the presumption that mere political argument by one actor cannot change the preferences of another actor (Austin-Smith 1992). The resulting conclusion, that all speech acts in international politics are merely strategic, leads one to doubt that any shared will at the global level is possible. It may also explain why "democracy has achieved real gains within states, but very meager ones in the wider sphere, both in terms of relations between states and on global issues" (Archibugi 2003, 5).

With respect to global environmental affairs in particular, there are additional reasons to doubt the possibility of international consensus. First, early nation-states lived within boundaries that usually conformed to some set of natural criteria. This allowed for a genuine, if sometimes fluid and indistinct, sense of a home region that provided the basis for an ecological knowledge and community solidarity that was facilitative of collective action (Snyder 1998). The expanded boundaries of modern nation-states, and emerging regional communities like the European Union, undermine the existence of that shared sense of place. In its absence, the citizens of existing nations find it hard to build a domestic consensus on the environment, let alone participate in an international environmental concord. This difficulty is reflected in the problems confronted by the European Union in implementing its developing environmental policies (Demmke 2004). The trend toward globalization has, in many ways, made matters worse. National governments have been forced into "a zero-sum game where necessary economic objectives can be reached only at the expense of social and political objectives" (Habermas 2001b, 51). Among the most troublesome manifestations of this global game, also evident within nation-states lacking strong central authority, are the tendency to discount excessively future environmental damage (Cumberland 1979) and the temptation to export environmental problems resulting from patterns of economic trade (Gormley 1987).

Taking all of these matters into account, why would anyone be optimistic about the prospects for a global consensus on environmental protection? One reason might be that optimism at the global level is the only realistic alternative to a universal and thoroughly depressing pessimism. Yet beyond this general preference for hope over despair, environmental problems provide an obvious example of issues that rightly belong to the global community because the level of "interconnectedness and interdependence" involved makes those problems impossible for national or regional authorities to resolve alone (Held 1995, 235). As far back as John Stuart Mill there has existed a concept of joint ownership of natural resources from which specific rights can legitimately be inferred (Nathan 2002). There is a growing realization that states are interdependent, sharing common interests that lead them to cooperate, and that cooperation is self-reinforcing because cooperative institutions come to be valued in themselves over time (Keohane and Nye 1977; Miles et al. 2002).

So, in an age of globalization, political, moral, and cultural boundaries are all unstable. Both genetic and human diversity are at risk (Curtin 1999).

Humankind is irreducibly heterogeneous and is destined to remain so. But collective identities from the local to the global are made, not found. They have the potential to unify the heterogeneous in a common political life in which all participate on equal terms while they remain "others to one another" (Habermas 2001b, 19). In the final analysis, the fundamental issue is "whether we can foster democratic, or at least relatively noncoercive, discourse about global change" (Curtin 1999, 17). The development of such a discourse is essential if we are to develop the extended political alliances that will allow democracy to "catch up with the forces of a globalized economy" (Habermas 2001b, 53).

Clearly, globalization and the environmental challenges it presents suggest the need for a form of ecological thinking that transcends narrowly nationalistic frames of reference (Lahsen 2004). Optimism about this project is justified by the fact that nations do not have intrinsic and unalterable characters but are, rather, imagined communities that rely on a variety of symbolic elements, historical narratives, customs, and institutional structures to create and reinforce a sense of shared identity (Anderson 1983). Environmental sustainability is largely a concept of community, or common purpose (Bryner 2004). To build a consensus in support of sustainability is a necessarily democratic and participatory exercise for at least two reasons. First, developing a consensus for sustainability requires a breaking down of the polarized and polarizing languages that reflect entrenched political ideologies. This kind of consensus building is essential for the development of community-based solutions to issues of sustainability that can survive outside the carefully constructed confines of environmental interest groups (Plevin 1997) and can penetrate the well-defended bastions of business and government. So, for entirely practical reasons at least, any global environmental initiative must be democratic and broadly participatory.

Second, environmental values and democracy are bound together at the level of principle (Eckersley 1996). To understand why this is so, we must only recognize that politics is increasingly organized around risk allocation. The targets of risk are so numerous, and so capable of political mobilization, that they undermine the legitimacy of the socioeconomic power structure. The resulting crisis of legitimacy can only be addressed by public participation in the allocation and amelioration of risk (U. Beck 1992). In this way, the challenge of global sustainability demonstrates that the crises of ecology and democratic legitimacy are inextricably linked. A discursive form of democracy is better placed than alternate

political models to foster a fruitful engagement between humans and their environment (Dryzek 2000) because only it can give voice to the otherwise silent revolution of postmaterialist values that environmentalism represents (Ingehart 1977). Thus, arbitrary or authoritarian approaches to protection of the environment have to be dismissed as unacceptable in principle, even if they were not destined to fail (which, of course, they are).

From Willing to Knowing: Is Smarter Better after All?

Having argued that a global consensus in support of environmental sustainability is possible (provided that it is democratic), the next logical step is to suggest what content that consensus will have to encompass. Some of the challenges that we face are clear. Whereas the character of global environmental problems suggests the need for a form of ecological thinking that transcends narrowly nationalistic frames of reference, universalizing discourses must be approached with caution. They can distract us from the need to confront concrete and local inequities and can mask the interests of those who (often claiming to support "sustainability") advocate measures that generate those inequities. The emergence of a global epistemic community is undoubtedly essential for environmental protection. But experience suggests that it will be a complex domain characterized by both transnational networks tending toward cognitive convergence as well as persistent lines of division that will render any global environmental consensus precarious and unstable (Lahsen 2004).

It has long been recognized as something of a paradox that environmentalism both blames modern science for environmental degradation and looks to it for support and solutions (Yearly 1992). In fact, an environmental crisis cannot even be perceived as such without a great deal of scientific information and technological sophistication (Caldwell 1990). Given the limits of the sciences, the dependence of environmentalism on them means that there will always be a degree of uncertainty about the true nature and severity of environmental problems (Kirkman 2002). This uncertainty will be exacerbated by certain tensions that are inherent in the interrelationship of science, environmentalism, and democracy.

A fundamental element of modernity is its empiricism. At its most basic, this article of the modern faith is captured by John Locke's assertion in *An Essay Concerning Human Understanding* that "all the materials of reason and knowledge" derive from experience (Locke [1689] 1952,

121–122). Yet the amount of knowledge that we can justify from evidence directly available to us can never be very large. The overwhelming proportion of our factual beliefs will, necessarily, be held at secondhand through trusting others (Polanyi 1958), others whom we often refer to as experts. It is hardly irrational to recognize an expert's authority by taking his or her reasoning as a proxy for our own when we have grounds to suppose that he or she knows more than we do and that, if we had access to that knowledge, we would draw the same conclusions (R. Friedman 1973). The advantages of a respect for the authority of science-based expertise are numerous. We stand to gain the accuracy of judgment and depth of ecological understanding that is provided by the specialized training and quality-control mechanisms of modern scientific disciplines (MacRae and Wittington 1997). Moreover, the habits of thought encompassed and encouraged by modern environmental science carry benefits not specific to the environmental arena. The development of an ecological consciousness, grounded in the environmental sciences, can promote more enlightened and progressive policy choices generally by highlighting the actual and potential relationships between the interdependencies in nature and those in the social realm (Valadez 2001). There are many, however, who argue that science is at best a mixed blessing.

All of science is, at least in part, a matter of observation. What we choose to observe in any situation is a function of our background theories and assumptions. It can hardly be otherwise (N. Hanson 1958). Our ability to deal with knowledge is hugely exceeded by the potential knowledge contained in our environment. To cope with this diversity, our perception, memory, and thought processes long ago came to be governed by strategies for protecting our limited capacities from the confusion of overloading (Bruner 1962). Even science, therefore, is irreducibly personal. When it takes the form of expert judgment, it constitutes a form of tacit knowledge that people know for reasons beyond those that they can clearly enunciate (Stone 2002). The situation is further complicated by the fact that most policy problems, including those related to the environment, transcend the domain of any one discipline (MacRae and Wittington 1997). They arise within the context of a civil society in which everyone, no matter how accomplished, is a layman in the face of the expertise possessed by others (Habermas 2001c).

For all of these reasons, the supposed objectivity of science and its claims to expertise may not take us very far. What we think of as facts, assertions intended as true representations about the state of the world,

are produced by complex social processes. They come not from direct observation, but from social knowledge that is an accumulation and presentation of observations and beliefs that are structured by both our shared as well as our personal experiences (Stone 2002). This opens science-based environmental expertise to a variety of criticisms. As an example, it is alleged that science is closed to the oppressed and disadvantaged (Jennings and Jennings 1993). This is a criticism that, to the extent it is true, is even more troubling at the international level than it is within nation-states. Others suggest that normative commitments, like the balance of nature (nature in balance) vision, have distorted model building in environmental science (Shrader-Frechette and McCoy 1994). Still others complain that scientific detachment from the realm of human values and ethical principles allows even those whose careers involve the study of nature to participate in its devaluation (Gismondi and Richardson 1994). No wonder that many people, citizens and scientists alike, resist even the most apparently objective and factual knowledge because of its source, its implications, or the challenge it presents to their own tacit knowledge (Stone 2002).

Beyond these general limitations to the reach of science, the search for knowledge about the relationship between humans and their environment confronts a special challenge. Since at least the time of Kant, it has been recognized by cognitive scientists that understanding even so basic a cognitive function as perception requires us to focus on the environment rather than on what goes on within the human organism (Ben-Zeev 1984). Social theorists, in their more lyrical mode, agree that "the very ground and horizon of all our knowing" is the earth itself (Abram 1996, 217). The environment cannot be understood merely as surroundings, no matter how static one's analytical perspective. It is, rather, a dynamic relationship (Caldwell 1971, 5). Neither environments nor organisms are independent entities, captured by a biology that views one as a source of demands for adaptation and the other as a survival calculus at work (Lewontin 1992). In the case of humans, the relationship between the knower and the known is more complex still.

Physical environments play a constitutive role in the most basic activities of the mind. Vision, for example, is an activity rather than a passive response to stimulus. What humans see is a function of what they look at, what they look for, and what they notice (Gibson 1979). There is a connection between cognition and the landscape within which, from our earliest experiences, we are able to think about ourselves and structure

our relationships with others (Cobb 1977). So the physical environment is not simply a site in which knowing occurs. It is, rather, a highly specific and normatively significant place that continually presents alternative possibilities for active knowing (Casey 1997). Thus the ecological forms of thought we are called upon to develop are patterns of understanding in which human cognition interacts with an environment rich in the information resources that are vital for organizing our individual and collective existence (Hutchins 1995).

This relationship between knowledge and place might be regarded, for good or ill, as a limitation on the reach of science. But need it be? A general suspicion of science, coupled with the inherent uncertainty of its results, can make the gulf separating scientists and grassroots environmentalists difficult to bridge (Foreman 2002). Moreover, information regarding long-term environmental hazards and necessary hazard adjustments are comprehended by residents of an area at risk only to the degree that they are communicated in language that is familiar to them (Lindell and Perry 2004). Is it too much to expect that scientists will adapt their messages to suit their audiences and that citizens be asked to meet them halfway? In a democratic and multicultural environment, scientists must recognize this necessity (Habermas 2001b). It makes little sense for indigenous populations to claim that coming to terms with what science can tell us is damaging to their cultural institutions. After all, a society becomes ecologically irrational when its forms of epistemic authority and institutional practices threaten the ecosystemic relations on which it relies (R. Bartlett 1986, 2005; Dryzek 1987). When a society fails to preserve the life-support systems on which its members depend, the preconditions of the society's continued existence (and that of its cultural and social institutions) are compromised (Dryzek 1983).

In light of these considerations, the local specificity of knowledge can be regarded as positive rather than limiting, especially given the enormously heterogeneous character of both the natural environment and human society. Important categories of "localness" may include culturally distinctive interests, ways of organizing knowledge production, and discursive traditions (Harding 1998). Yet the essential character of scientific understanding is not surrendered simply by recognizing that knowledge is not a transcendental phenomenon, but, rather, a local commodity designed to satisfy local needs and solve local problems (Feyerabend 1987). Environmental science and politics should be seen as coproduced, or as mutually reinforcing at every step. Politics are not merely stimulated by scientific

findings but are prevalent in the shaping and dissemination of environmental science (Forsyth 2003).

Just as the production of a critical political ecology requires adaptation in the scientific community, science has significant transformative potential for politics. There is little doubt that the move to exclude metaphysical perspectives and forms of discourse from discussions of ethics and politics in this century has been inspired by the success of the natural sciences (Williams 1999). The consequences of this have been positive for both democracy and environmental protection (Baber and Bartlett 2005). Realizing that science and politics are coproduced carries with it the power to reveal the covert uses of science for political objectives. It also allows for the devolution of environmental scientific governance within diverse social groupings in pursuit of democratically determined solutions at the local level (Forsyth 2003). This can promote the more effective use of scientific knowledge by creating "ecologies of knowledge"—dense, crosshatched relationships of practice and process that retain environmental knowledge through use rather than allowing it to dissipate through suspicion or indifference (Brown and Duguid 2002).

Having suggested that there is a particular form of ecological science that is appropriate as a foundation for an international consensus in support of environmental protection, it remains to suggest what institutional forms that consensus might take and by what means they might be developed. One of our initial premises is that any global environmental consensus will have to be democratic. But what, precisely, does democratic mean in this context? Indeed, what can it mean?

From Thinking Locally to Acting Globally

As a general matter, it is widely believed that international politics suffers from a "democracy deficit" (Wallace 2001). This deficit is a consequence of the fact that the decisions made within international institutions are driven by democratic concerns only to the extent that domestic foreign policy in the various nations is the result of democratic politics. International democracy, so it might be argued, will never be more than a theoretical possibility in the absence of a sovereign and democratically elected legislature at the global level (Slaughter 2004). Recent explorations of the idea of deliberative democracy, however, hold out a different hope. Deliberative democracy is particularly well suited to the task of environmental protection (Baber and Bartlett 2005; Meadowcraft 2004). Deliberative

democracy, operating at the boundary between the state and civil society, is a political practice that can generate broader public support for more ecologically sound policies while enhancing the institutional capacities of public agencies (Meadowcraft 2004). As we have seen, the challenges of popular participation, environmental knowledge building, and institutional adequacy are even more acute at the international level than they are within states. To see how deliberative democracy might help us confront these challenges, a more complete understanding of the concept is necessary.

Deliberative democracy is a concept that defies easy definition. The deliberative democracy movement has been spawned by a growing realization that contemporary liberalism has lost something of its democratic character. Modern democracies, confronted by cultural pluralism, social complexity, vast inequities of wealth and influence, and ideological biases that discourage fundamental change, have allowed their political institutions to degenerate into arenas for strategic gamesmanship in which there is little possibility for genuine deliberation (Bohman 1996, 18–24). True democracy is impossible where citizens are mere competitors with no commitments beyond their own narrow self-interests. How to move beyond mere interest is a matter of considerable debate. Elsewhere (Baber and Bartlett 2005) we have described three distinct approaches to deliberative democracy—public reason, ideal discourse, and full liberalism. Our ultimate objective in this book is to suggest how deliberative democracy might inform our thinking about the international "democracy deficit" in general and the challenge of developing an international environmental jurisprudence in particular.

Public reason is an approach to deliberative democracy advanced most prominently by John Rawls (1993, 1999a, 1999b, 2001). Rawls ventured beyond fundamental rights and goals of distributive justice by using only the Kantian pursuit of universalizable principles and the perspective of the least favored (I. Shapiro 2001). The intuition at work is that if persons would agree to a policy principle when they might be the ones most adversely affected by it, they should agree to it in every other circumstance as well (applying the transivity principle of rationality). For Rawls, "public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution" (Rawls 1993, 214). Deliberation is a search for binding precommitments to political values that are fundamentally important but limited in scope (Bartlett

and Baber 2005). In this form of deliberation, one reasons from the little one knows in the "original position" (wherein all information about one's personal situation is hidden by a veil of ignorance) in pursuit of unanimity based on reasons with which anyone similarly situated would freely agree. In this mode of deliberation, individual interests are neither compromised nor reconciled. They are eliminated as reasons that can justly be offered in defense of one's positions (36–38).

The conception of individual citizens advanced by Rawls's theory of public reason is the most difficult approach of the three we will deal with because it diverges the most dramatically from our everyday experience. Rawls's well-ordered society is populated by people who are "equal . . . autonomous . . . reasonable" and possessed of the "capacity for social cooperation" (Rawls 1993, 306). Furthermore, they view society as "a fair system of cooperation over time, from one generation to the next" (15). Also, they aspire to be both rational in a technical sense and reasonable in a broader political sense. This is because "merely reasonable agents would have no ends of their own they would want to advance through fair cooperation; merely rational agents lack a sense of justice and fail to recognize the independent validity of the claims of others" (52). Because they share these characteristics, the citizens of a well-ordered society would readily commit themselves to abide by the principles of justice flowing from a discourse in which they (or their representatives) were guided by the regulative concept of the veil of ignorance. This concept requires decision makers to ignore virtually all information about their positions in society, their individual interests, and even which generation they represent (Rawls 1999c).

The approach taken by Rawls has both advantages and difficulties. Some critics of deliberative democracy have complained that deliberation of this sort has a sedative effect that curbs the behavior (and thus the influence) of the historically disadvantaged. They also argue that some citizens are better at articulating their arguments than others, so much so that well-educated white males are destined to prevail in the deliberative environment (Sanders 1997). The Rawlsian approach, however, sedates all participants with the same dosage of the same drug. Although Rawls acknowledges that we all have a right to products of our own abilities, they can justly provide us only what we become entitled to "by taking part in a fair social process" (Rawls 1993, 284). Presumably, fine debating skills, whether innate or acquired, are covered by that injunction.

Others have suggested that Rawls's conception of public reason is too narrow because it is based upon the assumption that people's preferences

are determined prior to political interaction and do not change as a result of such interaction (Offe 1997). But this is true only to the extent that Rawls's theory embodies an attempt to justify collective decisions by appealing to reasons that can be adopted by people simply by virtue of their common citizenship and the shared interests implied by that common status (Evans 1999). Indeed, the greatest problem with Rawls's approach to public reason may be that, rather than counting too little on change, it counts on change far more than is reasonable. Deliberative democracy of the kind he advocates requires a radical equality of access for individuals, groups, and interests that have been historically excluded from decision making (Rawls 1999a, 580–581) If actually achieved, such a circumstance would unsettle, if not subvert, existing understandings about the dimensions and boundaries of political conflict (Knight and Johnson 1994, 289).

A second form of deliberative democracy, ideal discourse, is most closely associated with the work of Jürgen Habermas. In this view, deliberative democracy relies on a shared political culture and is rooted less in government institutions than in civic society. For Habermas, deliberation is a process of testing the competing validity claims put forward by citizens in search of a general consensus based upon reasons that are shared, not merely public. In ideal discourse, individual interests are the source of these competing validity claims. But those interests are not regarded as givens, the fundamental stuff of politics. Interests must be open to change because citizens engaged in ideal discourse are committed to search for a genuine meeting of the minds, rather than the modus vivendi that less demanding approaches, such as full liberalism (discussed next), might allow (Baber and Bartlett 2005, 35–36).

The view of citizens in the ideal discourse situation adopted by Habermas shares much with that of Rawls, but differs in some important ways. Habermas speaks of personally autonomous participants in deliberative discourse who are "free and equal," each of whom is "required to take the perspective of everyone else," and who thus project themselves "into the understandings of self and the world of all others" (Habermas 1995, 117). They do not, however, adopt this attitude out of any commitment to abstract principles of justice produced in a reflective equilibrium free of ideology and interest. These citizens are committed to advancing their normative validity claims in forms that can be treated like truth claims; that is, in forms that can be subjected to empirical evaluation (Habermas 1990). There is no mechanism of impartiality at work. Indeed, Habermas (1995) criticizes Rawls for his willingness to purchase the neutrality

of his conception of justice at the cost of forsaking its cognitive validity claim. It is as if Habermas is invoking the second clause of Rawls's own maxim that "justice is the first virtue of social institutions just as truth is of systems of thought" (Rawls 1999c, 3).

The reasonableness Habermas seeks is born of a social and cultural commitment to an inclusive and rational discourse (Habermas 1995) based upon "the justified supposition of a 'legitimate order' " (Habermas 1996, 68). It is true that the processes of internalization that structure the normative foundations of the values espoused by citizens are not free of repressive and reactionary tendencies (Habermas 1996). It is also true that those who constitute the politically interested and informed class of the public may be disinclined to seriously submit their view to discussion (Habermas 1998d). Ultimately, however, the consciousness of their own autonomy gives rise to an "authority of conscience" that becomes an integral part of the politically informed and active citizen's motivational foundation (Habermas 1996, 67). This commitment to intellectual honesty would seem to be an essential element of the ideal discourse situation, conceived of as a rational and noncoercive discourse designed to test empirically the truth-value of competing normative claims.

Finally, full liberalism is a widely shared perspective exemplified most clearly by the ideas of James Bohman, Amy Gutmann, and Dennis Thompson. Their work can be viewed as an attempt to reconcile the divergent approaches of Rawls and Habermas in ways that make deliberative democracy more feasible in a complex and normatively fragmented society. Bohman describes a politics characterized by equality of both access and influence, good-faith bargaining, and plurality rule accompanied by continuing minority acceptance of the fairness of the process. Thus, in full liberalism one's individual interests are the primary source of individual preferences and motivation. But the reasons a citizen offers to others in support of his or her policy positions must transcend personal interests, at least to some extent. They must be public reasons, but only in the limited sense that their acceptability is not dependent on membership in some particular social group (Baber and Bartlett 2005, 34–35).

The theory of full liberalism is, in many ways, less demanding than either public reason or ideal discourse (Baber 2004). For example, Bohman assumes that citizens in a democracy are unavoidably divided by deep-seated normative differences he describes as cultural pluralism (Bohman 1994). He also doubts the possibility that any form of public reason or

any view of the common good can ever command a consensus in communities as complex as the modern democracies. In Bohman's view, "community biases" and the exclusion of many from "effective political participation" are unavoidable, at least to some extent (Bohman 1996, 238). Finally, Bohman argues that knowledge and information are always scarce resources in a complex society, and that neither innate capacities nor acquired knowledge can ever be evenly or widely distributed. Consequently, citizens in pluralistic democracies will inevitably "surrender their autonomy to experts, delegates, and other forms of the division of labor" (168).

This does not suggest that deliberative democrats should surrender to the injustices currently observable in democratic life. Bohman supports an equalization of deliberative resources and capacities as far as that is possible, as do other deliberative democrats (Cohen 1997; Gutmann and Thompson 1996). But as Dryzek has pointed out, some degree of inequality may not only be unavoidable, it also may actually serve as grist for the deliberative contest (Dryzek 2000, 172–173). The point of providing support to the disadvantaged in the context of public deliberation is not to equalize their position with "the other interest groups jostling for influence" but, rather, to ensure that they can make "effective use of their political liberties" (Gutmann and Thompson 1996, 305, 277). Strict equality is neither necessary nor desirable from the point of view of maintaining the critical edge brought to deliberation by the disadvantaged. After all, it is not as if deliberation under full liberalism is a search for one correct solution.

Having rejected the notion of a singular form of public reason, it is not surprising that theorists of full liberalism should find themselves in the company of the majority of representative democrats who, from Burke's time, have regarded political questions as inevitably controversial ones without a right answer (Pitkin 1967). The objects of deliberation, in their view, are the interests of specific persons who have a right to help define them. Politics is recognizably democratic when it gives them that right. These deliberative democrats do not try to specify a single form of citizenship. They search for "models of representation that support the give-and-take of serious and sustained moral argument within legislative bodies, between legislators and citizens, and among citizens themselves" (Gutmann and Thompson 1996, 131). In this way, deliberative democracy is not so much a search for ethically or empirically defensible solutions as it is a process of personal development for citizens. John Dryzek

has argued that, in the face of ideologies and structural forces that perpetuate distorted views of the political world, we should seek the competence of citizens themselves to recognize and oppose such forces, which "can be promoted through participation in authentically democratic politics" (Dryzek 2000, 21). Thus, one might say that the most important product of deliberative democracy is neither just principles nor rational policies but, rather, the critical capacities of the citizens themselves. It might further be argued that this objective is the most important one that collective-will formation can pursue. After all, to the extent that permanent solutions to the ecological crisis require significant changes of collective consciousness, preserving our species and its environment may be possible only through such a process of social evolution.

Full liberalism's most important contribution to our concerns in this book arises from Bohman's notion of a plural form of public reason and the advocacy, by Gutmann and Thompson, of give-and-take in representative institutions. Both of these ideas touch upon one of the most serious criticisms that has been leveled at theorists of deliberative democracy, namely, that both Habermas and Rawls have made a mistake by insisting that citizens converge on the same reasons for a decision rather than agreeing on a course of action each for his or her own reasons. This convergence, it has been suggested, can be no more than an ideal of democratic citizenship rather than an actual requirement of public reason (Bohman 1996). Worse yet, according to these critics, this preoccupation with convergence has led Habermas to the strong principle of unanimity that will ultimately render his theories impractical in a world characterized by social complexity and moral pluralism (Bohman 1994). In fact, Dryzek has concluded that Habermas "long ago realized the practical difficulties that precluded the realization of consensus in practice" (Dryzek 2000, 72). Habermas may, however, have actually done something rather more subtle.

In his recent work, Habermas (1996) maintains a strong emphasis on reasoned consensus while showing a willingness to discuss majority rule in certain circumstances. Some have concluded that he has abandoned his earlier commitment to unanimity in the face of moral complexity and now regards consensus as merely a "regulative ideal" (Gaus 1997). On this view, consensus is merely "a model for real world discourse in concrete, historical conditions" (Postema 1995, 359).

Habermas, however, describes a form of majority rule that suggests a certain practical priority for consensus (Habermas 1997b). Consensus

and majority rule are compatible, in his view, "only if the latter has an internal relation to the search for truth." Public reason must "mediate between reason and will, between the opinion-formation of all and the majoritarian will-formation of the representatives" (Habermas 1997b). A decision arrived at in the political realm through majority rule is legitimate only if "its content is regarded as the rationally motivated but fallible result of an attempt to determine what is right through a discussion that has been brought to a *provisional* close under the pressure to decide" (47; emphasis in the original). Habermas is careful to indicate that such a decision does not require the minority to concede that it is in error or to give up its aims. It requires only that they forgo the implementation of their view until they better establish their reasons and gain the necessary support (47). Ideally, then, a vote is only "the concluding act of a continuous controversy" carried out publicly between argument and counterargument (Habermas 1998d, 212). If the idea of a concluding act seems to fit poorly with the concept of a continuous controversy, we can better understand why many have found Habermas to be elusive on this subject.

What are the practical implications of this view of majoritarianism? First, it should be apparent that accepting something less than consensus is justified only where the pressure to decide precludes further deliberation. In some circumstances, action must be taken if an opportunity is not to be lost. In other cases an institutional imperative may require that something be done in a circumstance where the perfect may have become the enemy of the good. Often the prospect of immediate and irreparable harm to the environment or to human interests justifies action in the face of what may be significant uncertainty about the facts. Other principles of immediacy are certainly conceivable. But the concepts of lost opportunity, institutional imperative, and imminent harm are clearly major categories of the pressure to decide.

A second implication of this view is that public reason must be the tool used to determine when the pressure to decide is sufficient to justify majority rule. In this way, the political process of majoritarian will formation is disciplined by the social process of the opinion formation of all. In effect, the minority maintains a veto on collective action but chooses not to exercise it immediately in the expectation that the discourse will continue and any intermediate action will be regarded as a provisional decision based upon only a weak consensus that prompt action is required. So majority rule will always be available, but it will be legitimate only

where members of the minority are satisfied that the discourse will continue and they will not ultimately be required to yield to the force of numbers.

Finally, where lost opportunities and immediate harms are major concerns, and where many (if not most) decisions will be regarded as legitimate only if they are provisional, there must be a strong bias against any action (or inaction) with irreversible consequences. Providing protection for an endangered species is a positive manifestation of this negative bias. The species can be de-listed, should further research warrant. But an old growth forest that is logged, or a wetland that is paved over, is a permanent loss that later regrets cannot recover. These are actions that a majority could not justify as provisional decisions. So, if our description of Habermas's theory is sound, neither he nor other deliberative democrats who accept his reasoning should ever tolerate such decisions absent a genuine consensus among all those choosing to debate the issues in the ideal discourse situation.

From Municipal to Cosmopolitan Environmental Law

At this point in our discussion, are there any tentative conclusions that could guide us in conceptualizing an international environmental jurisprudence? In our view, three general remarks are in order. First, for environmental law to attain global reach humankind must invent a mechanism that allows for the formation of a collective will in the absence of sovereignty as it is conventionally understood. If environmentalism represents an intersection of science and reason, one would never expect it to exist solely within the narrow confines of government (Ehrlich and Ehrlich 1996). Why, then, would we assume that environmentalism can be held captive by so limited an institution as the sovereign state (Dryzek et al. 2003; Dryzek 2005; Dryzek and Schlosberg 2005)? Benvenisti and others have discussed the idea of formally empowering substate units of government to enter into international agreements (Benvenisti 2000). The potential of non-state-centric environmental governance has been explored by Wapner (1996) and others. How much further a step would it be to empower citizens to engage one another on the international stage in deliberation regarding the survival of the species? After all, "just as there are issues of scale inherent in any environmental issue, so citizenship is an issue of scale. Each begins, although neither ends, at a local level with local knowledge" (Curtin 1999, 179).

Second, this insight provides the foundation for our general observation that international environmental jurisprudence must be grounded in a knowledge base that is local and concrete. Environmentalism has long been understood to be dependent on the insights of scientific disciplines that advance universal propositions based upon empirical research. As we have argued, it could hardly be otherwise. But the political ecology upon which international environmental law must be founded must adopt a "critical attitude" toward supposedly neutral explanations of ecological reality (Forsyth 2003, 267). Environmental problems are not merely particular manifestations of general principles. They always arise in a human context, and dealing with them effectively requires a wisdom of place, an understanding of the role that the environment plays in the cultural experiences of resident populations (Basso and Felds 1996). International environmental agreements benefit from strong support in civil society from coalitions of interest and ideology that unite private and public actors (Zartman 2001). The positive relationship between international environmental agreements and civic environmentalism runs in the opposite direction as well. International agreements give rise to support groups throughout member nations (transnational coalitions, grassroots organizations, and monitor and watch groups), which are crucial to building and sustaining the information base and political resources necessary for implementation of the agreements themselves (Deng and Zartman 2002).

Third, just as the knowledge base of international environmental law must be "democratized," so must be the political processes that produce it. International environmental agreements are sustained as meaningful regulatory processes over time by constant give-and-take over changing conceptions of consensual knowledge (Sjöstedt 2003). The importance of consensus in this regard can be traced to the fact that international environmental agreements are largely self-enforcing by their very nature. There are often political costs for noncompliance that pose significant trade-offs for negotiation purposes. But there are rarely significant inducements to comply or sanctions for noncompliance (Barrett 1998). It is in this context that the debate among deliberative democrats over the place of consensus in popular government finds its natural home. Consensus in collective decision making at the national or subnational level may be a regulative norm or a mere aspiration. But when one steps on the international stage, consensus becomes a practical necessity.

So what we seek, then, is nothing less than collective choice without sovereignty, reliable knowledge without abstraction, and effective implementation without coercion. Reasons for rejecting this agenda abound. Only the necessities of human survival can be offered in its defense. But pessimism at the outset is unwarranted in light of the fact that popular government appears to be succeeding at the level of the nation-state. After all, effective environmental law at the international level only requires us to perform the same basic functions that domestic governments perform—the legislative, administrative, and adjudicatory functions (Sands and Peel 2005). We must remember that whether the international institutions and process that eventually develop to satisfy these functional requirements resemble their municipal counterparts is less important than that they be fully democratic and ecologically sustainable.

In later chapters, we offer a specific proposal for global collective will formation, such that general commitments to abstract principles of environmental protection can be developed into more concrete and specific obligations that would allow organizations and individuals to assert and answer claims in coherent ways. A deliberatively democratic approach suggests both a jurisdictional and a jurisprudential rationale for the resolution of environmental disputes by international tribunals, namely, by reference to a juristically democratic kind of transnational common law. Specifically, we imagine certain institutions—innumerable citizen-constituted policy juries that deliberate hypothetical cases, at least one global codifying agency, and a resulting cosmopolitan and transnational common law—that can provide for "scaling up" deliberative democracy to the global level, by offering processes that can integrate local knowledge and contextual ecological science in ongoing global democratic will formation. Imperatives of the current world order of states and global capitalism pose challenges, but success would not be contingent on these being abolished or ignored or wished away.

Our intent is to advance a proposal that is entirely realistic and pragmatic, in the hardest-headed senses of those words. But both of those words come with philosophical and ideological baggage that immediately entangles, potentially introducing a level of complexity and confusion into the understanding of terms that most ordinary people use in relatively unproblematic ways. Essential to our argument that follows is a functional analysis of the requirements of international law and of the necessity of freeing ourselves from the constraints imposed by assump-

tions about how those requirements should be met. Essential as well is an analysis of the merits of a foundation in philosophical pragmatism for both deliberative democratic theory and international relations theory and the necessity of freeing ourselves from the constraints imposed by assumptions about the pluralist and statist context of international politics. These are the tasks of the next three chapters, before we turn explicitly to an exploration of how we might cultivate a transnational common law.

2

Political Realism: How Realist, How Realistic?

Realism, as the term is used in political science and international relations (IR), is seldom examined in the context of the broad sweep of the way it has been used in scholarly work generally. IR realism shares some of the theoretical premises of realism in the arts, law, and philosophy. But unlike these other intellectual endeavors, IR realism is only partly a theoretical perspective. The term *realism* was adopted in IR because it had (and has) political appeal beyond the realm of theories and scholarship. Realist theorists and ideologues gain an advantage over intellectual and political opponents by defining them into an untenable position.[1]

To self-define a perspective as realism is to declare that perspective to be dealing with the *real* and to characterize its proponents as *realistic* and *realists*. Thus when a perspective such as IR realism does battle in "real world" political conflicts of ideas and ideologies, it does so after it has preemptively occupied all the linguistic high ground. When, to be understood, even its putative political opponents must refer to it as realism, they implicitly acknowledge that all other perspectives must therefore be unrealistic and dealing with the unreal, or at least less realistic and less real. In the face of this linguistic hegemony, any possible new order, however sweeping or modest, must embrace the realism terminology of the old.

There is much that is problematic in the traditional perspectives of IR realism, but, perhaps a bit like democracy, the alternatives are even more flawed. At least in realism there is an often-unacknowledged core of philosophical pragmatism that offers a foundation for development of any workable jurisprudence for international environmental law. Thus, for reasons both substantive (real) and strategic (realistic), any workable system of international environmental jurisprudence probably must build upon a perspective of realism, albeit a less constraining and more humble realism than that offered by traditional IR realism.

Excavating this foundation requires, first, identifying how IR realism has departed from the way scholars in philosophy, the arts, and law have conceived of realism and, second, distinguishing what is common and worthwhile in all these endeavors. Upon that exposed rock, a more modest realism can be erected to serve as a useful guide to building international environmental law and policy.

Political Realism

There are many kinds of realism, including philosophical realism, aesthetic realism, mathematical realism, logical realism, and linguistic realism, to name but a few. Many forms are attendant to the formal sciences and could be subsumed as subtypes of philosophical realism. This level of detail, however, is unnecessary to our present purpose. It suffices to observe that the various forms of philosophical realism share a commitment to the reality of abstract objects, objects that necessarily have no spatial or temporal location.[2] This view is "the core conception of an abstract object in realist thought from Plato to Gödel" and it constitutes the most compact definition "that fits the usage of both realists and their critics" (Katz 1998, 1). Adding additional defining elements (e.g., that abstract objects are causally inert or mind-independent) is generally redundant because the original definition implies those other properties.

Aesthetic realism might be perceived as a phenomenon entirely distinct from such arid philosophizing. But that distinction is not as clear as one might imagine.[3] To take an admittedly simplistic example, realism has always been considered to be at least one way to deal with the problem of illusory perceptions. For instance, a round, green table can appear to be an oval from a certain angle or appear to be blue in a certain light. The realist, however, can be certain of the table's true nature because he knows that it possesses the qualities of roundness and greenness and that those qualities are real and determinate even if they are abstract. Moreover, the realist is in the happy position of being able to definitively evaluate his own perceptions, as well as those of others, because he is in touch with the facts as they really are, roundness and greenness being no less factual than extension and mass. This opportunity to get beyond mere perception was very appealing in the Victorian era, when there was an eagerness to shake off the timidities and romanticism of transcendentalism. It was, according to Henry James (1879), an age with a taste for realism. If transcendental idealism was illusory (a blue oval table), the writers, artists,

and scientists of the late nineteenth century would apply the disillusionment that was called for and lead, in the bargain, toward new levels of social progress that only a hardnosed critique of the status quo could produce. It was during this period that a realistic outlook came to pervade every aspect of intellectual and artistic life (Shi 1995).

In this cultural context it should not be surprising that those whose primary interests were political should look for ways to get in on the realist revolution. The romanticism surrounding the founding of the American republic, for example, had long since worn thin, particularly after it was exposed to the trauma of the Civil War. But by the early decades of the twentieth century, the search for social facts had begun to express itself, on both sides of the Atlantic, in the development of a philosophy in the social sciences that would ultimately prove hostile to the realist projects. Positivism distinguished itself from theological or metaphysical conceptions of the world by laying claim to positive knowledge of human affairs. Represented by Rudolf Carnap, Carl Hempel, and Ernst Nagel in the United States and Karl Popper in Great Britain, this approach emphasized the continuity of all science, including the social sciences and history. A central element of their thinking has been referred to as the law-explanation orthodoxy (Outhwaite 1987). At its simplest, this is the view that all science is the search for explanations that take the form of general laws. This view is grounded in Hume's theory of causation "according to which all we can ever observe is the 'constant conjunction' of events" and that this is "all we need to know for empirical science to be possible" (7).

This new logical positivism, however, presented both an opportunity and a challenge to realism. The obvious opportunity was to focus one's attention on perceived objects and events and to build, on that observational base, a superstructure of universals that a realist might choose to regard as more real than the underlying experiences. Our perception of social facts is, after all, subject to the inaccuracy of observation or the imprecision of operationalization for which the social sciences are notorious. The logical positivists, however, help us avoid any inferiority complex by reassuring us that we actually are inferior. They very kindly let us off the hook by dismissing questions about the true nature of social forms—reducing them to the status of mere definitional matters. But notice the bitter that accompanies this particular sweet. Ontological questions, questions about what exists, have thus been resolved into either formal postulates of a theory or meaningless metaphysics. What room

remains, then, for the realists' actually existing universals? Or, indeed, for the values associated with social progress and political reformism?

Political realism, if it is have any vitality at all, clearly must not acquiesce in this trivialization of ontology. But how should it be answered? To begin to understand how political realism has approached the problem, we begin with a classical formulation. According to Brian Leiter, classical realism is a reconstruction of a long-neglected perspective on questions of moral, political, and legal theory (Leiter 2001a). Classical realists accept three basic doctrines. First, they subscribe to a *naturalism* that holds "there are certain (largely) incorrigible and generally unattractive facts about human beings and human nature." Second, they hold to a *pragmatism* that assumes "only theories which make a difference to practice are worth the effort." Third, they adopt a *quietism* based on the view that any normative theorizing that fails to respect the limits imposed by the facts of human nature is "idle and pointless" and that it is better to keep quiet than "to theorize in ways that make no difference" (245). Before discussing how classical realism manifests itself in the more particular forms of legal realism and realism in international relations theory, let us examine these three conceptual elements more closely.

What does it mean to say that human nature is an incorrigible and unattractive fact? To begin, if we mean by incorrigible that human nature is not subject to change, then we have said very little. Ignoring the possibility of intentional genetic manipulation, which we should not ignore (Habermas 2003a), if we take the point seriously it tells us nothing. Even over the course of geologic time, no species transcends the limits of its genetic potentiality. If we reduce that potentiality to a sufficiently definitive present state such that the label "human nature" makes sense, pointing out that it is constant adds nothing to our understanding of it. If by incorrigible, however, we simply mean that human nature is not subject to control, then the argument is not only refuted by our every social experience but it is also inconsistent with the very idea of having the kinds of theoretical arguments that realists wish to have. If humans are literally beyond any control, then the ideas of law, politics, and social science are of no practical (one might say pragmatic) utility and to even discuss them is a waste of time.

If we argue for an intermediate position that human nature can be controlled but never corrected, then the appropriate response is both "so what" and "how do you know"? From a pragmatic point of view, it is quite enough to govern people's behavior and leave their underlying per-

sonae unaffected. That we have knowledge of both those underlying personae and the abstract model of which they are representations can be assumed (as classical realists do) but not proven (as both pragmatists and logical empiricists would require). Finally, and incongruously, the judgment that human nature is an unattractive fact assumes both its incorrigibility and our ability to imagine it otherwise. From what vantage point could something that is immutable be regarded as unattractive? It is difficult to see how we would even begin to make sense of such an idea, much less couch it in theoretical terms that would make it anything other than the kind of useless theorizing that classical realists claim they wish to avoid.

Passing over the element of pragmatism, to which we shall ultimately return, the realist's commitment to quietism is worthy of closer but not lengthy examination. Recall that the idea behind quietism is that any normative theorizing that is inconsistent with human nature (in all its incorrigible and unattractive glory) is "idle and pointless" (Leiter 2001a, 245). It is therefore better to keep quiet about normative matters than to engage in theorizing that makes no difference. But if human nature is truly incorrigible, then how could we ever assess it in normative terms? If we are trapped by our nature, then our actions are not appropriate subjects for normative theorizing at all. What humans do is just what humans do, and there is nothing more worthwhile to say about it normatively, any more than it makes sense to condemn a cat for eating meat or a cow for walking on four legs. That, in fact, is what at least one classical realist has concluded. Leiter has argued that, "given what human beings are really like, one should not expect moral claims or normative theory to have much impact upon them: either people are such that they won't answer to moral demands, or they are such that moral theory will not affect them" (248). Theorizing, then, should be "essentially descriptive and explanatory, rather than normative" (248). But even this limited kind of theorizing is problematic. A descriptive theory, to be a theory at all, must do something more than describe. Ultimately, the only explanation that a realist could add regarding any instance of human behavior is that it is consistent with human nature. Reduced to its logical form, the explanation for any human action *a* in response to circumstance *c*, is that when confronted with circumstances such as *c*, human beings manifest such behaviors as *a*. No amount of regression through the causal chain will ever produce any different, or more informative, result. That being the case, quietism is an entirely appropriate attitude to adopt. When asked why George Bush

invaded Iraq, the clear-thinking realist will simply shrug his shoulders and smile a knowing smile. But is that what real realists do?

The volume of the literature in legal realism and in the realist school of international relations suggests very strongly that the quietism of classical realism has not translated well into practice. Having made so encompassing an assertion as that moral theorizing "furnishes no motive, and creates no motivation" and that "motive and motivation have to come from outside morality" (Posner 1999, 7), one might expect an author to fall silent. Silence would be especially appropriate if the author has also attributed all human behavior to a single and invariable force such as self-interest. If both of those things are true, there is literally nothing more to be said, except perhaps that all human interactions are greater or lesser forms of direct or indirect coercion. That, in fact, is one interpretation of much else that realists have had to say. But here we are getting ahead of ourselves. At this point it is necessary to divert from our main line of questioning and explore the manifestations of realism in law and international relations. We will then be prepared to return to the pragmatist element of realism, discussion of which we have postponed.

Legal Realism

The impression one gains of legal realism depends to a significant degree upon which of its advocates one reads. Some take a flat, descriptive approach to their topic while others display a level of rhetorical flourish not usually associated with the work of lawyers. At its most basic, legal realism is no more than a rejection of the formalism and conservatism that dominated legal philosophy in the nineteenth century. It can trace its origins back to Oliver Wendell Holmes Jr.'s claim that "the life of the law has not been logic: it has been experience" (Holmes [1881] 1991, 1). On that same page, Holmes added that "law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." This argument, radical for its time, inspired a group of American legal scholars led by K. N. Llewellyn (1962) and Jerome Frank (1963), among others, to reject the notion that the law was a complete and autonomous system of socially neutral rules and principles that judges merely applied to cases as they presented themselves. In the hands of these legal realists, the law no longer presented questions of logical consistency but, rather, of socially desirable outcomes.

A less modest and moderate form of legal realism emphasizes the intuitive sense of justice brought to cases by judges. For instance, Frank quoted Judge Chancellor Kent who described his approach to cases in the following way. First, said Kent, he made himself "master of the facts" and "I saw where justice lay." Then, "when I sat down to search the authorities," Kent said, "I almost always found principles to suit my view of the case" (Frank 1963, 104). This emphasis on the intuitive sense of justice possessed by judges led to the exciting, if unfortunate, rhetoric of the early realist movement, which claimed that there was actually no such thing as law, that law is merely a set of predictions about what judges will do, or that law is simply a matter of what the judge had for breakfast (Dworkin 1986). We should, however, eschew these more inflammatory statements of the realist view in favor of the most plausible one that can be found, so that if we eventually decide against realism we will not have merely succeeded in demolishing a straw man.

We take the work of Brian Leiter to be the strongest contemporary statement of legal realism. The core claim of legal realism, in Leiter's view, is that judges respond primarily to the stimulus of the facts of a case rather than to the rational demands of a system of legal rules (Leiter 1997, 277). This does not require us to conclude that law doesn't exist because, as every attorney knows, what counts as a fact in any case is a function not only of the actual historical events and the predisposition of judges but also of the operation of "secondary" rules (or rules of adjudication) that focus the attention of judges on one set of events rather than another (Hart 1994). Even if we wished to deny the existence or importance of primary laws (rules of legal obligation), we would have to concede that adjudication is rule-governed behavior, and that at least in the minimal sense it is what contemporary linguistic philosophers would describe as a language game. Without at least that sense of legal order, there would quite literally be nothing we could say about the actions of judges. We would be unable to designate some actions as adjudication and exclude other actions from that category. Even an inquiry into the morning eating habits of judges would be pointless because we would lack the linguistic and conceptual tools necessary to discuss the adjudicatory significance of eggs and oatmeal.

A few additional points are necessary. First, Leiter's understanding of realism sets that doctrine against the sort of formalism that views judges as automatons, acting out the inescapable consequences of a deterministic system of normative law. Second, Leiter's core claim is intentionally

behaviorist in character. It directs our attention away from internal mental states, beliefs, and desires, focusing instead on the role of facts in triggering adjudicatory responses (Leiter 1997, 277–279). Leiter's realism differs from what he characterizes as the received view, which consists of the idea that judges exercise unfettered discretion to reach results based on their personal tastes and values and that they use legal rules and reason only as post-hoc rationalizations of their actions. Our ability to predict with fair accuracy what judges will do belies the idea that their actions are truly unfettered. Our ability to discern patterns in the actions of judges as a group suggests that whatever forces constrain their behavior, they are of sufficient generality and commonality that they are potentially accessible to systematic inquiry. Indeed, something like Leiter's twin theses of determinism and generality would seem to be essential if legal realism is to exist as a tradition of inquiry with any content whatsoever.

Leiter has conceded, however, that legal realism has suffered telling criticism (Leiter 2001b)—in particular, H. L. A. Hart's critique of realism as a form of rule skepticism (Hart 1994). By demolishing the predictive theory of law (that law is merely a prediction about what a court will do), Hart is widely perceived to have cut the legs from under realists who deny that legal rules bind the decisions of judges in any important way. The form that rule skepticism takes is, however, subject to some variation. Hart first describes it as a claim that "talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them" (138). This view Leiter usefully characterizes as conceptual rule skepticism, because it has to do with our understanding of what the very concept of law means (Leiter 2001b). Hart also discusses another sort of skepticism, one that offers a theory about "the function of legal rules in judicial decisions" (Hart 1994, 138), which Leiter characterizes as empirical rule skepticism. Empirical rule skepticism is, generally speaking, the view that legal rules have no inherent meaning or significance. They are only generalizations about what courts do when confronted with particular sets of circumstances. Leiter claims that "Hart never offers any argument against empirical rule skepticism" (Leiter 2001b). Hart does, however, use language that might lead one to a different conclusion.

In discussing the sources of support for empirical rule skepticism, Hart first claims that the skeptic is "sometimes a disappointed absolutist" who has discovered that legal rules are "not all they would be in a formalist's heaven." He suggests that some people adopt this view not because legal rules are literally meaningless, but because they want legal rules to be

moral and ethical absolutes (elements of the real world that entirely determine judicial actions for moral rather than prudential reasons) and when these rules fall short of that, they conclude that they mean nothing at all. Hart adds that "it does not follow from the fact that such rules have exceptions incapable of exhaustive statement, that in every situation we are left to our own discretion" (Hart 1994, 139). He also attributes empirical rule skepticism to realists having confused the question of whether an action manifests acceptance of the binding character of a rule with the psychological question of what thought processes led a person to that acceptance. The fact that a psychological process is sometimes intuitive does not render it inexplicable.

Moreover, in Hart's view the most important factor in showing that our intuitive actions involve obeying rules is "that *if* our behavior is challenged we are disposed to justify it by reference to the rule." Hart adds that "the genuineness of our acceptance of the rule may be manifested not only in our past and subsequent general acknowledgements of it and conformity to it, but in our criticism of our own and others' deviation from it" (Hart 1994, 140). It would make no sense to claim that an action was unjustified simply because it went unquestioned. Nor would it be sensible to argue that the justification a person offered of their action could be written off simply because they might be lying. "Tests for whether a person has merely pretended ex post facto that he acted on a rule are, like all empirical tests, inherently fallible but they are not inveterately so" (140). Some further empirical premise would be required to justify that conclusion. In response, it appears that political realism can offer only the assumption that human nature is incorrigible and unfortunate. But this would seem to be too heavily freighted with normative content (dare one call it a violation of the quietist moratorium on moral theorizing?) to function well as an empirical premise of the sort required.

Realism in International Relations

International relations (IR) realism has found expression in variety of ways. In fact, this is probably more true of IR realism than it is of legal realism. Here we will focus on three constituent elements of IR realism; *statism*, *anarchism*, and *utilitarianism*. (Earlier in this chapter we briefly explored a fourth element, *positivism*.) Each of these elements is characterized not by a single definition, but by a range of meaning arising from its application.

Statism, at the most general level, is the view that international relations consists of the relationships among states. This can be asserted with varying degrees of force. In its most limited form, this can mean merely that states consider themselves to be the ultimate ends of international relations (Schwarzenberger 1951). In response to this, one can only observe that any egoist would make the same argument, and if statism is reduced to official egoism it seems at once less surprising, less interesting, and less important. At the other end of the spectrum, it is argued that state interests provide the spring of all international action (Waltz 1979). This formulation at least suggests that the state is the necessary and sufficient component in any explanation of international events. Between this point and official egoism there is an intermediate form of statism.

The intermediate formulation is that the state is the central, but not the sole, actor on the international stage (Frankel 1996; Keohane 1986). Additional content is provided to this view of statism through various observations and premises that can most accurately be characterized as sociological. There is, first, the idea that humans face one another primarily as members of groups (Schweller 1997). This view can be extended by adding the element of conflict. If social and political relations are inherently conflictual, then approaching these relations as a member of a group can be viewed as an adaptation with significant survival potential (Gilpin 1996). This would seem to be sufficient warrant for statism if we interpret that idea as embodying an assumption that the important unit of social life is the collectivity, and on the international level the most important collective actor is the state because these actors recognize no collectivity above them (Smith 1986).

Anarchism, like statism, has a range of possible meanings. At its simplest and least taxing, as an element of IR realism, it is nothing more than the assumption that states possess military capabilities that allow them to hurt one another if they choose to do so (Mearsheimer 1990, 1994–1995). Beyond this fundamental observation, one might add ideas associated with power. It is hard to dispute the fact that states tend to seek power and to calculate their interests in terms of power (Keohane 1986). No state can ever be certain that another state, even an ally, will not exploit its military weakness (Mearsheimer 1994–1995). The logical conclusion is that power relationships will be the fundamental feature of international affairs (Gilpin 1996). But many, if not most, realists take this line of thinking one step further.

If one adds to the fundamental importance of power in international relations the assumption of an ineradicable tendency toward evil (Smith 1986), an entirely new sense is given to the idea of anarchism. If conflict is an essential rather than contingent feature of international relations, then the realist should resist the temptation of identifying the moral aspirations of any particular nation with any universal moral laws that might be thought to govern the universe (Morganthau 1978). Indeed, if Morgenthau is correct in arguing that politics is governed by objective laws rooted in an essentially evil human nature, then politics is not and cannot be a function of ethics. Necessity and reasons of state will always trump morality, and the power of reason is so weak that humankind is incapable of transcending the international war of all against all (Schweller 1997). When this version of anarchism is appended to virtually any form of statism, utilitarianism becomes nearly unavoidable.

Utilitarianism is, to put it simply, the view that states participate in the international system as utility maximizers—they pursue their material power interests to the virtual exclusion of any other concerns. At the outset, the realist stipulates that the most basic motivation driving state behavior is survival (Mearsheimer 1994–1995). Realists assume that international relations can be understood by the rational analysis of competing state interests defined in terms of the constituent elements of state power (Smith 1986). The necessities involved in the pursuit of state power result from the unregulated competition of states over the resources that support the existence of power. Rational calculation based on an understanding of those resources and the means by which they are converted to competitive advantage allows state actors to plan their course of action and it allows observers of international affairs to predict those actions. Success of these actions is understood as strengthening and preserving the state, and success in those terms is the ultimate test of state policy (Waltz 1979).

If pursuit of power is as ubiquitous and inescapable as realists take it to be (Smith 1986), certain other views would seem to follow. From an analytical perspective, it would seem reasonable to conclude that theory does not lead to practice, but practice leads to theory. At the moral level, politics cannot be a function of ethics. Ethics must follow and serve politics (Carr 1946). All that there is to understand about the use of force in international relations is, therefore, its utility (Frankel 1996). This leads to the chilling conclusion that law and morality can never rise above the

level of apologetics and that any action thought by a state to be necessary for its self-preservation is justified (Schwarzenberger 1951).

Few of realism's adherents are still willing to go so far. Most would readily concede that if the postwar tendency toward naïve idealism justified the cold shower of realism, it is now equally important to cool the overheated rhetoric of an unrestrained cynicism (Schwarzenberger 1951). A reflection of this moderation has been the move away from the "classical" realism of Morgenthau in the direction of the structuralist perspective of "neorealism" (Waltz 1979). Rather than seeing power as an end in itself, some neorealists "see power as a possibly useful means, with states running risks if they have either too little or too much of it" (Waltz 2008, 79). Other neorealists still see states relentlessly seeking power, not for its own sake but because the international system creates powerful incentives to do so "by taking advantage of those situations when the benefits outweigh the costs" (Mearsheimer 2001, 21). Perhaps the most significant implication of this trend is a reduced reliance on (or abandonment of) the concept of an incorrigible and negative human nature in favor of a perspective that locates the source of aggressiveness in the structure of the international system (Herz 1976). Neorealists have recognized that it is unhelpful for their analytical perspective to be viewed as an immoral doctrine that can be used to excuse the worst forms of violence humankind has so far devised (Gilpin 1986).

So where does this leave our critique of political realism? At a minimum, it raises a significant doubt about the usefulness of realism's core assumption regarding human nature. Moreover, it leaves us still in need of some perspective on the role played by pragmatism in the superstructure of political realism.

Pragmatism and the Nature of Humankind

If the realists in international relations have abandoned their commitment to the idea of an incorrigible and negative human nature, perhaps their reasons go beyond the obvious problems with their public image. The concept of human nature is exactly the kind of abstract object the reality of which realists wish to not affirm. It is, in their view, an atemporal, non-natural object comparable to the objects of mathematical knowledge (Katz 1998). A nominalist might well reply that "human nature" is merely a label for an indeterminate set of characteristics that we have observed in human behavior. So here we have again the very nearly eternal

dispute among philosophers about what actually exists. Should our attitude about the abstract concept of human nature be "realist" or should it be "realistic"? We hasten to add, however, that this is not a dispute that we actually need to resolve, particularly if we, like IR realists, fancy ourselves to be pragmatists.

Returning to Leiter's formulation of political realism (which he characterized as "classical realism"), recall that he included pragmatism among realism's essential elements. Here we find pragmatism taken to be the view that "only theories which make a difference to practice are worth the effort: the effect or 'practical pay-off' is the relevant measure of value in theoretical matters" (Leiter 2001a, 245). The ability of neorealists in international relations to give up the abstract concept of human nature for a more theoretically useful and politically palatable focus on the influence of institutions betrays exactly this kind of pragmatism. Were he able to offer an opinion, we suggest that John Dewey would congratulate them for outgrowing a philosophical dispute we were never destined to resolve. The ontological status of international institutions is, of course, another matter for a future debate. But a consistently pragmatic approach would be fully able to shift our attention again if the structural focus of neorealism becomes cumbersome or simply outlives its usefulness.

The demise of human nature as an immutable object of our social terrain also offers a new perspective on the third element of realism identified by Leiter. Quietism, he suggested, was the only reasonable approach to theorizing that failed to respect what he took to be the incorrigible facts about human nature (Leiter 2001a). But if, as card-carrying pragmatists, we abandon the idea of immutable and determinative human nature, what do we have to be quiet about? Are we not free to "moralize" human nature as Habermas (2003a) has urged us to do?

Technological change in the fields of production and exchange, communication, and transportation, as well as our military and medical capabilities, have all required changes in normative regulation in support of the resulting social transformations. By enlarging the scope of human choice, science and technology have formed an evident alliance with the fundamental credo of political liberalism—that all citizens are entitled to an equal opportunity for autonomous direction of their own lives. These technical advances also create the social space in which we can achieve an ethical self-understanding of the species, allowing us to recognize others as autonomous persons who are the authors of their own life histories. Technological control of human nature (through genetic manipulation,

behavior modification, and other techniques) is only the most recent manifestation of our persistent tendency to extend the range of our control over our natural environment (Habermas 2003a).

If our future is to be largely about continuously remaking our own nature, then "quietism" on the subject is singularly inappropriate. Moreover, the "naturalism" of classical realism has become a wholly inappropriate attitude, not because it is suddenly wrong but simply because it is no longer useful.

So the last man standing on political realism's team is pragmatism. The rest of realism turns out to be a set of questions that were never answerable or useful. In the best pragmatist tradition, realism must outgrow them. If, however, pragmatism is to be our guide to a more human future, can it offer us a form of politics that is both robustly democratic and scalable? That is, can we deploy pragmatic realism on a global scale? To answer these questions, or even begin the process of answering them, it will be necessary to excavate the foundations of pragmatism in much the same way we have realism.

3

"Dewey Defeats Truman": Pragmatism versus Pluralism in Deliberative Democracy

Around 1990 the theory of democracy took a definite deliberative turn. Prior to that turn, the democratic ideal was seen mainly in terms of aggregation of preferences or interests into collective decisions through devices such as voting and representation. Under deliberative democracy, the essence of democratic legitimacy should be sought instead in the ability of all individuals subject to a collective decision to engage in authentic deliberation about that decision.

—John S. Dryzek, *Deliberative Democracy and Beyond*

The emergent theory of deliberative democracy holds many attractions for those who have grown frustrated with the limitations of interest-group liberalism. In the world imagined by deliberative theorists, the mechanisms and institutions of interest aggregation (voting, parties, interest groups) are to be supplemented by processes that allow for "genuinely thoughtful and discursive public participation in decision making." These new direct approaches to democracy, it is hoped, will lead to policies "more just and rational" than those produced by existing representative practices (Baber and Bartlett 2005, 3). But, as with democrats generally, deliberative democrats have often blunted their swords though disagreements among themselves.

Elsewhere we have cataloged many of the points of disagreement among deliberative democrats (Baber and Bartlett 2005). In doing so, we identified five conceptual dimensions that can be used to understand the issues at stake. These dimensions include

1. the prerequisites for successful political deliberation,
2. the style of reasoning appropriate to political deliberation,
3. the role of self-interest in political deliberation,
4. the role of experts in political deliberation, and, finally,
5. the standard of success for political deliberation.

Using this analytical scheme, we described three general models of deliberative democracy. These we have characterized as *full liberalism*, *ideal discourse*, and *public reason*.

In comparing these three models, one noteworthy observation is that deliberative democrats take different approaches to dealing with the underlying reality of political pluralism. As one might imagine, all deliberative democrats accept, indeed celebrate, the fact that modern democratic societies are highly pluralistic. But after the cheering dies away, the celebrants are left with a hangover in the form of a nagging doubt about how much pluralism a coherent political system actually can tolerate. To borrow a phrase from Habermas, pluralism presents the challenge of developing a pragmatics of social interaction that is appropriate to deliberative democracy (Habermas 2001c). The task is to specify a form of "communicative competence" (75) within which participants in deliberative discourse can put forward their claims and assess the claims of others. For Habermas, this competency is achieved when "the democratic procedure is institutionalized in discourses and bargaining processes by employing forms of communication that promise that all outcomes reached in conformity with the procedure are reasonable" (Habermas 1996, 304). According to Habermas, no one has worked out this view more energetically than John Dewey (304).

It is ironic that the deliberative democrat who has had the most to say about pragmatism generally, and about John Dewey in particular, is the German, Jürgen Habermas. Whereas John Rawls mentions Dewey only in two footnotes in *A Theory of Justice*, Habermas refers to Dewey repeatedly in at least eight of his major works. It might be that pragmatism is so much a part of the life-world of American philosophers that they hardly notice its influence anymore. But whatever the reason, the influence of pragmatism may well be the greatest underacknowledged debt owed by deliberative democrats. It may also be that a satisfactory resolution of the quandary of pluralism will continue to elude deliberative democrats until that debt is honored. We think it entirely likely that unless deliberative democrats, like IR realists, take more seriously their roots in pragmatism, a triumph of their ideas in the political world of policy and problem solving will elude them as well.

In pursuit of a more satisfactory understanding of the relationship of pragmatism to political realism, and a better account of the relationship between pragmatism and deliberative democracy, we will apply to the prag-

matist approach to politics the same five-part analytical framework we used in our previous research. We will take John Dewey as our representative pragmatist because, as is well known, he had far more to say about politics than Charles Peirce or William James or Oliver Wendell Holmes Jr. We will then suggest how this pragmatist model can advance the deliberative agenda—reconciling differences among its advocates here, extending its reach there. But as a preliminary step, it will be useful to also apply our analytical framework to the practice of aggregative democracy, against which both Dewey's pragmatism and contemporary deliberative democracy can be seen as reactions. And as our avatar of aggregative democracy we take the foremost analyst of interest-group liberalism, David Truman.[4]

The Conceptual Structure of Aggregative Democracy

To take a single scholar as representative of so vast a literature as that associated with the idea that politics is about the aggregation of interests is, of course, unfair both to the chosen representative and to those others who are overlooked. There is, however, a practical reason for doing so. One of the recurring issues in the deliberative democratic literature is how to take account of pluralism, both as a social fact and as an organizing principle of politics and government. For example, various accounts of social pluralism have played an important role in the choices of deliberative theorists among the basic decision-threshold requirements of plurality rule, general consensus, and unanimity (Baber and Bartlett 2005). Yet in the form of interest-group liberalism, pluralism provides deliberative democrats a target for their criticisms of both the quality of political life and the performance of governing institutions. Thus the leading advocate of what he calls "strong democracy," Benjamin Barber has identified the interest-group scholarship of David Truman as the "modern locus classicus" for the pluralist model (Barber 2004, 144).

In applying our analytical framework to Truman's interest-group liberal theory of politics, certain allowances need to be made. For example, we have characterized our first point of comparison as the "prerequisites of successful political deliberation." Clearly, use of the term *deliberation* to describe the objective of politics is inconsistent with Truman's basic approach. We will, therefore, allow ourselves to describe the conceptual elements that constitute our framework in more general terms in this section than we have elsewhere.

Prerequisites for Successful Politics

For Truman, anyone active in politics is striving for power, either as a means in serving some other ends or for the satisfactions associated with the possession of power itself. The key prerequisite to success in this effort is the "development and improvement" of access to the "key points of decision" in government. These factors are the common denominators of the tactics of all interest groups (Truman 1951, 264). In order for this contest to proceed in an orderly way, any polity requires a set of "rules of the game" that are associated with some "minimal recognition" of the claims of other groups (524). That recognition results from the existence of others who are affected by one's actions and who are aware of those consequences. This awareness is "the basic attitude or opinion" necessary for the existence of an interest group (218). The existence of such a widespread "censoring and restraining" force might be taken as evidence of some "harmony in the body politic" (516). That assumption, however, would be unwarranted. In fact, without the multiple and conflicting memberships in actual and potential groups that characterize modern societies, "it is literally impossible to account for the existence of a viable polity such as that in the United States or develop a clear conception of the political process" (514). With reliable rules of engagement and a wide diversity of interest groups with which individuals can affiliate, neither shared cultural commitments nor equality of political resources are required for a successful political process to be sustained.

Appropriate Style of Reasoning

Is "reasoning" even an issue in interest-group politics? In a way, it is. In the practice of interest-group politics, manipulating the attitudes and opinions of others is the fundamental form of human interaction. Indeed, shared attitudes and opinions are the foundations upon which interest groups are built (Truman 1951, 33–34). The major ways political actors can manipulate the attitudes and opinions of others are through the use of economic power and propaganda. Economic power can be converted into political power only at a significant discount (258) and it is occasionally found to be illegal. So as a general matter, the preferred approach is propaganda. But political advantages in the area of propaganda are unstable for a variety of reasons (261). Understood as an attempt to control the behavior of others "by the manipulation of words and word substitutes," propaganda is inherently problematic. For example, the line between education and propaganda often seems entirely arbitrary. On the one hand, in

Truman's view, "to promote a favorable attitude toward individualism would be education in the United States, but propaganda in the Soviet Union." On the other hand, "to train people in the principles of aerodynamics would be education in both places." And lest some moral commitment to science should be assumed, the characteristic of aerodynamics that is important here is that it is "accepted by the society under examination" (223). In fact, "as a social process . . . propaganda is no more a matter of morals than is the process of buying and selling" (222). The reasoning involved in interest-group politics is, therefore, entirely strategic in character.

The Role of Self-Interest

In Truman's view, human behaviors and experiences "cannot even be described, much less accounted for, in isolation" (Truman 1951, 17). Human interests are, therefore, inescapably a group phenomenon. Moreover, no individual is "wholly absorbed" in any one group to which he belongs. Only a fraction of his attitudes are expressed through any one such affiliation (157). Accordingly, those involved in political activity pursue a diversity of interests, both personal and group (335). Interests, therefore, serve a variety of important roles in the political process. They form the basic motivations that bring people into the political process (47–52). They generate the shared attitudes and opinions that form the basis for group affiliations (16–23). And they create a network of cross-cutting and countervailing affiliations that give rise to the rules of the game (348–350). Self-interest, therefore, is the very essence of politics for the interest-group pluralist and it is a group phenomenon by its very nature.

The Political Role of Experts

For Truman, the role of the expert in politics is twofold. First, the very nature of contemporary political issues lends a special importance to the policy inputs originating in the scientific community. "The development of atomic power, the increasing recognition of the importance of basic research in all the sciences, and the increased importance of military considerations in American politics, to mention only a few changes, have combined to give organized scientists a greatly augmented political role" (Truman 1951, 64). This is not merely to say that expertise provides important bargaining chips for interest groups to whatever extent science lends empirical support to their respective arguments. Truman goes on to characterize the scientist as the "functional descendant" of the ancient

shaman. The activities of both shamans and scientists "consist of techniques for adjustment to the environment fully as much as do those of the farmer, the weaver, and the bricklayer." All of these occupations deploy skills that are "parts of different group patterns and their resulting attitudes and behavioral norms" that identify them as interest groups in themselves (26).

The Standard of Political Success

Interest-group politics does not have to produce grand syntheses. According to Truman, in developing a group interpretation of politics "we do not need to account for a totally inclusive interest, because one does not exist" (Truman 1951, 51). The great task of politics is what it always has been. It is to maintain the conditions under which a multiplicity of organized interests can pursue their objectives without undermining the viability of the governmental system (524). This is made easier by the fact that "violation of the rules of the game normally will weaken a group's cohesion, reduce its status in the community, and expose it to the claims of other groups" (513). There is no necessity to actually adjudicate the validity of competing group claims. Each can realize the benefits that their guile and resources provide. No particular level of agreement, among either groups or individuals, is required. It is necessary only that the contestants continue to play. And the game as a whole is intended only to produce a "dynamic stability" permitting an ongoing process of gradual adaptation that will avoid "domestic or international disasters" of such severity that they completely discredit the system (535).

Pragmatism as Democratic Theory

John Dewey has been described as a "halfway modernist" who "sensing the implications of modernism did everything possible to avoid its conclusions" (Diggins 1994, 5). Taken as a reaction to the modern world, modernism can be viewed as the consciousness of what we presume to have once had but now have lost. "Knowledge without truth, power without authority, society without spirit, self without identity, politics without virtue, existence without purpose, history without meaning" (8); these were the felt absences of Dewey's time. They are gaps between nature and spirit that philosophy has tried to bridge since before Plato, but that Dewey was convinced had no practical bearing in daily life. Problems such as these are ultimately abandoned precisely because they are not important to

human concerns. "We do not solve them, we get over them" (Dewey 1973b, 41).

For Dewey, it is of special importance to the development of a decent form of politics that we get over problems of this sort. In his view, the harsh conditions of the predemocratic and prescientific world stemmed from two philosophical premises that lay behind the dualisms posed by modernism. These premises are that "the object of knowledge is some form of ultimate Being which is antecedent to reflective inquiry and independent of it" and that "this antecedent Being has among its defining characteristics those properties which alone have authority over the formation of our judgments of values" (Dewey 1929b, 69). Dewey's conception of truth serves as a refutation of these two premises—premises that unless overcome would prevent us from realizing his vision of a unique individualism with a distinctive moral element. In contrast to Truman and others who obsess about pluralism, Dewey's primary commitment is to the integrity and inherent value of the *individual*. He would not count as a bargain any politics that does violence to the integrity and inherent value of the individual even if it comes wrapped in democratic clothing (which is all elections and universal suffrage necessarily are). Creating relatively open public institutions and securing the vote for all adults, admirable as these accomplishments are, will not serve our needs fully because, alone, they do not promote an individualism that expresses equality and freedom "not merely externally and politically but through personal participation in the development of a shared culture" (Dewey 1929a, 119). This fundamental concern is the backdrop against which Dewey's approach to our five points of comparison can best be understood.

The Prerequisites of Successful Deliberation

The challenges to achieving a successful democracy are, in Dewey's view, "not solved, hardly more than externally touched, by the establishment of universal suffrage and representative government" (Dewey [1935] 2000, 39). These are certainly important preconditions for democracy, but they are far from sufficient. Popular government may have been successful in creating a form of democratic public spirit, but its "success in informing that spirit" has not so far been great (Dewey [1927] 1954, 207). Any liberalism that "intends to be a vital force" has as its primary work "first of all education, in the broadest sense of that term" (Dewey [1935] 2000, 63). The challenge to democracy then becomes extending that form of organization "to all the areas and ways of living, in which

the powers of individuals shall not be merely released from mechanical external constraint but shall be fed, sustained and directed" (40). To say that the first object of a renascent liberalism is education is to indicate that its task is to "aid in producing the habits of mind and character, the intellectual and moral patterns, that are somewhere near even with the actual movements of events" (65–66). This task has dimensions that are individual, social, and institutional.

The individualism inherent in the American approach to democracy has often been viewed as problematic. From the concerns of *The Federalist* papers through those of the public choice theorist, an excessive preoccupation with the individual has been taken to be a practical obstacle to effective government (H. Richardson 2002). Dewey, on the other hand, is unprepared to sacrifice anything of the individual to the collective. He goes so far as to suggest that the choice we are offered between individual and collective interests is a false one. After all, Dewey reminds us, "all valuable as well as new ideas begin with minorities, perhaps a minority of one" (Dewey [1927] 1954, 208). Beyond the level of the individual, liberalism has to "assume the responsibility for making it clear that intelligence is a social asset . . . clothed with a function as public as its origin" in concrete social cooperation (Dewey [1935] 2000, 70). The importance of this task goes beyond merely laying claim to the advantages that cooperative inquiry offers. It provides an important form of protection for freedom of inquiry itself. "As long as freedom of thought and speech is claimed merely as individual right, it will give way, as do other merely personal claims, when it is, or is successfully represented to be, in opposition to the general welfare" (69). Just as our collective success is dependent upon our success as individuals, individuals cannot succeed in isolation. The power of thought "frees us from servile subjection to instinct, appetite, and routine, it also brings with it the occasion and possibility of error and mistake" (Dewey [1910] 1997, 19). All the fear and lack of confidence that gather about our own thoughts, "cluster also about the thought of the actions in which we are partners" (Dewey 1929b, 6). Resolution of these doubts is, obviously, a collective endeavor, requiring a particular form of reasoning.

The Style of Reasoning Appropriate to Deliberation

To learn to be fully human, in Dewey's view, is to "develop through the give-and-take of communication an effective sense of being an individually distinctive member of a community; one who understands and appre-

ciates its beliefs, desires and methods, and who contributes to a further conversion of organic powers into human resources and values" (Dewey [1927] 1954, 154). The advent of modern democracy has made this process "primarily and essentially an intellectual problem, in a degree to which the political affairs of prior ages offer no parallel" (154). The pressing need of democracy is the "improvement of the methods and conditions of debate, discussion and persuasion . . . freeing and perfecting the processes of inquiry and of dissemination" of the conclusions reached (208). This can be accomplished by applying "the method of discrimination, of test by verifiable consequences . . . in all the matters, of large and of detailed scope, that arise for judgment" (Dewey [1935] 2000, 40).[5]

Dewey focuses on the collaborative and participatory character of science more than on the particulars of its methodology. What is important is that "we shall discriminate between beliefs that rest upon tested evidence and those that do not, and shall be accordingly on our guard as to the kind and degree of assent yielded" (Dewey [1910] 1997, 27). What is required is "approximation to use of scientific method in investigation and of the engineering mind" in our collective "invention and projection of far-reaching social plans" (Dewey [1935] 2000, 75). It is not necessary for Dewey that "the many should have the knowledge and skill to carry on the needed investigation" but, rather, that they "have the ability to judge of the bearing of the knowledge supplied by others upon common concerns" (Dewey [1927] 1954, 209). The role of the public, is, therefore, to yield its assent to the conclusions that have been drawn by communities of scholars consistent (in the general view) with the cannons of their respective disciplines. Given the proper education, Dewey thought all citizens capable of becoming democratic experimentalists "who would see to it that the method depended upon by all in some degree in every democratic community be followed through to completion" (Dewey [1935] 2000, 81).

The Role of Self-Interest in Deliberation

To understand how so well-educated and widely experienced a person as Dewey could be so optimistic about democracy, it is essential to appreciate his views about self-interest, expertise, and the relationship between the two. According to Dewey, "majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is merely majority rule" (Dewey [1927] 1954, 207). The driving force behind our collective activities is, of course, personal. But in that there is reason for neither shame nor pessimism. The problem bears the seeds of its solution. After

all, it is the interactive effects of people pursuing their self-interests that create the public. It is the "indirect, extensive, enduring and serious consequences of conjoint and interacting behavior" that calls into existence a "public having a common interest in controlling these consequences" (126). And this public is more than merely social.

All interactions among individuals are social in character. But the public carries with it an inherent problematique, an awareness of the need for coordination of activity and reconciliation of difference. In other words, public activity is more than mere interaction. It is a form of problem solving (Dewey [1927] 1954, 12–17). The method of democracy, understood as that of "organized intelligence," is to bring the conflicts among interests into the open where their "special claims can be discussed and judged in the light of more inclusive interests" than are represented by any of them separately (Dewey [1935] 2000, 81). Popular government, therefore, can be understood as a form of collective inquiry. It is "educative as other modes of political regulation are not. It forces a recognition that there are common interests, even though the recognition of what they are is confused; and the need it enforces of discussion and publicity brings about some clarification of what they are" (Dewey [1927] 1954, 207). Self-interest is not, therefore, an evil to be avoided. It provides the motivation, agenda, and raw material for public interaction in a participatory democracy.

The Role of Experts in Deliberation

If it is our objective to develop a fully participatory democracy, its citizens in constant pursuit of a consensus regarding those beliefs warranted by the facts, what role should we imagine for scientists and other technical experts? For many democrats, deliberative and otherwise, the very topic of the expert's role in political decision making creates unease (often bordering on queasiness). In the modern age, they sense that "rule by experts," lurks around every corner. They may, in fact, be correct. One does not have to lose sleep over the military-industrial complex to worry that we may trade away too much of our democracy for the effectiveness that experts offer. Dewey shared these concerns. "No government by experts," he argued, "can be anything but an oligarchy managed in the interests of the few." The masses must always have "the chance to inform the experts as to their needs" (Dewey [1927] 1954, 208). This is more than a gesture in the democratic direction; it is an epistemic necessity.

Any class of experts, regardless of their disciplinary foundation, inevitably becomes so "removed from common interests as to become a

class with private interests and private knowledge, which in social matters is no knowledge at all" (Dewey [1927] 1954, 207). Expertise is most readily attained in "specialized technical matters, matters of administration and execution which postulate that general policies are already satisfactorily framed." In light of the fact that experts become a specialized class, "shut off from knowledge of the needs they are supposed to serve" (206), their role at the macrolevel of policy cannot be great. In a participatory democracy, "expertness is not shown in framing and executing policy, but in discovering and making known the facts upon which the former depend" (208). The challenge for experts is "no longer merely technological applications for increase of material productivity, but imbuing the minds of individuals with a spirit of reasonableness, fostered by social organization and contributing to its development" (Dewey [1935] 2000, 39). It is not, therefore, an act of anti-intellectualism for citizens to question or even reject the input of experts. It is not necessary that the many should have the knowledge and skill to carry out the necessary inquiries. It is sufficient that they have "the ability to judge of the bearing of the knowledge supplied by others upon common concerns" (Dewey [1927] 1954, 209).

The Standard of Success for Deliberation

For what might advocates of deliberative democracy reasonably hope? Is democracy nothing more than an expedient, a rationalization for the strong to assert themselves? Or does nature itself, as it is uncovered and understood by our best methods of inquiry, sustain and support our aspirations for something more? For Dewey, democracy is "a wider and fuller idea than can be exemplified in the state even at its best" (Dewey [1927] 1954, 143). From the standpoint of the individual, democracy consists in having a "responsible share according to capacity in forming and directing the activities of the groups to which one belongs and in participating according to need in the values which the groups sustain." From the standpoint of interest groups, democracy involves the liberation of the potentialities of members of the group "in harmony with the interests and goods which are common" (147). So democracy is about empowerment of citizens both as individuals and as members of the myriad groups in which they affiliate. The free give-and-take that democratic politics offers is valued because of the "fullness of integrated personality" that it promises (148). Moreover, when viewed as an expression of social intelligence, democracy addresses our need to unite "earlier ideas

of freedom with an insistent demand for social organization" and to achieve a "constructive synthesis in the realm of thought and social institutions" (Dewey [1935] 2000, 39).

But what threshold should we require ourselves to reach? Is it sufficient, as the interest-group liberal might argue, to achieve a stable governing coalition that perpetuates the social and economic system? Or should we join with the most demanding of the deliberative democrats and hold out for unanimity based upon what we regard as correct reasons? The appropriate objective of democracy at the level of the individual is, for Dewey, relatively easy to describe. It is to "develop through the give-and-take of communication an effective sense of being an individually distinctive member of a community; one who understands and appreciates its beliefs, desires and methods, and who contributes to a further conversion of organic powers into human resources and values" (Dewey [1927] 1954, 154). But what hurdle must the polity clear for its decisions to deserve the label "democratic"? The only answer that can reasonably be formulated is likely to leave many unsatisfied.

For Dewey, democracy is a search for consensus but "consensus demands communication" (Dewey [1916] 1944, 5). Whenever our participatory processes fall short of achieving the necessary level of consensus, there is no alternative but to hold to our method and to continue our inquiry. It is in this sense that Dewey famously observed that "the cure for the ailments of democracy is more democracy" (Dewey [1944] 1916, 146). Persistence in the methods of participatory democracy is justified by the fact that it is simple defeatism to "assume in advance of actual trial" that such methods are incapable of "either further development or of constructive social application" (Dewey [1935] 2000, 86). Simple majority rule is, of course, an important improvement on the various oligarchies of the past. But to satisfy ourselves with that is to make "the better . . . the enemy of the still better" (73). The further improvements in democratic inquiry that Dewey envisions are both institutional and individual.

Concluding that the existing level of social intelligence is insufficient to our common tasks is unreasonable until "secrecy, prejudice, bias, misrepresentation, and propaganda as well as sheer ignorance are replaced by inquiry and publicity" (Dewey [1927] 1954, 209). This obviously requires both ongoing reform of the processes of democratic inquiry and continued education of the public for political participation. As long as the communication processes of democratic inquiry continue, "all natural events are subject to reconsideration and revision; they are readapted to meet the

requirements of conversation, whether it be public discourse or that preliminary discourse termed thinking" (Dewey [1929] 1958, 132). It is unwarranted ever to admit that we have failed to achieve understanding as long as this kind of communication can be sustained. Moreover, education of citizens for democratic inquiry is never complete. The "unregenerate element" in humanity persists. It shows itself whenever the methods of coercion replace the "method of communication and enlightenment." It manifests itself "more subtly, pervasively and effectually" when the "knowledge and instrumentalities of skill which are the produce of communal life" are employed in the service of interests "which have not themselves been modified by reference to a shared interest" (Dewey [1927] 1954, 154–155). So there is no threshold for success in deliberation because the deliberative project is never finished: a commitment to its process is its product. And, as with democracy, the cure for what ails deliberation is more deliberation.

The Pragmatic Value of Pragmatism

What lessons of practical value might a deliberative democrat draw from subjecting pragmatism to this exercise in philosophical taxonomy? The benefits of exploring the rich relationships between pragmatism and deliberative democracy are limited only by the energy and imagination of democratic theorists. But we would be remiss if we did not at least indicate what we take to be some particularly fruitful lines of continued investigation. These we associate with the ideas of truth, consensus, and scalability.

Truth

The contemporary pragmatist Richard Rorty (1995) poses the question, is truth a goal of inquiry? Rorty admits to having swung back and forth between "trying to reduce truth to justification and propounding some form of minimalism about truth." The *reductionist* view would deny that asserting something to be true is a rather unimpressive claim. It is merely to say that a proposition can legitimately be asserted as the result of some identifiable process of inquiry (Rorty 1995, 282). The *minimalist*, on the other hand, might account for our use of the term *truth* as follows. All of our propositional utterances share a "fundamentally rational pattern" that all rational creatures must share. This rational pattern makes "the same pattern as truth makes, and the same pattern that meaning makes. You cannot have language without rationality, nor either without truth"

(284). So in the minimalist view, all one claims when one characterizes an assertion as true is that it comports with the manner in which the terms comprising it are properly used.

We assume, with Rorty, that nearly a century of analytic philosophy has moved us beyond the idea that there is a mind-independent truth, the measure of which is the correspondence of our ideas to an unmediated external reality. So which of these pragmatic theories of truth is now to be preferred? The reductionist view would be consistent with Peirce's view that reasoned inquiry had little to say about morality, politics, and "all that relates to the conduct of life" (Peirce [1898] 1997, 29). For Peirce, truth was that opinion "which is fated to be ultimately agreed to by all who investigate" it and "the object represented in this opinion is the real" (45). This theory of truth limits our use of that concept to an ideal situation in which all investigators are members of an epistemic community, the archetype of which is modern empirical science. Dewey referred specifically to this formulation as "the best definition of truth from the logical standpoint which is known to me" (Dewey 1938, 345). Yet Dewey had more to say about truth.

Without ever adopting William James's language about truth having a cash value, Dewey showed far more interest than did Peirce in truth as a lived experience. Dewey illustrates his approach to truth in a discussion of knowledge as intention. Choosing an example that hardly seems coincidental, he says that knowledge of hunting dogs is essential for one who intends to hunt with hounds. But there is a difference between "knowledge of the dog, *qua* knowledge," and the use of that knowledge in the "fulfillment experience" of the hunt. For Dewey, "the hunt is a *realization* of knowledge; it alone . . . verifies, validates, knowledge or supplies tests of truth" and "makes faith good in works" (Dewey 1973a, 180). What faith does our "hunt" redeem? The confidence in our knowledge of hounds, perhaps. But more important, the hunt itself is a form of redemption. The hunt can be seen as an expression of faith that there exists something out there for us capture. "The fulfilling experience is not knowledge itself" (181). The tests of truth or falsity present themselves as significant facts "only in situations in which specific meanings and their already experienced fulfillments . . . are intentionally compared and contrasted with reference to the question of the worth, as to reliability of meaning, of the given meaning or class of meanings" (185).

Rorty would recognize Dewey's emphasis on truth as a function of meaning. It speaks of the minimalist position in which Rorty eventually

finds himself. But it does not reduce our inquiry (our hunt) to a nominalist exercise in parsing language. Neither is the search for truth a solitary enterprise. After all, one unsuccessful day of hunting tells us very little. We do not need to question our knowledge of dogs or our choice of hunting grounds merely because we caught nothing today. But if our entire hunting party is frustrated day after day, we must consider the faith we have taken to the field. A consultation among the hunters is in order. The same logic applies to our hunt for solutions to problems confronting our democracy. It is not necessary that each of us should have all the "knowledge and skill to carry on the needed investigations" but, rather, that we have "the ability to judge of the bearing of the knowledge supplied by others upon common concerns" (Dewey [1927] 1954, 209). As with any hunt, a consensus among the members of the party is more likely to be correct than any individual's intuition. This certainly places us at a great remove from the aggregative democrat's struggle for minimum winning coalitions among interests defined entirely in terms of the self. But how seriously must we take this notion of consensus?

Consensus

Elsewhere we have noted that deliberative democrats take a variety of positions on the question of how nearly we must approach unanimity for collective decisions to be legitimate. Theorists we have characterized as advocates of "full liberalism" would require plurality rule with an acceptance on the part of the minority of the fairness of the underlying decision process, as evidenced by their acquiescence in the result and their willingness to continue in deliberation. Habermas is more demanding. He requires that deliberations produce a wider general consensus based upon reasons that are shared among those participating in an ideal discourse situation (where participants yield only to the force of the better argument). Yet Habermas does not go so far as Rawls, who insists on unanimity based upon reasons that are not only shared but also right, in that they satisfy the condition of being fully public and comport with our shared principles of justice. But both Habermas and Rawls go beyond the point of full liberalism, agreeing that something approaching unanimity based upon something beyond private interest is necessary for decisions to be both democratic and legitimate (Baber and Bartlett 2005, 29–58).

What might pragmatism do to help us bridge, or at least better understand, this disagreement among deliberative democrats? Recall that both

Peirce and Dewey take as their model for reasoned inquiry the practices of modern science. They view truth (or its nearest approximation to which we can reasonably aspire) to be the product of collaborative investigation. They appear to differ, however, on how large a community of minds can be involved in that inquiry. Whereas Peirce is far from sanguine about the intellectual potential of average citizens, Dewey regards training in both the substance and methods of science and the procedures of democratic politics to be essential for everyone. For Dewey, any education that failed to include such training would also fail to "acknowledge the full intellectual and social meaning of a vocation." For democracy to flourish, every citizen requires an education that includes "instruction in the historic background of present conditions; training in science to give intelligence and initiative in dealing with material and agencies of production; and study of economics, civics, and politics, to bring the future worker in touch with the problems of the day and the various methods proposed for its improvement" (Dewey [1916] 1944, 318). More important still, vocational education would provide citizens the "power of readaptation to changing conditions so that future workers would not become blindly subject to a fate imposed upon them" (319).

Dewey's emphasis on the intimate and essential relationship between democracy and education is evidence of his belief that full participation in every aspect of our collective existence is the birthright of every individual. It is also evidence of the extent to which Dewey regards democracy as a face-to-face proposition. American democracy, Dewey observes, was "developed out of genuine community life . . . the township or some not much larger area was the political unit, the town meeting the political medium, and roads, schools, the peace of the community were the political objectives" (Dewey [1927] 1954, 111). Political life in this style is the form of democracy that Dewey believed was educative. Through such give-and-take, we learn to be fully human by developing "an effective sense of being an individually distinctive member of a community" (154). This view runs counter to a tendency among deliberative democrats to move away from the small-group techniques associated with deliberative polling and various forms of participatory local planning. These face-to-face procedures are often regarded as limited in the range of their application, a complaint to which we shall return. More troubling, however, is the allegation that the immediacy of this form of deliberation places at a disadvantage those who have been isolated historically and are, as a result, less able to assert themselves in heterogeneous groups.

This last criticism, pressed most insistently by those known collectively as *difference democrats*, might actually be said to prove Dewey's point. If in any political community there are minorities of the population who have historically been disenfranchised, it is likely that the method of their oppression has been exclusion from the processes of "converting organic powers into human resources and values" (Dewey [1927] 1954, 154), which are the very business of the political community. If our communities are ever to be guided by a "genuinely shared interest in the consequences of interdependent activities" (155), the politics of those communities must be fully participatory and the decisions they reach consensual. This insight helps us make sense of Habermas's declaration that "truth is public" (Habermas 1971, 100). It is not only the interest of the minority that is at stake. So too is the accuracy of the process of inquiry itself, which depends upon the effective participation of the entire community. It makes no more sense to exclude or excuse members of minority groups from the discursive rigors of deliberative democracy than it would to leave them out of the jury process or alter its essential character for the sake of their comfort. That truth that results from the involvement of all serves the legitimate and genuine interests of all.

To return to the problems of applying face-to-face methods of deliberation beyond the level of the local community, this is a challenge to which Dewey was fully attentive. Dewey, it is true, claimed that "democracy begins at home, and its home is the neighborly community" which must always remain "a matter of face-to-face intercourse" (Dewey [1927] 1954, 213, 211). But he was fully aware that democrats would accomplish little if their insights proved worthless when one traveled from one town (or state, or nation) to another. Happily enough, however, there is a silver lining to the cloud of scalability. Since the foundation of genuine democracy is in the local community, there is no difference in principle between transferring our democratic insights to the national level and deploying them internationally. Neither task is easy. But our success in achieving the former, whatever its extent, should give us grounds for hope about the latter.

Scalability

If, when we think of deliberative democracy, we think only about planning cells in Germany, policy juries in Britain, or watershed partnerships in the U.S. Pacific Northwest, we will have trouble imagining how international politics can ever be genuinely democratic. It is quite true that

the deliberative mechanisms and approaches with which we are most familiar have been developed primarily at the local level. Dewey would tell us, of course, that this is neither surprising nor is it grounds for pessimism. He, too, recognized that "for the world's peace it is necessary that we understand the peoples of foreign lands." He went on to wonder, however, how well we truly understand those next door to us. The chances of our regard for distant peoples being effective seemed remote to Dewey where there is no close community experience "to bring with it insight and understanding of neighbors" (Dewey [1927] 1954, 213).

Our eventual success in globalizing deliberative democracy depends at least as much on our expectations as it does our choice of deliberative mechanisms. To expect that the global community will approach atmospheric warming in the same intensely participatory way as loggers and environmentalists might collaborate to manage the resources of a single river basin is obviously unreasonable.[6] But the collaboration of interested parties in resolving specific political disputes is neither the only nor necessarily the best model for deliberative democracy. Indeed, many theorists have begun to wonder whether the disinterestedness of the policy jury might not be preferable to negotiations among stakeholders. If this question is posed at the national and international level, interesting possibilities are opened.

As an example, deliberative polling in the United States and policy juries in Europe have tended to ask participants to formulate broad-ranging positions on specific policy questions. An example is By the People, a citizen deliberation project of local organizations, PBS stations, community colleges, and MacNeil/Lehrer Productions, staged around the United States to discuss such issues as health care, education, and the future of the Social Security program (By the People 2005). Participants in jury-sized groups read preliminary material, listen to expert presentations, and discuss various policy alternatives with one another. There is no particular attempt to get participants to reconcile, or even to recognize, the underlying normative differences that lead to their divergent preferences. The choice among general policy alternatives is more important than any consensus on values that might (or might not) support that outcome.

Imagine, however, a situation in which deliberative juries were presented with a hypothetical (but concrete) dispute and were then asked to produce a decision for one of the parties to that dispute. The jury would be required only to produce a concise general statement in support of their ruling, in much the same way that an administrative law judge

explains his or her regulatory decision. One such ruling would be an interesting, perhaps fascinating, curiosity. A hundred decisions of this sort would constitute a useful database on the normative issue captured by the hypothetical. Add a few hundred more decisions, spread across many communities, and you would have the raw material necessary for an analytical exercise such as the restatements produced by the American Law Institute that capture and organize the normative consensus we generally refer to as the common law.

If analytical work of this sort were done, and done well, there would be nothing to prevent administrative law judges from looking to the results as persuasive authority in their rulings (both adjudicatory and rule making) on actual policy questions. The implementation of those rulings by policy experts in government would then be guided, for the first time, by normative premises of a distinctly democratic pedigree. Here we have a model for integrating popular wisdom of direct and participatory politics with the analytical capacities of epistemic communities in a way that Dewey might well recognize as a next step in the evolution of democracy.

Dewey or Don't We?

Notice that the model we have described can be implemented at any level of government, from the local to the global. At the national level, this approach answers to the general description of "decentered democracy" provided by James Bohman. In his view, modern democracies are becoming decentered along two different dimensions, "at the microdimension of the sort of processes that constitute decision making and at the macrodimension of the scale of interlocking levels of governance from cities to regions, to global society" (Bohman 2004b, 39; 2004a). At the international level, this form of democracy is consistent with Anne-Marie Slaughter's concept of the disaggregated state system. In this account, the world increasingly consists of governments "with all the basic institutions that perform the basic functions of government—legislation, adjudication, implementation—interacting both with each other domestically and also with their foreign and supranational counterparts" (Slaughter 2004, 5). As both Bohman and Slaughter have pointed out, one of the essential facts about globalization is that it reduces the practical value of state sovereignty in myriad ways. This can either undermine our control over the forces of production and distribution, as many fear it will, or it can enhance our ability to choose our own fate, as Dewey hoped one

day we would. At the very least, distinguishing these two alternate futures gives us a finer appreciation of all that is at stake in our choice between a democracy that is merely aggregative and one that is genuinely deliberative.

At this point, however, one might reasonably ask how important it is for us to choose between a future politics of aggregation and one of deliberation. Could we not continue indefinitely with the "better than average" results that interest-group liberalism provides? Is there no risk with the direction that pragmatism and deliberative democracy propose that we take? To answer these questions, and relate them more clearly to the problems of international norm building, it will be helpful to summarize the argument we have made to this point.

The pragmatist foundations of deliberative democracy rest upon three basic insights. First, both Dewey and contemporary deliberative theorists have recognized that a certain level of agnosticism is helpful in human affairs. Whether they opt for Rawls's veil of ignorance, the restrictions of Habermas's ideal speech situation, or some variation of these, deliberative democrats would agree that the idea of truth as something one brings to a conversation makes less sense than the idea of truth as something that results from conversation. Where Dewey advanced what he referred to as a "coherence" theory of truth and Habermas prefers the term *consensus*, they would have agreed that truth is not the correspondence of our thinking to some external absolute. Rather, we can most intelligently regard as true those ideas that cohere in a system of ideas that achieves our intentions. This approach to the subject places in philosophical context the commitment to intellectual growth and an experiential style of reasoning that we have discussed here.

Second, both pragmatism and deliberative democracy share a common view of language and its use. For Dewey, our use of language, our ascription of meaning to utterances, was an instrumental issue. He argued that "to find out what facts, just as they stand, mean, is the object of all discovery; to find out what facts will carry out, substantiate, support a given meaning, is the object of all testing (Dewey [1910] 1997, 116). Carrying the insight further, Habermas has suggested that our use of language evidences a number of different intentions. Although it is true that we often use language in an attempt to represent reality to one another, language is a product of that intention, not a feature of reality. We also use language to establish and assess the legitimacy of interpersonal relations as well as to disclose to others the elements of our own subjectivity

(Habermas 1979). This instrumental view of language, which Rorty has characterized as antirepresentationalism, leads to an understanding of inquiry that emphasizes a continual process of "recontextualization" rather than an ever-closer approximation to reality (Rorty 1991). This attitude is most clearly evident in the pragmatist intention toward the development of ever more inclusive concepts of our shared interests and an approach to discourse that makes use of, but does not defer to, assertions of expert knowledge.

Finally, pragmatism and deliberative democracy share a common view of law and its purposes. Dewey observed that the laws of the state are "misconceived when they are viewed as commands (Dewey [1927] 1954, 53). Law, he argued, is the result not of sovereign authorship but of "widely distributed consequences, which, when they are perceived, create a common interest and the need of special agencies to care for it" (54). As Holmes warned, law is not a formal system of logic but, rather, an organic product of our shared experiences (Holmes [1881] 1991). This formulation is suggestive of Habermas's (1996) later description of law as having the character of both a fact (consisting in the institutions of its interpretation and enforcement) and a norm (deriving from a commitment to the shared interest that gave rise to it). This approach encourages us to accept, indeed embrace, the "large arbitrary and contingent element" in law as well as law's "plausible identification with reason" as a limit to those troubling elements (Dewey [1927] 1954, 55). This perspective lends a clearer sense to the pragmatist view that the measure of success in all of our deliberative inquiries is a continuing tendency toward higher levels of consensus.

These three philosophical elements (a coherence theory of truth, an antirepresentationalist view of language, and an antiformalist approach to law) are the philosophical bedrock of both pragmatism and deliberative democracy. But Dewey's liberal reformism and prophecies of social progress are not the only possible products of these philosophical positions. As Rorty has pointed out, Martin Heidegger came out of the same starting blocks, turned right instead of left, and dreamt far different dreams than those of Dewey and the deliberative democrats (Rorty 1999). The problem with pragmatism's starting points is that they appear to offer no syllogism, no process of argument, which takes us inevitably away from totalitarianism and toward reform liberalism. Pragmatists appear to be divided on what we should do about this. Some, like Peirce and Rorty, seem to conclude that pragmatism as a philosophy is a useful theory of truth

and inquiry, but can ultimately tell us little about moral and political issues. Others, like Dewey and Hilary Putnam, argue that pragmatism can (and must) guide us in our ethical commitments (H. Putnam 2004). Their imperative tone can, we believe, be traced to a concern that Richard Wolin described as the "intellectual romance with fascism" (R. Wolin 2004).

The victory of fascism over socialism throughout much of fin-de-siècle Europe is difficult to understand if it is regarded only as a matter of brute force, although it certainly was that in part. By the time Hitler stormed onto the world stage, the people of Europe had been subjected to a parade of economic dislocations and political debacles that left them groping for an escape from the social decadence and institutional decay they perceived, which were then compounded by the trauma of World War I. What they lacked, it has been argued, was a language that gave the term *good* a use more rigorous than it got in the phrase "good taste"—a language in which questioning the decisions of their political leaders was no longer a meaningless exercise (Janik and Toulmin 1973). This insight suggests that it would be unfair to attribute the rise of fascism solely to a lack of moral character and sloppy thinking on the part of average Europeans. The leadership of the left also shares some of the responsibility as a consequence of its inability to enunciate a sufficiently persuasive counterargument. Where socialism offered the abstractions of internationalism and class consciousness, *national* socialism offered the far more concrete and familiar solidarity of state and ethnic affiliation. Moreover, where socialists actually took control of governmental institutions, their willingness to play the game of parliamentary politics betrayed them to radicals of both the right and the left as false prophets of revolution (R. Wolin 2004).

What does all of this tell us about our current situation and the prospects for developing an international jurisprudence that would be both democratic in character and effective in use? One might argue that, as a century ago, we face our own fin-de-siècle. Starting with Vietnam and continuing through Watergate to the debacle in Iraq, we have witnessed what seems to be the unraveling of what had been a reasonably democratic and competent collection of governmental institutions. Add to that the mounting economic pressures resulting from globalization and the immense gulf between today's super-rich and the average citizen, and you create the conditions for a level of social and political disquiet that pollsters routinely measure and report. Then comes the terrorist. Although no one would argue that the events of September 11, 2001, were as traumatic for America as World War I was for Europe, the timing was equally

unfortunate. Is it any wonder, then, that Americans seem to want to relate to the rest of the world primarily in military terms, and the politics of ethnocentrism and xenophobia are on the rise? Where in all of this is there room for an approach to political will formation that does more than merely aggregate interests and divvy up the spoils?

Pragmatism's answer to these questions is a politics that is decentralized and experimental. It asks of citizens that they confront problems with universal implications, but not that they do so in ways that are abstract or deprive them of the context within which their languages have meaning. It allows for a form of discourse that includes both rigorous argument and the kind of inspirational storytelling that may take us beyond where argument alone can reach (Rorty 1989). Pragmatism offers an approach to politics within which it would be no less remarkable that nation-states tolerated meaningful forms of international government than that they provided for effective institutions of provincial and local government. If politics is "recontextualized" (to borrow Rorty's term) as problem solving rather than competition, the way is open for a democratic experimentalism that will provide us with both the rigorous arguments we need to test each other's policy preferences and the stories we need to tell each other in order to keep the world turning left instead of right.

In short, what pragmatism offers on the global level is the possibility of a grounded, bottom-up approach to international law, policy, and politics: an experimental perspective that gets beyond setting up questions based on false dichotomies such as liberalism (idealism) versus realism, questions of the type that Dewey suggests we outgrow rather than try to answer. The potential of any such pragmatic realism will, however, require us to confront, rather than merely assume away, some deeply held mental constructs about nation-states, democratic institutions, and law. We turn to the first of these next.

4

International Environmental Jurisprudence: Conceptual Elements and Options

A conceptual inquiry into any subject is necessarily a battle with and about words and the ways in which they have been used. This is certainly true of our present endeavor. Our premise is that in the field of international law our understanding of the world around us and our options for living within that world have been limited by our own language and the mental constructs that our language is used to represent. This is more than a matter of quibbling over words (though it may sometimes seem to be that as well). There are mental constructs, valid and useful within certain parameters, that have been distorted in ways that prevent us from gaining a clear understanding of both the challenges and opportunities of globalization. So our project is similar to, though far less expansive than, the task undertaken by John Locke in his *Essay Concerning Human Understanding* (Locke [1689] 1952). Locke characterized himself in that volume as an "under labourer" who was content in "clearing the ground a little, and removing some of the rubbish that lies in the way to knowledge" (89).

Perhaps the most important thing for any underlaborer to do is to accurately identify the underbrush that should be removed. The conceptual obstacles to a more useful (and hopeful) understanding of international law that primarily concern us are four of the constituent elements of the realist school of international relations that we identified in chapter 2:

Statism—the idea that nation-states are the only significant actors on the world stage.
Anarchism—the notion that there is and can be no over-arching normative order in international affairs.
Utilitarianism—the view that nation-states always, and to the exclusion of all else, pursue their own material interests.

Positivism—the assumption that law is the authoritative pronouncement of governmental institutions backed up by the use or threat of coercive force.

These general concepts pose at least three important problems. First, they discourage the growth of a fuller transboundary understanding of the problems that confront humankind. As an example, state court judges in the United States automatically canvass the case law of sister states for solutions to the adjudicatory challenges they confront, but they ignore even so close a geographic and cultural neighbor as Canada (Abrahamson and Fischer 1997).

Second, when combined with the emergence of global challenges to human survival and the growing insistence that governments be responsible to those for whom they act, the conceptual straitjacket of realism imposes on us what Anne-Marie Slaughter has characterized as the "trilemma" of global governance (Slaughter 2004, 10). We are confronted with the need for effective rules of global governance, enforced by government actors who do not possess the power of centralized government, held accountable by democratic political institutions that do not exist.

Third, the conceptual framework of realism disempowers ordinary people by radically distancing them from the reality of international politics. It is often considered a social duty, or even a moral duty, to be informed about world events, in spite of the fact that no one is expected to do anything about them. This apparent contradiction can be traced to the fact that our knowledge of the world is typically superficial and emotionally charged, due to the manner of its presentation (Belshaw 2001). International events are presented by a mass media that treats us to an endless parade of horrible images set just beyond our reach and produced by the selfish, lawless, and uncontrollable behavior of others.

In this chapter, we pursue three objectives. First, we will subject the first of these four conceptual elements, statism, to a fundamental reevaluation. We will assess its validity as a description of reality, as a predication about future states of affairs, and as a prescription about how matters should be. Second, we will subject statism to a critique from the dual perspectives of the deliberative democratic theorist and the environmentalist. These are perspectives on domestic and international politics that, we have argued elsewhere, are essentially complementary (Baber and Bartlett 2005). Our commentaries on the merits of anarchism, utilitarianism, and positivm will be presented incidentally, inasmuch as these elements are all to some degree implicit in statism and consequently any

separate systematic attention to them would be largely redundant of a critique of statism. Third, we will end this chapter by proposing an alternate agenda for international law, particularly in the area of environmental protection. This will not be a set of procedural or institutional reform proposals. Rather, we hope to achieve the more limited goal of spelling out the search criteria that should be used in finding international arrangements that will more effectively and legitimately govern the behavior of humans (both individually and in national collectives) and their relationship to the natural environment.

One Concept, Three Problems

The view that nation-states are the only actors of consequence on the international stage is most closely associated with the realist analysis of Hans J. Morgenthau. This is, in some ways, ironic because Morgenthau regarded the struggle for power among nations as an accident of history rather than an essential element of human nature (Morganthau 1978). It resulted from a conjunction of obsolescent institutions and selfish individuals and groups that could, he believed, be overcome through rational political reform (Morganthau 1946, 1951). Nevertheless, many later writers seemed to take it for granted that nation-states are the only appropriate focus for our study of international relations and that they are both the only source and proper object of international law (McCaffrey et al. 1998).

In turning Morgenthau's observation about the significance of nation-states into an intellectual article of faith, three steps were required. First, it was necessary to ignore or discount examples of significant impacts on international decision making produced by non-state actors. This step established the descriptive hegemony of statism in international relations. Second, it was essential to develop a theoretical construct within which states were the only significant actors and it was not reasonable to expect other actors to emerge. In other words, for statism to hold sway, it had to be strongly predictive of future patterns of influence. Finally, for statism to prevail it was important that students of international relations regard the preeminence of the state actor as actually desirable from a normative point of view. Although widely accepted, often unthinkingly, at each of these levels of necessity the unique role of the nation-state has recently been challenged in significant ways.

The Descriptive Problem

As a description of reality, statism has much to recommend it. Even those writers who are essentially cosmopolitan in orientation pay homage to the state. Daniele Archibugi has argued that the nation-state is the most successful social structure in human history, offering the hope that the benefits of full democracy may one day be realized for all humankind (Archibugi 2003). David Chandler (2003) asserts that international law derives its legitimacy only from the voluntary assent of nation-states. The international regimes and institutions that might be cited as actors of importance along with nation-states are important "not because they constitute centralized quasi-governments, but because they can facilitate agreements, and decentralized enforcement of agreements, among governments" (Keohane 2005, 244). Even the strongest advocates of international environmental regimes are compelled to admit that they are self-enforcing by nature, involving some tradeoffs in the process of their negotiation, but having no significant sanctions or inducements to comply (Barrett 1998). As strong a case for the nation-state as this all may be, however, there are significant reasons to doubt that the international arena is populated by no other entities of significance.

States are neither omniscient nor omnipotent. The small-scale nations of the past generally lived within territorial boundaries that conformed to a set of natural variables. The older human experience of a fluid and indistinct but genuine home region was gradually replaced by the arbitrary and often violently imposed boundaries of the states that we know today. In this process of consolidation, there were significant losses in our knowledge of the environment that sustains us and the nature of the social relations upon which we depend (Snyder 1998). The process of social consolidation has not stopped there. National governments are now losing their ability to formulate and implement policy within territorial boundaries that have been rendered increasingly porous by globalization, immigration, and the information revolution (Reinecke 1998). In short, there is reason to doubt whether contemporary nation-states understand their situation or control their future as they once did.

Moreover, it may not make as much sense as it once did to regard states as unitary entities. For example, heads of state play a two-level game in which they manipulate international policy to enhance their strength domestically and take advantage of domestic politics to strengthen their position in international negotiation (R. Putnam 1988). A game-theoretic analysis of the behavior of policy entrepreneurs describes their use of in-

ternational regimes to overcome resistant forces in their own legislature (Reinhardt 2003). For example, President Bill Clinton was able to blunt congressional opposition to U.S. participation in armed humanitarian intervention. His commitment to participation in international organizations increased the costs to the United States of backing down, forcing a Congress that was unwilling to accept the responsibility for undermining presidential initiative to limit itself to symbolic action (Schultz 2003). In developing nations, policy initiators use international organizations as a means of consolidating domestic reform. By empowering domestic private capital interests through participation in liberal international regimes (Keohane 2005), by raising the costs of backtracking, and by compensating elites that are out of power, they reduce the temptation to seize power by extraconstitutional means (Pevenhouse 2003). These observations suggest that our understanding of the state is in need of adjustment. The idea of sovereignty can increasingly be seen as "relational rather than insular, in the sense that it describes the capacity to engage rather than a right to resist" (Slaughter 2004, 268). So, although it would not be correct to say that the state is disappearing, it might well be accurate to say that the state is "disaggregating" (31). Taking this view suggests that heads of state, ministers, legislators, and judges play dual roles as domestic officers and as participants in transgovernmental networks that are challenging the primacy of states on the global stage.

The Predictive Problem

The idea that states may be in the process of disaggregating leads us to a discussion of the second aspect of statism, its value as a predictive construct. There are a number of reasons to doubt that nation-states will continue to dominate the global arena to the extent that they have in the past. Beyond the fact of disaggregation mentioned above, there is a clear trend in the direction of state disintegration. By this we mean the growing importance of substate units of government that are finding their way into transnational agreements. An example is the Alpine-Adria Working Group, which is an organization of sixteen subnational members from five European states that has been established to foster cooperation on cultural, environmental, and commercial matters that transcend state borders (Arend 1999). Another development that undermines the hegemony of the state as a political form is the process of regional integration. The most prominent (though not the only) example of regional integration is the European Union. Western European political organization no longer fits into the tra-

ditional state format of territorial sovereignty and exclusivity. The member states of the EU are no longer fully sovereign in the classical sense, but neither has the EU itself become a sovereign state (Waever 1997).

There is a second group of factors that challenge the preeminence of the state, those from outside the governmental sphere. First, the development of advanced communication technology associated with the more general process of globalization is breaking down the boundaries of national consciousness upon which states have traditionally been built by allowing individuals to develop a more global sense of identity (Bohman 2004a). Second, there has been a marked growth in the number of transnational organizations that exercise a parallel authority along side states in matters of technological innovation, economic management, and labor relations. This arena is populated by both transnational corporations (Strange 1996) and emerging global social movements that seek to challenge corporate interests on the world stage (O'Brien et al. 2000). Finally, and most ominously, challenges have arisen to the role of the states as the only actors on the global stage that employ coercive force. Terrorist organizations, long a plague to individual states, have globalized along with economic institutions (Held 2003).

The Prescriptive Problem

Having suggested that statism is not particularly successful as either a description of reality or as a prediction about our emerging future, it remains only to be decided whether these failings are something we should regret and try to repair. Put somewhat differently, should states remain (or once again become) the preeminent actors on the world stage? Arguments in favor of the hegemony of the state seem to fall into two general categories. First, it is argued that the state is a uniquely legitimate form of organization. This point of view is sometimes further refined to suggest that states are, at least potentially, the form of political organization in which genuine democracy stands the greatest chance of success. The sine qua non of legitimacy in the modern age is democracy, whatever that is taken to mean. Second, it is often argued that there is something particularly effective about the modern nation-state. Coming in various forms and flavors, the argument for effectiveness generally amounts to a suggestion that (communitarian and cosmopolitan theories aside) units of government either smaller or larger than the nation-state simply do not work very well as a matter of fact. Even after setting aside the questions of legitimacy and effectiveness as they apply to subnational govern-

ments, an exhaustive evaluation of these two arguments is obviously beyond the scope of this book. It is possible, however, to suggest in general terms why each argument should be regarded as suspect when used as a critique of transnational institutions of governance.

Mancur Olson observed that small groups are better suited to overcome the problems of collective action than are large ones because the benefits they realize from providing collective goods are more likely to exceed the costs and because social pressure and incentives can be used to encourage compliance rather than coercion (Olson 1965). Robert Keohane has applied the same logic to the international arena (Keohane 2005). He argues that if there were a very large number of equally small actors in world politics, the general desirability of reducing collective uncertainty through the formation of international agreements would not lead to the creation of those agreements. But the fact that the number of key actors in the international political economy of the advanced industrialized countries is small gives each state incentives to make and keep commitments so that others "may be persuaded to do so" (258). Keohane is quick to add that a single world state is not a desirable alternative because it would lead not to cooperation but coercion. In fact, "the prospect of discord creates incentives for cooperation" (215). Therefore, the legitimacy of the international system, conceived as a free association of sovereign states, resides in the fact that the only binding obligations it involves are those into which the parties freely enter.

A variation on this theme is that global government of any sort would face an unavoidable "democratic deficit." This deficit has been traced to the fact that the legislative function of government is underdeveloped at the international level (Wallace 2001). The democratic deficit is also attributed to the simple truth that as one ascends from the local to the global the voice of the people "province by province, country by country, region by region is much softer and less likely to be heard" than the voices of regulators, judges, ministers, and heads of state (Slaughter 2004, 104). Little wonder, then, that democracy is reputed to have achieved "real gains within states, but very meager ones in the wider sphere," both in terms of relations between states and the resolution of global issues in ways that respond to global public opinion (Archibugi 2003, 5). It is also clear why John Austin argued that while the happiness of a society is the aggregate happiness of its individual members, "the good of universal society formed by mankind is the aggregate good of the *particular societies* into which mankind is divided" (Austin [1832] 2000, 294; emphasis added).

The argument for state supremacy based on the effectiveness of states proceeds in a rather less grand fashion. It begins with the simple observation that a continuing respect for state sovereignty is likely to keep enforcement powers in the hands of those officials who have the coercive power necessary to ensure compliance with whatever standards of behavior are agreed to (Slaughter 2004). With respect to environmental enforcement in particular, this might be a positive rather than a limiting factor because the heterogeneous character of nature places a premium on local knowledge (Harding 1998). More generally, in a global culture of democratic experimentalism, states can ensure efficiency as well as compliance with international standards by borrowing emerging "best practices" from other international actors. In fact, such an infrastructure of decentralized learning can lead to the discovery of unanticipated goals and the means for attaining them (Dorf and Sabel 1998).

An example of how this decentralized learning can evolve is provided by the history of executive agreements negotiated between Presidents of the United States and Presidents of the European Union Commission. These agreements have generally led to ad hoc meetings between lower-level officials as well as among business, environmental, and consumer groups. These contacts have often resulted in the creation of working groups and other fluid arrangements designed to address common problems identified in the process of implementing the broader executive agreements. Although many of these informal networks were already emerging for functional reasons, the added impetus of executive agreements accelerated their development and enhanced their legitimacy (Pollack and Shaffer 2001). Observations of this sort can be offered to illustrate the continued vitality of the state as the central element of international relations. They also, however, open the door to a telling normative critique of statism as an organizing concept in international relations theory.

International networks of government officials and the nongovernmental organizations with which they interact are undoubtedly highly functional arrangements. They can "promote convergence of national law, regulations and institutions in ways that facilitate the movement of people, goods and money" in an increasingly free global economy. They have the potential to assure a "high and increasingly uniform level of protection of legal rights." And they can generate a "cross-fertilization of ideas and approaches to common governance problems" that may help improve the domestic performance of the participating countries (Slaughter 2004, 213). A chronic

lack of legitimacy, however, plagues direct international contacts at the substate level among national officials and administrators. These transgovernmental networks of government officials are part of a general shift "from government to governance" (Picciotto 1996–1997, 1039), involving the delegation or transfer of public functions to particularized bodies operating on the basis of professional or scientific expertise rather than democratic accountability. This problem of legitimacy is exacerbated by the fact that there are "tremendous asymmetries built into our current world order" (Slaughter 2004) that systematically disadvantage both peoples and issues that are disfavored by wealth, geography, and other variables unrelated to the merits of their claims. Keohane has summarized the problem trenchantly by observing that international regimes are plagued by moral deficiencies that "reflect the inequities inherent in the political and social systems of advanced industrialized countries" (Keohane 2005, 252), which are, of course, the dominant architects of those regimes. If the international agreements crafted by nation-states do no more than imprint their domestic injustices and irrationalities on the global landscape, why should we regard that as either legitimate or effective? Why should we assume that there are no alternatives?

A Deliberative Alternative?

One of the most hopeful developments in recent political theory, both for the fulfillment of the promise of democracy and for the prospects of environmental protection is the turn toward the idea of public deliberation. Given the conceptual difficulties with the assumption of state supremacy that we have discussed, it could prove worthwhile to explore deliberative democracy's potential to "repopulate" the international stage with actors other than (or, in addition to) states. Before that exploration can begin, however, it will be necessary to examine theories of deliberative democracy a bit further and to suggest how a discourse that has concerned itself almost exclusively with the domestic politics of Western democracies might be deployed globally.

In order to suggest what the deliberative democracy movement might have to contribute to international relations generally, and to the development of international environmental law in particular, it is necessary to provide some sense of how public deliberation differs from other forms of political life. To that end, it is useful to begin with two essential questions:

1. What is required for successful public deliberation?
2. What is the objective of public deliberation?

We focus our discussion of these issues on the three responses in the deliberative democracy literature that we introduced in chapter 1: public reason as advocated by John Rawls, the ideal discourse theory of Jürgen Habermas, and full liberalism as advanced by James Bohman and others.

Public Reason

Rawls's central concern is that basic political institutions be just. His classical formulation of the two principles of justice is, by now, well known to most social theorists. Justice requires, first, that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others," and, second, that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all" (Rawls 1971, 60). These are the principles, according to Rawls, that reasonable persons in the original position would always agree to. Their decision is legitimate because it is reasonable, the result of a general and wide reflective equilibrium.

Rawls specifically denies that the justification of his principles is based in any way upon systems of opinion or belief. They are no more subject, he claims, to such preferences than are the axioms, principles, and rules of inference of mathematics or logic (Rawls 1995, 141–142, 144). In offering this justification, no appeal is made to any source of authority beyond generally accepted forms of reasoning found in common sense and the settled methods and conclusions of science. As for the preferences and values of specific persons, Rawls assumes only that people subscribe to reasonable comprehensive doctrines and that there is a possibility of their forming an overlapping consensus among those doctrines. A doctrine is fully comprehensive when it "covers all recognized values and virtues within one rather precisely articulated scheme of thought; whereas a doctrine is only partially comprehensive when it comprises certain (but not all) nonpolitical values and virtues and is rather loosely articulated" (Rawls 1993, 175, 224). The existence of such doctrines is regarded as a fact about the political and cultural nature of a pluralist democratic society. Rawls further assumes that these doctrines can be used like any other facts, that reference can be made to them and assumptions can be made about them without relying on the religious, metaphysical, or moral content (Rawls 1995, 144).

Ideal Discourse

For Jürgen Habermas, public discourses succeed only under conditions of broad and active participation. "This in turn requires a background political culture that is egalitarian, divested of all educational privileges, and thoroughly intellectual" in its orientation to public deliberation (Habermas 1996, 490). Habermas makes it clear that democratic citizenship need not be rooted in the national identity of a people. But he does insist that democracy requires that "every citizen be socialized into a common political culture" (500). But what does this suggest about the social requirements of public discourse?

Habermas argues "that constitutionally protected institutions of freedom are worth only what a population accustomed to political freedom and settled in the 'we' perspective of active self-determination makes of them" (Habermas 1996, 499). But what form of deliberation does this model suggest? For Habermas, a public agreement counts as rational, that is, as an expression of a general intent, if it could only have come to pass under the ideal conditions that alone create legitimacy. Democratic society can best be envisioned as a self-controlled learning process. Any deliberative arrangements must support the presumption that the basic institutions of society and its basic political decisions would meet "the unforced agreement of all of those involved, if they could participate, as free and equal, in discursive will-formation" (Habermas 1979, 186). For Habermas, the object of deliberation is legitimation. The general problem of legitimation results from the fact that traditional world views have lost their power and validity (as public religion, customary ritual, justifying metaphysic, and unquestionable tradition). They have reshaped themselves into subjective systems of belief that serve to ensure the cogency of a capitalist and bureaucratic culture. The promise of that culture is that the exchange relationships that have come to dominate society will be legitimate because of the presumed equivalence of position occupied by parties to transactions. Thus in principle the political domination of a market economy can be legitimated "from below," rather than from above, through institutions of traditional culture (Habermas 1970, 96–99).

To the extent markets have become politicized, however, the requirement for direct legitimation of social relations, which existed in precapitalist societies, reappears in the modern era (Habermas 1970, 102). Loss of the independent power of capitalism to legitimate social relations has created a problem of circularity (Habermas 1979). States justify their actions through presumptions and procedures—namely, all of the presumptions

and procedures that constitute interest-group liberalism—that are not themselves based on any normative order because capitalist-instrumental rationality allows for none. These presumptions and procedures exist to satisfy the demands of the legitimation crisis and are accepted, not because they make sense morally or ethically, but because they serve that social function. In this sense, they are reflective (self-validating to the extent that validation is considered relevant by the established order). "The procedures and presuppositions of justification are themselves now the legitimating grounds on which the validity of legitimation is based" (185). To rationalize this apparently irrational situation is the central challenge to modern legal theory.

In Habermas's view, procedural law must be enlisted to build a legitimation filter into the decision processes of state bureaucracies that are oriented as much as ever toward efficiency. A legal norm has validity whenever the state guarantees two things at once. First, the state must ensure compliance among the population at large, compelled by coercive force if necessary. Second, the state must guarantee the institutional preconditions for the legitimate development of the norm itself, so that it is always at least possible for the citizens to comply out of respect for the law instead of fear of coercion (Habermas 1996, 38–39).

The procedures for the production of law form the only possible source of legitimacy that is not anchored in a metaphysical worldview. Procedures of democratic discourse make it possible for issues and arguments, information and reasons, to flow freely. They secure "a discursive character for political will-formation" and, thereby, ground the "assumption that results issuing from proper procedure are more or less reasonable" (Habermas 1996, 448). From this perspective, Habermas foresees that constitutional democracy will become "at once the outcome and the accelerating catalyst of a rationalization of the lifeworld reaching far beyond the political. The sole substantial aim of the project is the gradual improvement of institutionalized procedures of rational collective will-formation," procedures that do not prejudge participants or their goals (489). By rationalizing the power of markets and bureaucracies and creating the possibility that legal commands may be regarded as both social facts and legitimate norms, public discourse allows modern societies to be integrated not only through instrumental rationality but also by shared values and mutual understandings (39).

Full Liberalism

According to James Bohman, democratic deliberation is constrained by the facts of cultural pluralism, large inequities of wealth and influence, social complexity, and community-wide biases and ideologies that discourage change (Bohman 1996, 20). A fully developed system of constitutional rights is a necessary condition for successful deliberation in that it prevents the worst abuses of bias and inequity. But the political institutions created by a system of rights can become less a forum for deliberation than an arena for strategic gamesmanship. In Bohman's view, rights make deliberation possible, in part by placing limits on it. But these rights tell us nothing about what deliberation is or about how it is best conducted under the existing conditions and constraints (23–24). Bohman outlines a set of conditions under which public discourse might be expected to succeed.

Bohman's core assumption is that "a people cannot be sovereign unless they are able to deliberate together successfully and unless they have something to say about the conditions under which they deliberate" (Bohman 1996, 198). The discursive structures of deliberation, whatever specific form they take, must discourage irrational and untenable (nonpublic) arguments. It is also essential that discursive procedures be broadly inclusive, allowing for the creation of neither persistent majorities nor permanently disenfranchised minorities. To assure that the losers in any given public deliberation will continue to participate, discursive procedures must allow for ongoing revisions that take up compatible features of defeated positions or improve their chances of being heard (100).

In full liberalism, successful public discourse produces "a shared intention that is acceptable to a plurality of the agents who participate in the activity of forming it." To this Bohman adds the notion that the success of deliberation should be "measured reconstructively," that is, in light of the observed development of democratic institutions, rather than by some a priori standard of justification. These arguments, in turn, suggest the basic requirements for the legitimacy of collective decisions resulting from public deliberation. To be legitimate, decisions must result from fair and open decision-making processes in which all public reasons are given equal respect. Decisions must reflect the views of the majority, but the deliberative process must give the minority reason to continue to cooperate in deliberation rather than merely comply with the majority will (Bohman 1996, 56, 187, 241). This can suggest that the majority is a shifting coalition of interests in which every individual is included with sufficient frequency that none feels permanently disenfranchised. Or it can imply that a permanent

minority is treated by the majority with consideration sufficient to retain its commitment to the ongoing deliberation in spite of its minority status. As a practical matter, successful public deliberation will always be sustained by both of these conditions (representing pluralism and individual rights, respectively).

What do comparisons of the work of these three theorists suggest concerning the nature of public deliberation? Each of these approaches was developed from the perspective of Western domestic political experience. What Bohman requires for public discourse might be described as interest-group pluralism at its best. Citizens are entitled to use public discourse to pursue their own ends and are entitled to expect that other citizens will hold no more influence over collective processes than they themselves enjoy. Habermas would undoubtedly view this as necessary but insufficient. In his view, a shared political culture is necessary for successful public discourse. This does not have to rise to the level of a national identity. But there must be a shared commitment to the use of public reasons (reasons not derived from particular ethical or religious perspectives) in defense of positions adopted in the arena of public discourse and a commitment to testing the truth claims of competing world views. For his part, Rawls requires that fundamental decisions arise from an initial position that is purged of ethical and religious suppositions as well as any specific information about the situation of individuals in the collective arrangement being constructed. Bohman, Habermas, and Rawls, therefore, present three fundamentally different visions of what is required for successful public discourse. But what, if anything, can these theories of deliberation tell us about politics at the international level? More particularly, can they provide any insight regarding statism? Is it possible to escape the assumption that only states populate the global stage? Is it an assumption that we should even be trying to escape?

International Deliberation and the State

These three major theorists of deliberation have each had a good deal to say on the subject of international affairs. Yet none of the three provides us a direct critique of statism.

Rawls

John Rawls provided the most complete discussion of his views on international affairs in his book, *The Law of Peoples* (1999a), but he never

advanced a general theory of international relations, much less a plan for global government. *The Law of Peoples* is, rather, a conceptual exploration of what might be called the foreign policy of liberal democracy. A central premise of Rawls's approach is that the citizens of democratic countries should relate to one another as "peoples" rather than as individuals. This would seem, at first, to actually reinforce the assumption of state preeminence in international affairs. But that is not necessarily so.

Rawls is careful to point out the difference between a people and a state. Starting from his "political conception" of society, Rawls "describes both citizens and peoples by political conceptions that specify their nature." A liberal people are characterized by "a reasonably just constitutional government that serves their fundamental interests." Moreover, the citizens who comprise a people are united by "common sympathies" and a "moral nature" that they express through the state that serves them (Rawls 1999b, 23). Liberal peoples "limit their basic interests as required by the reasonable," whereas the interests of states do not allow them to be "stable for the right reasons" (29). The state is merely an instrumentality of governance, not capable of acting from any commitment to a conception of what justice requires.

It is not entirely clear why Rawls never extended his theories about the role of and relationship between citizens in a just society to develop a theory of citizenship in a global state.[7] He views his principles of justice as the results of an analytical process that logically extends from "local justice (applying to institutions and associations)" through "domestic justice (applying to the basic structures of society)" to "global justice (applying to international law)" (Rawls 2001, 11). So, then, why not allow deliberation among citizens on the international level in pursuit of international justice and a government to sustain it? Perhaps his most direct answer to that question is that a world government would "either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy" (Rawls 1999b, 36). This, of course, is the argument advanced by Immanuel Kant in *Perpetual Peace* that has shaped the thinking of political scholars for more than two centuries (Kant [1795] 1939). But it is precisely this assumption that we are interested in evaluating. Is there no global institution of government that individuals, relating to each other as citizens of the world, might aspire to establish?

The reception accorded *The Law of Peoples* has been generally critical (Reidy 2004), but not for its failure to answer our question. A number of

critics allege that Rawls's approach is insufficient to secure results that any reasonable person would support. Allen Buchanan contends that Rawls's approach cannot provide guidance for two of the most important topics a moral theory of international law must address: global distributive justice and interstate conflict (Buchanan 2000). According to Brian Shaw, Rawls fails to provide any compelling moral reason why liberal and other decent peoples would wrongly suffer a diminution of their political autonomy if they were obliged to alleviate the worst consequences of burdened peoples' disadvantages (Shaw 2005). These and other questions of distributive justice have led both Charles Beitz and Thomas Pogge to advance more egalitarian principles that apply Rawls's difference principle to the relations between peoples (Pogge 1994; Beitz 1979).

Others have focused on what they regard as an inability of Rawls's approach to deal appropriately with specific issues of justice. Anton A. van Niekerk argues that the law of peoples deals inadequately with the fundamental interest in human health and should be extended to require that catastrophic events, like the AIDS pandemic, be dealt with according to rules of international justice that require redistributions from unaffected peoples to those most disadvantaged (van Niekerk 2004). Andrew Kuper and Chris Naticchia contend that Rawls deals inadequately with human rights issues. Naticchia argues that Rawls's approach is conceptually flawed because he makes the protection of human rights a precondition for the deliberative process, the outcome of which is supposed to justify their protection (Naticchia 1998). Kuper maintains that there can be no secure minimal human rights without a right to democracy, and that as long as securing democratic rights remains a national issue—rather than a global obligation—the development of international democracy remains stunted and human rights are removed from global view (Kuper 2000).

A final group of criticisms have to do with the reasoning that Rawls has employed, rather than the results he has produced. Farid Abdel-Nour argues that Rawls's claim that both liberal democratic and decent hierarchical societies would accept the law of peoples is unfounded (Abdel-Nour 1999). Abdel-Nour contends that a hierarchical society would be willing to accept Rawls's reasoning only if its advocates (liberal democrats) were willing to intervene in that society's ethical and philosophical debates and forge the necessary overlapping consensus among competing doctrines. Shaw suggests that in order to achieve anything like distributive justice across a range of countries and cultures, some comprehensive doctrine (probably one sustaining the importance of individuals' rights)

is likely to be necessary (Shaw 2005). If this is so, it may be due to another alleged flaw in Rawls's reasoning, namely, the failure to recognize that there is a basic global structure that sustains inequity and that the populations of states are not peoples in the sense that Rawls uses the term (Buchanan 2000).

Nowhere in this bill of indictment appears the allegation that Rawls should have provided for direct deliberation among citizens on the global stage. The closest we find is an unflattering comparison, drawn by Beitz, between the law of peoples and cosmopolitan approaches that are committed to justifying and assessing social arrangements by their consequences for individuals (Beitz 2000). But even in this instance, the critic is only proposing different criteria of evaluation, not a genuinely participatory form of international democracy. Of course, Rawls's defenders are concerned to show that his focus on peoples as opposed to states is reasonable (Reidy 2004). This obviously offers little help in deciding whether Rawlsian deliberation might be transplanted from the domestic to the international level without relying entirely upon states to represent citizens.

Habermas

Jürgen Habermas's approach to international affairs is more wide-ranging and less easily summarized than is that of John Rawls. Habermas begins with the observation that national governments, whatever shape their internal profiles assume, are increasingly entangled in transnational policy networks. For this reason, nation-states are becoming ever more dependent on "asymmetrically negotiated" (Habermas 1998a, 11; 1998b, 11) arrangements designed to improve the flow of goods, capital, people, and information across national borders that are rendered increasingly irrelevant to the lives of their citizens. As a consequence, the individual's sense of identification with what might be called a national identity becomes ever more attenuated. This, in turn, threatens what has been the singular achievement of the modern nation-state—the creation and maintenance of "a new mode of legitimation based on a new, more abstract form of social integration" (Habermas 1998b, 111). The growing inability of states to cushion their citizens from the more inegalitarian consequences of globalization, together with this delegitimization of national identification, destabilizes national politics and gives new life to older forms of social integration arising from tribal and metaphysical traditions.

This rather dire picture is brightened, somewhat, by recalling what it is that nations have done well and how those successes might form the

basis for improvements in the international situation. Nations are widely recognized to be the arena in which democracy was finally able to assert itself to the fullest. Far from dissenting, Habermas goes further. He observes that "the idea that societies are capable of democratic self-control and self-realization has until now been credibly realized only in the context of the nation-state" (Habermas 2001b, 61). He further suggests that the spread of liberal democracy domestically promotes the development of domestic public spheres that eventually extend their influence across borders (Habermas 1997a) and that "the artificial conditions in which national consciousness arose argue against the defeatist assumption that a form of civil solidarity among strangers can only be generated within the confines of the nation" (Habermas 2001b, 102). Reproducing the egalitarian institutions characteristic of liberal democracies is conceivable at the global level if we can "outline new transnational procedures and institutions that reflect political opinion, and that suggest how compromise between obviously conflicting interests could reasonably be achieved within the existing global political order" (Habermas 1998a, 240). Like Rawls, Habermas rejects the project of global government, but not the development of a global domestic policy. He envisions a cosmopolitan project carried out "from a perspective that aims at harmonization instead of synchronization, without granting a false, long-term legitimacy to the temporary multiplicity of ecological and social standards" that result (Habermas 2003b, 99). The long-term objective that lends legitimacy to the process will be a "steady overcoming of social divisions and stratification within global society," which also protects the "cultural distinctiveness" that provides meaning in the lives of citizens (99).

Lest his views be thought utopian, Habermas provides the hopeful example of the European Union, a subject to which he returns regularly. The European experience is, for Habermas, the best evidence that we can eventually "develop the present loosely woven net of transnational regimes and then use it to enable a global domestic politics to emerge in the absence of a global government" (Habermas 1999, 59). In his view, the member nations of the EU have a clear incentive to form a stronger union in order to "seek a certain re-regulation of the global economy, to counterbalance its undesired economic, social and cultural consequences" (Habermas 2001a, 12).

To achieve this end, Habermas identifies three important steps. First, the creation of an identifiable European civic society is essential. A hopeful sign in this regard is the strength of the transnational movement for human

rights. This development is crucial because, where the civic solidarity of a nation-state is rooted in particular collective identities, "cosmopolitan solidarity has to support itself on the moral universalism of human rights" and the egalitarian democracy it suggests (Habermas 2001b, 108). The second requirement of a stronger European Union is the buildup of a politically oriented European public. This involves the self-awareness of a society that is "capable of learning and of consciously shaping itself through its political will," a project that the recent European experience suggests is "still viable even after the demise of a world of nation-states" (Habermas 1998b, 124). Finally, the creation of a more unified Europe will require the development of a distinctively European political culture (Habermas 2002b). This will require the creation of a "constitutional patriotism" grounded in culturally distinct interpretation of republican principles that "can take the place originally occupied by nationalism" (Habermas 1998b, 118). These developments are, in Habermas's view, already underway. They will lead, in his view, to a Europe that is "able to act on the basis of an integrated multilevel policy" on behalf of European citizens who have learned "to mutually recognize one another as members of a common political existence beyond existing national borders" (Habermas 2001b, 99).

Bohman

In formulating his approach to international politics, James Bohman navigates the waters that lie between the work of Habermas and Rawls. Bohman shows the greatest affinity for the work of Habermas, which he takes to show a greater awareness of and concern for the implications of social complexity on the development of democratic norms (Bohman 1994). Rawls, on the other hand, is criticized by Bohman for an inadequate response to problems generated by irreconcilable values grounded in deep cultural conflict (Bohman 1995). In particular, Bohman argues that recent debates about the public or nonpublic character of religiously grounded reasons for policy preferences provide a test case of the Rawlsian view of public reason. They suggest that liberal democratic theorists are intolerant in this area and fail to live up to the democratic obligation to provide justifications to all members of the deliberative community. Accommodations to religious minorities must be built into the reflective equilibrium if the democratic ideal is to be achieved through public deliberations (Bohman 2003).

It is critically important to Bohman that our view of what counts as a "public" reason for policy positions should take adequate account of the

existence of cultural pluralism (Bohman 1999a). His is an avowedly "non-ideal" theory of cosmopolitan democracy (Bohman 1999c) in that he views our public deliberations as culturally specific and embedded in a particular social milieu. This is important for both cognitive and normative reasons.

For Bohman, democracy can be seen as a form of inquiry incorporating a cognitive division of labor. Citizens both advance their own understandings of public issues and participate in the creation of norms governing the cooperation between expert agents and lay principals (Bohman 1999b). Thus the development of the social sciences has a fundamentally practical and political character. The creation of a thoroughgoing pluralism strengthens, rather than weakens, both the social scientific and political aims of this critical social science (Bohman 1999d). Beyond this cognitive significance, the development of deliberative procedures has a profoundly ethical dimension. Human freedom and social development are, for Bohman, a matter of advancements in the human powers of action, particularly the power to create and interpret norms (Bohman 2005). Without reason-responsive institutions, citizens are able to influence political decisions only indirectly by means of public actions that are purely strategic rather than aimed at consensus building. This places a severe limitation on the range and quality of citizen involvement in transnational civil society as it is represented by the activities of human rights and environmental NGOs and other citizen-based organizations (Bohman 2001). To cross the threshold of strategic action and create a genuinely democratic international public sphere, a number of developments will be required.

First, it will be necessary to create a forum in which "speakers may express their views to others who in turn respond to them and raise their own opinions and concerns" (Bohman 2004a, 133). The fundamental impetus for more democracy in the international arena lies in "a vigorous civil society containing oppositional public spheres," in which both individual and corporate actors "organize against the state or appeal to it when making violations of agreements public" (Bohman 1999c, 506–507).

Second, there must be a "manifest commitment to freedom and equality" in the communicative interaction within this forum. A republican understanding of world citizenship, emphasizing freedom from subordination, is the best and most feasible cosmopolitan ideal of freedom under current circumstances (Bohman 2001). Moreover, cosmopolitanism ought to seek democracy (not merely its functional equivalent) by pro-

moting "the conditions of equal access" to the institutionalization of citizens' interests. The object is to create "opportunities and access to political influence and an environment for decision-making in which effective social freedom is widely distributed in international society" (Bohman 1999c, 512–513).

Finally, communication in the international public sphere must address an indefinite audience (Bohman 2004a, 133–134). Communicative public interaction is fully public if it is directed at an indefinite audience and offered with some expectation of a response, especially with regard to matters of interpretability and justifiability (135). Moreover, international communicative action must aspire to a "higher order" of publicity. This involves not just the expectation of a response, but also expectations about the nature of "responsiveness and accountability to others" as well as the characteristics of a "socially structured setting" that minimizes communicative inequality. This order of publicity produces international "talk about talk" that involves deliberations about "the norms of publicity and the normative contours of the social space that is opened up by communicative interaction" (136). This is essential for the long-term prospects of an international deliberative democracy because eliminating asymmetries of communicative capacity allows the uncertainties and instabilities of democracy to be "reduced over time by repeated interactions" that are "typical among free and equal citizens" in a unified polity (Bohman 1999c, 503).

Deriving Some Principles

It remains only to suggest the general principles that deliberative democracy offers us in a search for more effective and more democratic international institutions for environmental protection. We will attempt to state these principles at a level of abstraction that will allow for their imaginative interpretation in the search for political alternatives that we wish to encourage. We do so in the hope that John Dryzek's view that "democracy and democratization may be sought across states as well as in states and against states" (Dryzek 1996, 150) will not prove to be overly optimistic.

Based on the theories advanced by John Rawls, we have described a foreign policy that might be appropriate to a liberal democratic state. Such a state affirms the fundamental importance of personal autonomy, equality of opportunity, and a level of distributive justice that assures

each individual a decent existence and the full value of his or her basic rights. It encourages a form of public reasoning in which autonomous individuals reason together under conditions of impartiality that are created by a veil of ignorance that deprives them of all but the most basic information about their shared existence. Elsewhere we have advanced the hypothesis that this political procedure might be employed to produce a form of "ethical precommitment." This we take to be the normative foundation for environmental policies like the Endangered Species Act, which establishes a set of abstract criteria that mandate specific actions under concrete circumstances (Bartlett and Baber 2005).

Our discussion of the work of Habermas reveals a form of deliberative discourse in which interested parties measure validity claims advanced under circumstances of discursive equality in which the force of the better argument is dispositive and decision by consensus is the stated objective. This ideal discourse theory provides the foundation for a theory of jurisprudence in which the possession and use of political power is legitimated by the self-imposition of laws that citizens can both comply with as facts and respect as norms. As an example of the environmental application of this theoretical approach, one might offer the tradition of environmental impact assessment (Baber and Bartlett 2005). At its most general level, environmental impact assessment is a process of public discourse in which a wide array of policy actors may participate in the evaluation of knowledge claims about the probable consequences of ecologically significant decisions. Government officials are accountable to a legal standard requiring that their decisions meet both procedural and substantive requirements that are also legitimate subjects of discussion and compromise. Moreover, opportunities for appeal to judicial review often operate to impose a de facto requirement for decision by consensus (or near consensus) by imposing high decision costs in the presence of significant dissent.

Finally, the deliberative democracy of Bohman does not require public reasoning in the tradition of Rawls. Nor does it insist that citizens necessarily share a common political culture in the sense that Habermas has discussed. Rather, Bohman envisions a discourse characterized by equality of both access and influence that emphasizes good-faith bargaining rather than a true convergence of underlying opinions. He adopts this more modest theory of deliberation in order to avoid what he regards as insensitivity to cultural diversity and the deep disagreements that it can produce. His emphasis is on a discursive process that respects the values and insights of local culture while allowing for the development of new global awareness.

This approach offers a theoretical context for what otherwise might be characterized as little more than ecological consciousness-raising (Baber 2004). Bohman's commitment to communicative equality offers at least one answer to the problem described as the tendency of international deliberation to dissolve into violence without the restraining structure of the nation-state (Mitzen 2005). Mitzen raises the entirely legitimate concern that the anarchic environment of international relations lacks the "shared normative context" that provides "decision makers the motivation for self-restraint and citizens the motivation to participate rather than withdraw or rebel" (403). The response offered by Bohman is that in the absence of asymmetries of communicative capacity, a "relatively unrestricted communication" would lead citizens to the "reasonable expectation of influencing decisions in their favor" as well as the knowledge of when their proposals would be likely to succeed (Bohman 1999c). In this way, the uncertainties and instabilities of deliberative democracy are reduced over time as a consciousness of shared interests evolves.

It might be added at this point that few interests are more obvious and intuitively shared than the need for a sustainable environment. What options might emerge in a search for, or design of, effective institutional arrangements for environmental protection that derive from these principles? What should be part of an agenda for global jurisprudential development?

5

International Environmental Law and Jurisprudence: Institutionalizing Rule-Governed Behavior

In previous chapters we critiqued the conceptual foundations of international environmental law from the perspective of the deliberative democrat. We argued that environmental protection has been held hostage to certain assumptions about the nature of international law that are, at a minimum, suspect. These assumptions include the view that international law can exist only in the form of explicit and positive agreements between states, that the global arena is characterized by normative anarchy,[8] and that the behavior of states in that arena is invariably materialistic and utilitarian. We have further indicated that each of these assumptions has a descriptive, predictive, and prescriptive character. Each purports to describe accurately the current state of affairs, asserts that matters cannot be otherwise, and alleges that alternatives are not merely unavailable but undesirable as well. In critiquing these assumptions, we have associated them with the view of international affairs generally referred to as realism.

We have dissented from this realist perspective, but we have done so without explicitly adopting the idealist alternative. We have declined to embrace that label for two reasons. Self-labeling is inherently presumptuous. But more important, we are even less sanguine about idealism's underlying assumptions. It is far from clear that humans will or can rise above their self-interests, eschew strategic and coercive behavior, and pursue normative commitments to the well-being of the species in ways that may require putting aside some of the pleasures of personal autonomy. We argue only that this more optimistic collection of assumptions about the potential of international politics should not be dismissed out of hand, especially by democratic theorists who hold similarly high hopes about domestic political life. If, however, we are to assess the real potential for an approach to international law that is both more democratic and more ecologically sustainable,

we must begin with some basic appraisals of our experiences to date with environmental protection at the global level.

Charlotte Ku and Paul Diehl (1998) argue that international law has a dual character. It is, in the first instance, an operating system. On the one hand, it provides "the framework for establishing rules and norms, outlines the parameters of interaction, and provides the procedures and forums for resolving disputes" among the nations that participate in its interactions (6). On the other hand, international law is also a normative system that "provides direction for international relations by identifying the substantive values and goals" that may appropriately be pursued by members of the global community (7). Ku and Diehl's analysis tracks quite closely the jurisprudence of deliberative democracy as espoused by Habermas. In his view, law has the dual character of fact and norm (Habermas 1996). To be legitimate, law must assert itself in the world as an empirical fact. An imperative that does not actually govern behavior may qualify as exhortation, but it cannot reasonably be called a law. It must also be possible, at least in principle, for the addressees of law to regard its requirements as possessing the quality of a norm to which they can be committed. Otherwise, the putative law is nothing more than coercive power thinly disguised. So Habermas might be expected to agree with Ku and Diehl that international law must function acceptably well and must be able to at least claim to have produced normatively desirable outcomes.

At this point, however, our project runs the risk of being misunderstood. Focusing our discussion of international law on the functional requirements imposed by its role in institutionalizing rule-governed behavior among states might identify this as an exercise in structuralist social anthropology or sociological systems theory. Habermas characterizes these models of society as "subjectless rule systems" (Habermas 2001c, 16). They conceive of society as a structure of either symbolic forms or channels of information flow produced by underlying systems of rules that are impersonal and anonymous. Neither approach is suited for giving an account of how structures of intersubjectively binding meanings (including norms) are generated. That task requires resort to the analysis of communicative action (Habermas 1987). Here we are concerned with the generation of intersubjective situations of speaking and acting together—that is, with "the form of the intersubjectivity of possible understanding" (Habermas 2001c, 17). In adopting this approach, we ultimately concern ourselves with explaining both the gener-

ation of shared meanings and their institutionalization in purposeful action. If the substantive content of international environmental law cannot be rendered sensible at this level, then the idealist vision of international affairs is cast into doubt.

In the remainder of this chapter, we discuss examples of how rule-governed behavior has emerged from the supposedly chaotic maelstrom of state activity and whether that behavior rises to the level of communicative action in pursuit of environmental protection. In order to maintain focus and to ground our discussion in the reality of existing international organizations, we identify these behaviors by reference to their sources in judicial, executive, and legislative institutions. In doing so, we hope to create an agenda for further action and research designed to enhance the existing democratic tendencies in international politics and extend their potential reach into new areas of collective will formation.

A cautionary note: we assume that readers have a basic understanding of the depth and scope of the common law tradition, enough to appreciate that common law is not a vast collection of dusty precedents but, rather, the living and breathing heart of modern adjudication and legislation in the English-speaking world. Common law is not merely law operating in the spaces between statutes; indeed, virtually all of the statutory law produced in the last two centuries in the United States can be seen as just common law doctrine working itself out in the form of first-order generalizations.[9]

Adjudication and the "Common Law" of the Environment

It may at first seem incongruous to speak of an international common law. After all, in *Southern Pacific v. Jensen* the great expositor of common law, Justice Oliver Wendell Holmes Jr. chided certain of his fellow jurists for forgetting that the common law is not a "brooding omnipresence in the sky" but rather the "articulate voice of some sovereign or quasi-sovereign that can be identified" (*Southern Pacific Co. v. Jensen* 1917, 207). This might be taken to mean that no international common law is possible, in that no sovereign institution exists at the global level. But in a letter to Harold Laski, Holmes limited the scope of his own observation by saying that for a judge to try to impose his own abstract understanding of the common law on the state is "like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist" (Posner 1992, 235). The problem is not philosophical, but practical.

The judges of a state cannot forget that they derive their authority from the state, even if the content of the law comes from elsewhere. As Holmes argued in *The Western Maid* case, when an issue is said to be governed by foreign law, that is only a short way of saying that the sovereign has taken up a rule suggested from without and made it part of its own structure of rules (*The Western Maid* 1922).

How, then, are we to make sense of the idea of an international environmental common law? Perhaps we can clarify the matter by examining the case that is most widely referred to as an example of that law. *The Trail Smelter Arbitration* case (*United States v. Canada* 1938; *United States v. Canada* 1941) involved a controversy between two governments over damage that had occurred and was occurring in the territory of one that was alleged to be the consequence of behavior of an actor situated in the territory of the other. The Consolidated Mining and Smelting Company of Canada, Ltd. operated a zinc and lead smelter at Trail, British Columbia, on the Columbia River just north of the international border. The smelter emitted sulfur dioxide that was carried by the prevailing winds down the river valley into the state of Washington, where it damaged farms and timberlands. The law of the time in British Columbia held that actions for damages to foreign property were local actions that had to be brought in the state where the property was located. Yet the residents of Washington had no local recourse because their state had no "long arm" statute that would have allowed it to assert jurisdiction over a foreign party.

The Canadian and American governments referred the issue to the International Joint Commission (IJC), established by them in 1901 under the Boundary Waters Treaty, requesting that the IJC investigate the matter and issue a report. The unacceptability of that report to the United States led to the negotiation of a convention between the two countries establishing a tribunal that would arbitrate the case. The particulars of the tribunal's judgment are of limited interest in the present discussion. More important is the analytical approach taken by the tribunal and the general reasoning offered in support of its decision.

The tribunal's essential holding is clear. The principle of state sovereignty cannot be understood to include the right of one state to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another. When there is clear and convincing evidence that damage of this sort has been caused, compensation can be awarded and a preventative system of regulation imposed. Despite the lack of any general

jurisdiction or any means of enforcing its edict, the tribunal confronted the issues of the case in a direct and determined manner. Perhaps its members were emboldened by the fact that the tribunal had little to lose. At worst, its ruling might have been ignored. But a close reading of its decision hints at more.

The tribunal argued that "as between the two countries involved, each has an equal interest that if a nuisance is proved, the indemnity to damaged parties for proven damage shall be just and adequate and each has also an equal interest that unproven or unwarranted claims shall not be allowed" (*United States v. Canada* 1941, 685). The opinion also noted that in the creating the tribunal, each country had acknowledged the desirability and necessity of a permanent settlement of the dispute. Language such as this might easily be written off as either dicta or diplomatic doublespeak. But if taken seriously, these phrases are rich with meaning. They suggest that the interests of the countries involved are separate from and more encompassing than those of the Canadian industrialists and the American loggers. Furthermore, the focus on proof of damages and the need for finality of judgment evidences a primary concern for a continuing and orderly relationship that transcends the issues at hand. The assertion that the interests of the countries are complementary (indeed, symmetrical) implies an equality of status that refutes the realist notion that power is the defining quality and final arbiter of international relations and that wider norms yield to immediate interests in all circumstances.

Of even greater importance is the tribunal's reference to the common law doctrines upon which it relied in reaching its conclusion. The tribunal stated that the decisions of the Supreme Court of the United States which are the basis of these conclusions are "decisions in equity" and that the obligations of the Dominion of Canada under its decision exist "apart from the Convention" that established the tribunal (*United States v. Canada* 1941, 691). The reference to the Supreme Court's use of equity is more than a courtesy, more even than a suggestion, that the United States should consider itself bound by its own words to the tribunal's ruling. It is the invocation of a uniquely Anglo-American approach to remedies that evolved as an alternative to the sometimes harsh rules of common law. The term *equity* denotes a spirit and a habit of fairness, justness, and right dealing that regulates the affairs of men (*Gilles v. Department of Human Resources Development* 1974). As a body of jurisprudence, equity differs from the common law in its origin, theory, and methods.[10] But

in the United States, procedurally, equity and the rights and remedies of the common law are administered in the same courts at both the federal and state levels. The objective of this combination is to render the law more complete and its operation more just by affording relief where a court of common law would be incompetent to give it and no statutory remedy exists. Without involving itself in the complications attendant to a natural law analysis, the tribunal was able to invoke a form of jurisprudence that can seek an outcome that would strike the ordinary conscience and sense of justice as being right, fair, and equitable in advance of the question of whether the more technical jurisprudence of a court would so regard it. This broader analysis of the problem makes sense of the tribunal's assertion that the obligations of the Dominion of Canada arise from a source beyond the convention that provided for the tribunal itself.

By grounding its opinion in the use of equitable principles by the United States Supreme Court, the Trail Smelter tribunal invoked a tradition of jurisprudence that has traditionally been marked by a commitment to "practical flexibility" in the shaping of remedies (Kluger 1976, 715). It has been argued that the tribunal overstated the scope of state responsibility in describing Canada's obligations because of the Dominion's "voluntary acceptance of responsibility" for the damages and the implied agreement to abide by the tribunal's ruling (Bleicher 1972, 22). In fact, the Canadian government yoked itself to the smelter's owner in order to eliminate any doubt that an order from the tribunal would be carried out (Read 1963, 229). But this merely reflected a commitment to resolution of the dispute that was mirrored by the U.S. government, which held open the possibility that the tribunal would allow some level of ongoing pollution from the smelter. The American representatives were not prepared to press the claims of their citizens to the point of complete cessation of damage because a principle of that sort "would also have brought Detroit, Buffalo and Niagara Falls to an untimely end" (224–225). This perspective on the matter suggests that equitable analysis of international environmental disputes has the potential to serve (as it does domestically) as a "principle of interpretation" in disputes among states that elevates the norms of reasonableness and distributive justice while allowing for a greater degree of "judicial discretion" than is commonly appreciated (Arend 1999, 51).

International "Administrative Law" and the Environment

Discussions of the executive function at any level of government seem almost inevitably to degenerate into an argument between advocates of the parliamentary and presidential systems. This is particularly unfortunate when it occurs at the level of international politics because there the best answer may be "neither one, but thanks anyway."

The contemporary political experience of Africa and Asia is a testament to the danger of uprooting the European institution of parliament and depositing it indiscriminately in more heterogeneous and less stable societies. The executive function in a parliamentary system is necessarily less than wholly visible and a captive of the legislative process (Rockman 2000). As a result, the performance of the "plural" executive in parliamentary systems tends to reflect the divisions (and diversions) involved in maintaining a legislative majority. This has proved unfortunate in countries that were being held together through their postcolonial periods largely by wishful thinking. On the other hand, even a casual familiarity with the varieties of despotism practiced in Latin America suggests that the most dangerous American export is not weapons or genetically engineered food, but rather the presidential system of government.

Happily, another approach to the executive function is available. Anne-Marie Slaughter has argued that the executive function in foreign affairs is becoming "increasingly complex and differentiated" and has come to include "a variety of actors networking with their counterparts for different reasons" (Slaughter 2004, 38). Heads of state continue to play a two-level game in which they manipulate international policy to enhance their strength domestically and simultaneously exploit domestic politics to strengthen their positions in international negotiation (R. Putnam 1988). Beneath this level of grand diplomacy, and below the fold in the morning paper, regulators from nations all over the world are assembling the elements of a "disaggregated state." This structure consists of myriad specialized networks of subject-area specialists pursuing policy initiatives driven more by professional expertise than by national interest. The evolution of these policy networks has led Slaughter to argue that regulators have become the "new diplomats," threatening to eclipse both national legislatures and heads of state in importance (Slaughter 2004, 36–64). Many examples of this dynamic at work could be offered. We will discuss just a few.

Experts

In 1985, the World Commission on Environmental and Development (the Brundtland Commission) established the Experts Group on Environmental Law. The Experts Group was charged with preparing a report for the Brundtland Commission on legal principles for environmental protection and sustainable development as well as proposals for accelerating the development of international environmental law. The thirteen-member group was chaired by Robert Munro of Canada and included lawyers from ten countries. Certain of the provisions of the group's final report can be regarded as reflections of existing law (World Commission on Environment and Development 1987). Others, however, appear to break new ground and amount to suggestions for the progressive development of international environmental law.

As an example, article 10 of the Final Report of the Experts Group declares that "States shall . . . prevent or abate any transboundary environmental interference or a significant risk thereof which causes harm—i.e. harm which is not minor or insignificant" (World Commission on Environment and Development 1987, 75). In its commentary, the Experts Group cites the arbitration decision of the Trail Smelter tribunal. But can the tribunal's declaration, that no state has the right to use its territory in such a manner as to cause injury in or to another state, really be generalized in this manner? Doesn't the persistence of problems like the spread of both airborne and waterborne pollution along multinational waterways suggest that states have not really accepted such a general legal obligation? What are we to make of the group's claim that states are obligated to prevent risk? Would one state have a justiciable claim against another if a risk were created but no actual harm was caused? What threshold should be set for a finding of substantial harm? If mere risk is a sufficient cause of action, why do we even need a threshold?

Entrepreneurs

The Experts Group of the Brundtland Commission is just one example of an ad hoc intergovernmental organization (IGO) that has produced regulatory policies that, at least in form, present themselves to the world community as environmental law. Other IGOs enjoy a more permanent status and, consequently, exercise a wider reach in addressing international environmental problems. The leading example is, of course, the United Nations Environmental Programme (UNEP).

Established by the UN General Assembly in 1972, UNEP is an agency of small size and modest mission (Soroos 2005). Yet it has become one of the most entrepreneurial organizations within the United Nations framework and, in some ways, one of the most effective (Downie 1995). Originally created as a quasi-autonomous collection of several different organs, it has stimulated considerable research, promoted the collection and coordination of environmental information, created publications and educational programs, and sponsored numerous negotiations that have led to the establishment of other environmental organizations and the adoption of interstate agreements for environmental protection (McCaffrey et al. 1998).

In 1974 UNEP launched its Regional Seas Programme. Originally involving the conflict-prone states of the Mediterranean Sea, the program produced the Mediterranean Blue Plan for the control of both vessel-based and land-based ocean pollution (Haas 1990). This plan has become the prototype for similar projects that address the environmental problems of the Persian Gulf, the West and Central African Seas, the South Pacific, and the East Asian seas, which now collectively involve more than one hundred and forty coastal states (Soroos 2005). It has also given rise to the 1985 Montreal Guidelines on the protection of the marine environment against pollution.

The Montreal Guidelines are nonbonding in the sense that treaties are binding on the parties to them, except to the extent that the guidelines may represent customary international law. They are, however, quite far-reaching and ambitious. They impose a general obligation upon states to prevent, reduce, and control pollution of the marine environment. They specifically require states to ensure that land-based sources of pollution within their territories do not pollute the marine environment beyond their jurisdiction and to refrain from transferring environmental hazards from one area to another or transforming one type of pollution into another (McCaffrey et al. 1998). These obligatory assertions raise a number of obvious questions. In the absence of international agreements to support them, in what sense are they obligatory? How widely respected would they have to be to be considered a source of customary law? And, of course, whose answers to these questions (and others like them) are likely to be determinative of real-world outcomes?

Financiers

There is a third group of international regulators who have played an important role in protecting the environment. Surprisingly enough, these

are the trade and finance specialists who are normally associated with the commercial and industrial activities that pose the greatest threats to the global ecological balance. No mention was made of the environment in the original General Agreement on Tariffs and Trade, and for many years the connection between trade and the environment was generally overlooked (Esty 2005). That situation began to change as the environmental movement gained ground worldwide and, by the time of the Earth Summit in 1992, the linkages between economic development and environmental protection were clearly front and center (Gardner 1992). The World Trade Organization has responded by moving away from its strict opposition to the use of trade sanctions to impose and enforce environmental obligations (Wofford 2000). Similarly, the World Bank has done much to facilitate international economic development, but it has been severely criticized for its apparent indifference to the ecological problems caused by some of the projects it has financed (Le Prestre 1995; Kurian 1995; Caufield 1996; Kurian 2000). Yet, by 2002, projects with environmental and natural resource management objectives and components accounted for 14 percent of the World Bank's total loan portfolio (Soroos 2005). Given the hegemonic character of the free trade and private capital assumptions abroad in the world today, a closer look at these changes in the environmental role of international trade organizations and the World Bank is undoubtedly worthwhile.

The concern among environmentalists over free trade can be summed up in only a few words. The worry is that increased trade will promote economic growth without environmental safeguards, resulting in increased pollution and consumption of natural resources as well as the loss of regulatory sovereignty needed to combat these problems (Esty 2005). Conversely, however, it has been persuasively argued that economic development can contribute to the advancement of human freedom and empowerment in ways that have significant environmental benefits (Sen 2001). This tension is reflected vividly in the fundamental ambivalence with which environmentalists approach the issue of the harmonization of regulatory law.

One view of harmonization focuses on its character as an effort by industry to replace the variety of product standards and other regulatory policies that have been adopted by the nations of the world with one "uniform set of global standards" (Slaughter 2004, 221). On the one hand, many fear this particular form of globalization will promote an international "race toward the bottom" that will only accelerate as increasing

economic interdependence reduces the regulatory latitude of every national government (Esty 2005, 151). On the other hand, trade officials and environmental regulators have developed a framework of "fragmented coordination" that has allowed them to implement the Basel, Rotterdam, and Stockholm Conventions in a way that has provided "three sets of largely compatible principles, norms, rules, and procedures" that regulate different substances and stages in the life cycles of hazardous chemicals (Downie, Krueger, and Selin 2005, 141). Cooperation among regulators at this level eventually led to the adoption of the UN Globally Harmonized System of Classification and Labeling of Chemicals, which has contributed to improvements in the safe handling of chemicals worldwide.

An example of environmental entrepreneurship at the World Bank is its leading role in the establishment of the Global Environment Facility (GEF). The GEF is intended to provide funds to developing countries in support of environmental projects that have global benefits. This support has been targeted at ozone protection, limiting greenhouse gas emissions, preserving biodiversity, and protecting marine water quality (Soroos 2005). The United Nations Development Programme and the UNEP are junior partners to the World Bank in operating GEF, providing technical and scientific coordination and oversight. The GEF got off to something of a rocky start in 1991, encountering criticism from certain nongovernmental organizations for making project grants before clear criteria had been established (Jordan 1994). Many developing countries resented the GEF's focus on the global commons, which they believed blinded the organization to a broader range of projects that might have supported sustainable development at the national level. Due at least in part to these criticisms, the GEF underwent a major restructuring after the 1992 Earth Summit. The organization is now comprised of an assembly in which all member countries are represented and a governing council of thirty-two members, sixteen of whom represent developing countries. When consensual decisions cannot be reached, decisions require both a majority of member states and a majority of the votes of countries that make at least 60 percent of the GEF's total contributions. With this new structure in place, in a decade the GEF distributed $4.5 billion to 140 countries in support of 1,300 projects. Thus, in spite of its ad hoc origins and early miscues, the GEF has become a key player in the sustainable development movement around the world (Bryner 2004).

Both the World Bank's role in establishing the GEF and the emergence of environmentalism as a focus of international trade policy have significant

potential to enhance environmental protection, though no guarantees are yet justified. The problem with the rule structures developed by these policy entrepreneurs is not (necessarily) that they are ineffective. It is, rather, that they are insufficiently democratic. Both regulatory harmonization and international finance take place within global issue networks of individuals, groups, and organizations (both governmental and nongovernmental) held accountable for their actions in only the loosest manner. This emerging pattern of governance without government (M. Shapiro 2001) is profoundly troubling when it is played out against a backdrop of dictatorships, pseudo-democracies, and emerging democracies with representative institutions that are less than fully developed to begin with. Moreover, the introduction of international imperatives and obligations into domestic judicial processes raises a different problem of representation. A fundamental principle of the rule of law is that judges hand down decisions that are consistent with the controlling precedents in the jurisdiction where they serve. Much as we may want our domestic jurisprudence to be enriched by experiences and perspectives developed globally, how do we integrate those sources of wisdom, and the analytical techniques their use requires, into the theories that have heretofore legitimated the use of coercive power by the judiciary (Fried 2000)? This problem of legitimacy further highlights the problem of international law's democratic deficit (Wallace 2001).

The Search for Global Environmental Law

To whatever extent international law suffers from a democratic deficit, no single explanation can entirely account for the problem. Some of the blame might be laid at the doors of the world's legislators. It is probably true that in the global cacophony "the voice of the people . . . is much softer and less likely to be heard than the voice of the regulators, the judges, the ministers and heads of state" (Slaughter 2004, 104). All the more regrettable, then, that legislators have been so much slower to establish networks among themselves than officials in the other branches of government. That this should be so is hardly surprising. Legislators normally represent either regional or ideological subdivisions within their nations rather than represent the nation as a whole. They tend to be generalists, without the all-consuming interest in issue-specific matters that tend to animate transgovernmental networks of regulators and jurists. The relatively high turnover rate among legislators discourages the long-term investment required to build relationships with their foreign

counterparts. All of these facts mitigate against transgovernmental cooperation among legislators (Slaughter 2004, chap. 3). This is reflected in the process by which international environmental regimes are formed. A brief examination of one such regime will illustrate the point, as well as indicate the problems associated with executive dominance of environmental regime formation.

The Montreal Protocol is part of a global ozone regime that seeks to protect the Earth's stratospheric ozone layer. That regime is a set of "integrated principles, norms, rules, and procedures (Downie 2005, 65) that nation-states have created through a negotiating process that began with the Vienna Convention of 1985 and extended through the Beijing Amendment and Adjustment of 1999 (with stops in London and Copenhagen). A number of constituent institutions are crucial to the operation of the protocol. The annual Meeting of the Parties is a gathering of all of the protocol signatories where amendments and adjustments can be negotiated. The Open-Ended Working Group is a panel of policy experts that provides the scientific and technical support needed by the parties. The Multilateral Fund supports the efforts of developing countries to reduce their use of ozone depleting chemicals. The Implementation Committee provides a forum for the discussion of routine administrative issues and the Ozone Secretariat provides administrative support for the other agencies and groups, except the Multilateral Fund, which has its own secretariat (Benedick 1998). A number of other agencies are also critical to the implementation of the protocol. These include the World Bank, the United Nations Development Programme, the United Nations Environmental Programme, and the United Nations Industrial Development Organization (Parson 2003).

The ozone regime imposes significant and binding obligations on its signatories. The most important of these establish "specific targets and timetables" for the parties to "reduce and eventually eliminate the production and use of ozone depleting substances," create reporting requirements, provide for compliance assistance to developing countries, and provide for treaty implementation (Downie 2005, 66–67). Beginning in 1987 and continuing for the first fifteen years of its existence, the evolution of the ozone regime has involved a post-negotiation process that has focused on regime building and adjustment and regime governance issues (Wettestad 2002; Parson 2003). The major actors were the scientific community, which continued to increase its understanding of the mechanics of ozone depletion, and the national governments of the industrialized nations that had to ratify the protocol itself. UNEP was also intimately

involved in moving the protocol process along and ensuring that ozone depletion remained on the international agenda (Downie 1995; Chasek 2003; Parson 2003). More recently, the focus of the regime process has shifted to matters of implementation and compliance, particularly in the areas of financial assistance and capacity-building strategies in aid of developing nations (Mainhardt 2002).

A number of observations are possible regarding the development of the Montreal Protocol. First, among the influences that have contributed to the effectiveness of the ozone regime several arise from the entrepreneurial activity of network participants. Of special importance in this regard were the focusing of public attention on skin cancer risks and the development and promotion of technological substitutes for ozone-depleting chemicals (Parson 2003; Wettestad 2002). These achievements were produced over a prolonged timeframe by a coalition of national regulatory officials and representatives of international nongovernmental organizations. Second, the adoption of an international agreement on ozone protection was really just the beginning of a long and slow process involving successively lower levels of governance that was necessary to convert that agreement into sustainable solutions on the ground (Vogler and Jordan 2003). Regulatory specialists from around the world spent hundreds of thousands of hours over nearly two decades in post-negotiation efforts to give substance to the commitments their nations had adopted. Third, at both the negotiation and post-negotiation stages, the national legislatures were virtual bystanders. Although some analysts insist that legislators at the national level have at least the capacity to reign in their executive branches (Slaughter 2004), the fact remains that negotiating international agreements is largely the province of the executive branch. Given the span of time across which such negotiations generally take place, it is the career executives rather than the elected or politically appointed officials who play the greatest role. They are the key players in the "epistemic communities" that form the vital core of transgovernmental issue networks (Haas 1992).

If the preceding analysis is correct, then international law is produced by virtually autonomous policy entrepreneurs rather than by citizens. The law itself only gains clear meaning and effect after extensive development by unelected regulators. This process occurs at a level of specialization and over so prolonged a period of time that elected officials cannot reasonably hope to control it. A similar incapacity of domestic legislatures has led Theodore Lowi to argue that contemporary liberalism has squandered

democracy's hard won prize of political legitimacy (Lowi 1979). It is a conception of law that is certainly inconsistent with deliberative democrats' focus on citizen participation and decision by consensus (Habermas 1996). So it may simply be the case that the idea of international democracy is no more practical than its domestic variant. But given the apparent success of the Montreal Protocol, why should environmentalists care?

Our answer to this question is relatively simple. The Montreal Protocol has been relatively effective, but its effectiveness is notable for being exceptional.[11] Like all development to date in international environmental law, its legitimacy is questionable. The Montreal Protocol demonstrates only that policy effectiveness is possible in the absence of legitimacy, not that it is likely. International environmental law must be both effective and legitimate if it is to be durable. Far from being at war with one another, democracy and environmentalism are complementary at their most basic level. Globalization may well present us with the prospect of adjudication without jurisdiction, regulation without authority, and law without legislation. But that should only encourage us to look for new forms of democracy that can allow citizens to engage in direct deliberations that produce normative commitments grounded in a global civil society and then aggregate those commitments through processes of collective will formation. The objective should be to generate rule-governed behavior through laws that are recognized as both intersubjectively meaningful facts and as expressions of value in a shared political culture.

6

Adjudication among Peoples: A Deliberative Democratic Approach

In this chapter we offer an immanent critique of international environmental jurisprudence. By this characterization, we intend to distinguish our approach from that of scholars who have discussed international law from an endogenous perspective, an outstanding recent example of which is the work of Jack Goldsmith and Eric Posner. They reject the view that international law is a "check on state interests, causing the state to behave in a way contrary to its interests" (Goldsmith and Posner 2005, 13). Their view of international law holds it to be the product of rational choices made by nation-states rather than an independent force shaping those choices. The choices of states determine the requirements of international law, not the other way around.

Our purpose is not to quarrel with this modernized version of realist international theory. Indeed, as descriptions of what is, such endogenous approaches have much to recommend them. We argue, however, that the rational choice view of international law assumes that what the law is today is all that it ever can be. It is unlikely that we can evaluate this assumption from within the rational-choice frame of reference. To decide whether state preferences are fixed, we must determine whether there is anything intrinsic or essential about international law that prevents it from modifying the interests of states or independently restraining their pursuit of them. In short, we must discover whether international law has (at least potentially) an independent source of legitimacy. It is our argument that a possible source of legitimacy for international law can be found in the literature on deliberative democracy, particularly in the jurisprudence of Habermas.

Habermas has argued that the legitimacy of law depends upon the ability of those to whom it is addressed to regard it as both a fact and a norm (Habermas 1996). By this he means that citizens must see that law

establishes behavioral requirements that are backed up by appropriate and effective mechanisms of enforcement and that those requirements reflect a value or set of values that have been freely subscribed to in an act of collective will formation. Moreover, for any law to be democratic, two further conditions must be satisfied. First, the mechanisms of enforcement must be constrained by procedural guarantees of the kind that we generally associate with the ideas of equal protection and due process. Second, the act of will formation that produced the law must be broadly participatory and free of any coercion other than the force of the better argument. This much is well understood by students of contemporary democratic theory and these basic ideas form the underlying consensus in support of deliberative democracy that emerged from the rich debate between Habermas and John Rawls (Habermas 1995; Rawls 1995). Deploying this theory of legitimacy in the area of international environmental law is the objective of the remainder this chapter.

As a first step, we must explore the implications of deliberative democratic theory for the practice of environmental politics at the levels of the nation-state or substate. This we have done at considerable length elsewhere (Baber and Bartlett 2005). Here we limit ourselves to recounting the general contours of environmental democracy at the levels of the state or substate. This preliminary step is necessary in order that we may identify the problems that can be anticipated in any attempt to apply deliberative democratic theory to the question of international environmental law. At the national level, a deliberative environmental politics is grounded on the fundamental assumption that no regime of environmental protection can achieve the long-run, overall goal of ecological sustainability if it does not also satisfy the basic requirements of democratic legitimacy. Indeed, democracy is a constitutive element of ecological rationality. It suggests that a consensus criteria for decision making is essential both as a regulative norm of democracy and as a practical foundation for overcoming the network of mutual vetoes that has come to characterize the relationship in which stakeholders in environmental politics find themselves. It also leads to the conclusion that this consensus must be achieved among those who are most closely affected by the ecological issues at hand under circumstances of deliberative equality sufficient to assure the resulting agreement results from persuasion rather than coercion.

This account of environmental democracy at the levels of the nation-state or substate poses a number of challenges for adapting the concep-

tual demands of deliberative democracy to the circumstances of collective will formation at the international level. At the outset it is worth noting that not all of the news is bad. Deliberative democracy's commitment to decision making by consensus would seem to fit well in a decision framework that contains the idea of sovereignty as a central (some might say defining) characteristic of the parties involved. But as ancient mariners would say, beyond this point there be monsters. The truly monstrous nature of the seas that lie ahead can be appreciated if we take note of three general problems.

First, international environmental politics is plagued by a democratic deficit. To the extent that international environmental decisions contain any democratic content, it is a happy coincidence that can be traced to the existence of democratic processes within the countries that are parties to those agreements. In this sense, international democracy (to the extent that there is any) is always derivative rather than direct and participatory. This is troubling as a general matter, but it is especially problematic in the area of environmental decision making if one accepts the premise that democracy is a constitutive element of ecological sustainability. To the extent that premise is true, it might seem that protecting environmental values at the international level is a game that is lost before it is even begun.

Second, international environmental agreements (like other international accords) are not self-executing. The interpretation and enforcement of the provisions they contain cannot be delegated to an executive or regulatory agency as we would do at the domestic level. From Habermas's perspective, this problem casts doubt on the "facticity" of international environmental law. Without the ability effectively to alter the behavior of the parties to whom it is addressed, it is arguable that international law generally does not deserve to be called law at all. This is more than the semantic quibble that it is sometimes taken to be. It draws attention to the fact that the parties to international environmental agreements are states, but the actors to whom behavioral requirements contained in those agreements are generally addressed are private corporations and individuals. Taking this into account, one might go so far as to argue that the incapacity of environmental law to impose its requirements on legal individuals is just as well because that law is not the result of any unforced agreement among those individuals in the first instance.

Third, there would appear to be no way to resolve in any authoritative manner the disputes that arise under international environmental

agreements. Even if their meaning could be specified with greater precision and concreteness, and even if enforcement mechanisms were readily available, international tribunals seem to lack both the jurisdiction and the jurisprudence that would be necessary to adjudicate the claims and counterclaims certain to arise. In negotiating the terrain between facts and norms, this problem can be seen as both cause and effect. It is a further contributor to the inability of international environmental law to pose a social fact to those actors whose behavior it seeks to modify. It is a result of the incapacity of international negotiations to incorporate normative commitments that are genuinely representative of the values held by those whom the resulting agreements address. To borrow an idea from the law of contract, international environmental agreements fail to achieve meetings of the minds. They provide international tribunals with no ground upon which to erect the structure of a decision and no rationale for determining its content.

A full analysis of these three problems and a discussion of possible solutions are clearly beyond the scope of this book. Here we limit ourselves to discussing in more detail the problem of the alleged democratic deficit in international environmental law and suggesting a deliberative approach to collective will formation and the development of regulatory mechanisms that might bring a more direct and participatory form of democracy to bear on the creation of international law in this critical policy arena.

Viewed as acts of legislation, international environmental agreements, and international agreements in general, leave much to be desired. Most of these shortcomings fall into one of two broad categories, corresponding generally to Habermas's distinction between law as fact and law as norm. First, international environmental agreements are ineffective for a variety of reasons. Second, international environmental agreements do not capture any normative consensus among the organizations and individuals whose behavior those agreements seek to regulate. These two general problems are obviously interrelated. But it will be useful for analytical purposes to discuss them separately before suggesting a means of ameliorating their consequences.

Effectiveness

Lynton Caldwell has identified three fundamental questions that will inevitably arise with respect to the effectiveness of any international

environmental agreement (Caldwell 1991). First, we will want to know whether the coverage is adequate. Are all of the necessary parties and all of the essential issues included? Second, are the provisions of the agreement compatible with the corresponding elements of the domestic law of the signatories? Third, are the provisions structured in such a way as to produce a sufficient level of compliance on the part of the parties to the agreement?

Coverage

The problem of inadequate coverage in international environmental agreements can be traced to several underlying causes. For one thing, the general structure of environmental issues tends to make adequate coverage difficult to achieve. The ecological axiom that all things are ultimately interrelated is hardly compatible with the categorizing logic of Western-style law (Caldwell 1991). Moreover, even in countries where environmental awareness and commitment are relatively high, there is a growing problem of "green fatigue." The inability of international law to stop various forms of environmental degradation has undermined the ability of domestic leadership to translate general support for environmental protection into a mandate for stringent multilateral environmental accords (VanDeveer 2003). The ultimate success of international environmental agreements is heavily dependant on the ability of domestic leadership to generate popular political support for them (Hierlmeier 2002).

The difficulty in creating political support for environmental accords can be traced to more than simple fatigue or a sense of futility. The inherent elitism of the international political process certainly discourages citizen participation. As an example, success in controlling the use of ozone-depleting chemicals proved to be elusive until a leading role was assumed by the largest chemical companies whose behavior was at the root of the problem (Falkner 2005). Their economic and technological power gave a few enormous corporations the edge over other actors (including other corporations) in shaping the regulatory discourse that unfolded as development and implementation of the ozone regime got underway. The observation that the power of these corporations was moderated only by the agency of states and international organizations in no way changes the fact that the process was one of elite bargaining rather than popular will formation. Although we may feel some satisfaction with the outcome, it is simply not possible to argue that the process was democratic in any meaningful sense.

A final obstacle to adequate coverage in international environmental agreements is the tenacity of the idea of state sovereignty as the primary organizing principle in international law. The nation-state, as natural and inevitable as it may seem to us today, is a relatively recent and historically contingent development (Brooks 2005). Moreover, there are a number of reasons to believe that nations as a form of organization are not well adapted to the challenges of environmental protection in the age of globalization. Despite the large number of multilateral environmental agreements that have been negotiated and the high rate of compliance with their requirements, many assessments suggest that the state of the global environment continues to deteriorate (Crossen 2004). One reason for this pattern is that asymmetries between interest groups in the cost of lobbying are greater at the national level than they are globally. This results in a disadvantage for environmentalists in national capitals (Johal and Ulph 2002). Moreover, the globalizing forces of scientific advancement, mass communication, economic integration, population growth, and mobility are all conspiring to create pressure for universalizing basic ecological responsibilities irrespective of national boundaries (Caldwell 1999). It is becoming increasingly clear that, even from the domestic perspective, the populations of many failed or failing states would benefit from living under the norms of a non-state international society instead of the dysfunctional regimes within their own countries (Brooks 2005).

All of these problems contribute to a pattern in which multilateral environmental agreements fail to protect the environment, not primarily because their signatories fail to comply, but because the terms of the agreement contained weak obligations to begin with (Crossen 2004). The states that negotiate these agreements are so preoccupied with protecting their sovereign rights they overlook the fact that the soundest basis for protection of the environment is the affirmation of responsibilities (Caldwell 1991). This is the reason that assumptions regarding the autonomy of national law and sovereignty are beginning to change in fact even though traditional doctrines persist in political and judicial rhetoric (Caldwell 1999).

Compatibility

Given what has been said regarding the status of the nation-state, one might argue that the issue of whether or not international environmental regimes are compatible with domestic law is not particularly important. This argument would be persuasive only if sufficient resources to

implement international agreements existed at the supranational level. At the present time, and for the foreseeable future, this simply is not the case. As outmoded as institutions of national government may have become, the global system is still fundamentally anarchic in the sense that it lacks an authoritative government that can enact and enforce rules of behavior (Keohane 2005). Moreover, the complexities of ecological preservation require the use of policy networks comprised of actors who represent both national and supranational interests in an environment characterized by disaggregated government (Slaughter 2004). For both of these reasons, the compatibility of national and international environmental law will continue to be of concern.

The problem of reconciling international and domestic law arises in part from the fact that their modes of origin, administration, and enforcement are distinctly different. International law developed as the law of relations among states during the consolidation of modern nations as the primary institutions for governing the behavior of individuals and organizations (Caldwell 1991). This renders the very idea of environmental law among nations problematic. The direct object of environmental regulation is not wildlife, water quality, erosion, deforestation, or even global climate change. The object of environmental regulation is people, the only entities whose behavior has direct ecological consequences and the only actors over whom law has any real bearing (Caldwell 1999). To this extent, law among nations is rarely of direct environmental significance. What matters is what national governments are willing to do with respect to the regulation of their citizens in pursuit of environmental protection.

Our understanding of these matters is often obscured as a consequence of the fact that both domestic and international regulatory structures are too often simplistically characterized as mere compromises among stakeholders when they are, in fact, far more complex efforts to develop hegemonic formations of governance in specific markets or policy arenas (Andree 2005). Moreover, governments, international organizations, and nongovernmental groups typically focus on particular issues and developments with little regard to their broader contexts and implications. This ignores the fact that, through a significantly anthropogenic and additive process, specific decisions cumulate to change the environment as a whole (Caldwell 1999). As an example, global coordination of environmental protection is threatened by strategic policy competition among states in search of investment capital, which threatens to weaken environmental commitments (Johal and Ulph 2002). This has led to the development of the idea of "common but

differentiated responsibility," which yields ground on environmental standards in the face of a dubious argument that uniform and binding requirements would necessarily cripple the economies of developing nations (Weisslitz 2002). Thus, in order to incorporate the necessary parties and issues in any given international environmental accord, there is often a strong pressure to establish differential levels of obligation that ultimately undermine the legitimacy of the accord itself and further erode the global commitment to stringent standards of ecological behavior—the precise difficulty faced by the Framework Convention on Climate Change and its Kyoto Protocol.

Compliance

The signatories to any multilateral environmental agreement will fail to comply with its provisions (when they fail) for one of two reasons. Some could comply but will not and others would comply but cannot (Caldwell 1991). These circumstances present two distinct compliance challenges. In the case of willful noncompliance, both the systemic failings of international law and the inadequacy of its underlying political consensus are evident. In the early 1990s, it was possible to argue that although international law had failed to adequately address global environmental issues, some progress was being made (Brunnee 1993). More recently, however, it has been observed that the field of international environmental law has gone rather quickly from maturation to an infirm old age. International environmental problems have become more daunting, but the law has not responded to these problems with any growth in vigor (Driesen 2003). A number of factors are involved in this failure.

First, the general structure and formal characteristics of international norms of behavior are often problematic. For example, it is often difficult to state these norms with sufficient precision. Decision makers encounter different types of challenges using scientific information to judge the health and environmental risks involved in various types of disputes or decision scenarios. Where substantive standards of risk must be established, decision makers will face questions of how much emphasis to place on scientific assessments and how much on nonscientific (i.e., political) factors in assessing risk (Raustiala et al. 2004). Second, traditional international law based entirely upon interstate relations is incapable of addressing emerging global and cross-border issues. International justice based on state interest, state sovereignty, state equality and state responsibility is largely irrelevant in resolving transboundary environmental problems such as global warm-

ing. Addressing such issues requires that different rights and duties be assigned to different countries with different levels of economic and technological development. Further, it requires that we take into account not only interstate and interpersonal justice, but also intergenerational justice (Yokota 1999). Finally, international norms are often easy enough to identify but they are difficult to elevate to the level of enforceable law. As an example, the general idea of sustainable development is a well-understood principle that could be a very effective legal concept. It falls short of being a principle of customary international law, however, even though it enjoys significant support in international legal instruments and is endorsed by a wide variety of international actors (Marong 2003). These problems help explain both a pattern of multilateral environmental agreements that achieve high levels of compliance because they require only shallow levels of cooperation (Crossen 2004) and a situation in which a norm of international behavior like the precautionary principle fails to develop into an effective system of prevention and remediation of international harms in the way that America's system of tort law evolved (Garrett 2005).

A different set of problems emerges when we turn our attention to nations that would comply with international environmental norms if they were able. Many Third World states can make compelling arguments that if they were held to the same environmental standards as First World nations, their economic development would be severely curtailed. They further argue, therefore, that to impose uniform environmental standards would work a serious injustice upon sectors of the world's population that are least able to assert themselves in international political debates (Weisslitz 2002). Moreover, some states appear to be entirely failed enterprises. Some nations are so dysfunctional in so many ways that we cannot expect them to even attempt to meet international environmental standards. They are often characterized by minimal domestic environmental requirements or systems that are adequate at a formal level but underfunded to such a degree that the black-letter law on their books is simply irrelevant. The state-centric approach of our existing international legal system is to "restore" these failed states to a more successful level of performance. But many of these states never were successful and are unlikely ever to be (within decades, anyway). To continue to focus on the state in these circumstances is a misguided approach that is likely to do as much harm as good (Brooks 2005). In the case of these nations, common but differentiated responsibility is destined to fail as an equitable principle of law.

Substituting differential contribution norms for differential compliance norms as some have suggested (Weisslitz 2002) would merely result in the transfer of financial resources to failed states with predictable results. But the long-term non-state alternatives that might be appropriate would require international institutions much stronger, in terms of both political and analytical resources, than those that currently exist (Bodansky 1999). Of these resources, the political are arguably the most important.

Institutional change is, ultimately, dependent on political will and can be sustained only with popular political support (Hierlmeier 2002). Any system of transnational environmental enforcement would require nations to concede a right of international inspection, a right of performance audit and public reporting, and a common interpretive, meditative, and adjudicatory authority. In the final analysis, it would seem to be necessary for nations to subscribe to some institution capable of applying sanctions as a last resort (Caldwell 1991). The largest stumbling block is obviously the issue of coercive sanctions. Standards of national conduct and acceptable methods of mutual coercion, captured in legal principles enforceable as world law, would be necessary attributes of global environmental governance (Caldwell 1999). Mutual coercion would be less necessary, however, if mutual values and goals were more universal. And this brings us to the second major failing of international law, its inability to capture a normative consensus through the practice of global democracy.

Normative Consensus

Law is shaped both by the persistence of custom and the perception of change. Law is inherently conservative. Its continuity and predictability is presumed to protect the stability and survival of the society it serves. But contemporary legal doctrines (at both the national and international level) are being overtaken by unprecedented developments that pose the dilemma of whether serving their conservative function involves adhering to conventional arrangements or adapting to meet new and evolving circumstances (Caldwell 1999). The dilemma is all the more daunting if we add the requirement, derived from deliberative democratic theory, that law should embody a normative consensus that results from the unforced agreement of those whose behavior it seeks to govern. Having turned this corner in our discussion of international environmental law, we are confronted immediately with a problem widely known as the democratic deficit.

The democratic deficit is not unique to international law or to the arena of environmental policy. It has been argued that a democratic deficit is at the heart of America's slide into the anomic form of democracy that most citizens find so unsatisfying (Durant 1995). There also seems to be a democratic deficit afflicting British politics. Thus an effort is underway to imagine a constitutional role for monarchy at the center of a progressive agenda of democratic reform (Harvey 2004). In addition, the discussion of the democratic deficit has expanded to include the deficit of jobs, equality, and justice that suggest a deficit in the democratic system itself in the world's most developed nations (Gindin 1994). Our present concern, however, is limited to the democratic deficit in the relations among nations. Broad as even that subject is, we shall focus on the problem of a democratic deficit as it manifests itself in the most fully developed example of international cooperation available to us—the European Union.

Political scientists generally agree that the European Union is undemocratic, but they do not agree about how undemocratic it is or even about how serious a criticism the democratic deficit charge really is (Neundeither 1994). Part of the difficulty is that we lack a generally accepted method for assessing democracy in a political system such that there would be agreement on what would constitute adequately democratic institutions (Lord 2001). As a more general matter, there is considerable evidence that perceptions of EU democracy vary with perceptions of the economic costs and benefits of membership (Karp, Banducci, and Bowler 2003), suggesting that among mere mortals the normative value assigned to democracy will depend to some extent on its relative costs.

There is also disagreement about the source of the democratic deficit. One view is that the essence of the problem is that Europeans lack a party system that offers a meaningful choice to voters with respect to pan-European issues and that this failing is reflected in the unrepresentative qualities of the European Parliament (Andeweg 1995). The diagnosis would lead one to advocate the creation of genuine pan-European elections and parties. This, in turn, would require that the EU be transformed into a classic parliamentary system with a parliament vested with genuine legislative power and control of the executive selection process (Hix 1998). Others have argued, however, that it is simplistic to suggest that the democratic deficit can be solved simply by the direct election of a meaningful European Parliament. The issue is more complex and multifaceted. Democratic legitimacy in the EU is contested and

divided between the supranational and national levels of government. It is conditional and evolutionary. It is expressed through the dispute over the balance of power among the key supranational decision-making institutions and the argument over decision-making efficiency, transparency, and accountability (J. Lodge 1995). As for the unrepresentative qualities of the existing European Parliament, there is an argument to be made that the EU is already a highly open and accessible system that is actually burdened with a high level of interest representation (Greenwood 2002). According to this view, the EU suffers more from a democratic overload than a democratic deficit.

This ambiguity about the sources of and solutions for the democratic deficit lead to further questions about the scope of the deficit. For instance, we might legitimately question whether introduction of a common currency puts a negative entry into the democratic ledger, quite apart from any advantage it may confer in the area of economic growth (Martin and Ross 1999). And the development of immigration policies in the EU seems to emphasize tighter control of the numbers of immigrants and asylum seekers rather than the development of measures to combat racism and xenophobia. The consequence of this approach may have been an aggravation of both institutional and participatory aspects of the democratic deficit (Geddes 1995). But notice, these two observations, when taken together, could be viewed as evidence that the EU is damned if it does and damned if it doesn't. On the one hand, the complaint that a common currency is undemocratic would appear to rest on the idea that, at least in the area of monetary policy, too high a level of centralization has been reached. On the other hand, criticism of the immigration policies of EU members would seem to involve a claim that the Union fails to exert sufficient pressure toward uniformity in this policy arena.

In light of all this, it is little wonder that there is a lack of consensus about the EU's lack of consensus. Some argue that the democratic deficit is designed right into the EU's basic structure. The process of European integration, so the story goes, was marked from the beginning by a form of technocratic elitism that made a backlash against the Maastricht Treaty virtually inevitable. According to this view, the EU needs to achieve the same executive-legislative model found among existing European states (Featherstone 1994). A contrasting view is that concern about the democratic deficit in the EU is misplaced. Judged against existing industrial democracies, rather than against an ideal plebiscitary or parliamentary democracy, the EU can be regarded as entirely legitimate. Its institutions

are tightly constrained by constitutional checks and balances, narrow mandates, fiscal limits, supermajoritarian and concurrent voting requirements, and a system of separation of powers (Moravcsik 2002). If comparing the EU favorably to existing democracies is regarded as damning with faint praise, additional reassurance is available in the form of an argument that democratic legitimacy for the EU actually becomes problematic only if it is seen as a future nation-state. If instead the EU is regarded as a regional state with shared sovereignty, variable boundaries, a composite identity, a compound form of governance, and a fragmented democracy, the problem of a democratic deficit diminishes considerably (Schmidt 2004).

This more affirmative view of the European Union allows us to imagine further improvements in the democratic quality of international law. The recent history of EU political development is characterized by a heightened concern for inclusiveness and transparency in institution building (Fossum and Menendez 2005). For years, academicians and political actors have advocated new modes of governance in the EU. Many have limited their proposals to mechanisms that are mere extensions of existing participatory practices, restricted to so-called stakeholders and underpinned by the same elitist and functionalist philosophy that has animated the EU from its inception (Magnette 2003). This approach might be justified if we accepted the argument that the European public space is unavoidably dominated by an instrumental form of rationality that makes any form of democracy other than interest-group liberalism impractical (Meadowcroft 2002). Indeed, reproducing interest-group liberalism at the regional level would be a historic accomplishment if nothing more was ever achieved. It is doubtful, however, that European publics will be satisfied with that in the long run. This conclusion seems all the more likely when we consider that other regional agreements, far less ambitious than those constituting the EU, have been forced by public opinion to include features allowing for direct citizen participation. As an example, the North American Free Trade Agreement carried with it a side agreement officially entitled the North American Agreement on Environmental Cooperation (NAAEC). This agreement established the Commission for Environmental Cooperation, which has developed an innovative citizen submission process that provides a promising template for future multilateral environmental agreements (Markell 2000; DiMento 2003, 119–127). The continuing demands for a larger role for citizens in the international system following protests at the World Trade Organization meeting in Seattle in 1999 suggest that the pressure for greater

public participation in global policymaking is unlikely to subside (Strauss, Falk, and Franck 2001).

It is against this backdrop that current efforts to further democratize the EU must be understood. Efforts to adapt forms of representative democracy familiar from the domestic experience for use by the EU are destined to confront two fundamental challenges: the relatively stronger emphasis on executive government at the regional level and the multilevel character of the polity itself (Crum 2005). The relative weakness of the European Parliament is a major reason why democratic legitimacy in the EU has conventionally been discussed as a problem of direct election of legislators at the regional level (J. Lodge 1995). But since a European demos does not currently exist, and does not appear to be in the offing, the introduction of elements of direct democracy would seem a more promising approach (Feld 2005). Opportunities for direct participation are important both as a source of democratic legitimacy and as a matter of political acceptability (Giorgi and Pohoryles 2005). The disaggregated character of the European polity suggests that a conception of civil society based on contestation and communication within and across multiple public spheres is not only good for ecological democracy but also more consistent with imaginable political scenarios (Hunold 2005).

By way of summary, the next iteration of international environmental law will have to satisfy a dual imperative that is conceptually consistent with the jurisprudential theories of Habermas (1995). As social fact, international environmental law will have to achieve coverage of all the essential parties and issues. It will have to demonstrate its compatibility with existing environmental regimes at the national level. And it will have to present nations with political imperatives that encourage a significant level of compliance with international obligations. As an expression of international norms, environmental law will have to capture an international consensus regarding the obligations of those individuals to whom the law is addressed. That level of consensus can only be produced by methods of collective will formation that are both open and participatory and that generate the uncoerced agreement of at least a representative sample of the population to be governed.

Deliberative Democracy and International Environmental Law

Deliberative democrats have not always paid enough attention to matters of practice. For anyone who has followed the development of the

field, this observation will seem entirely unremarkable. An excuse that might be offered for this shortcoming is that political practice is derivative of preexisting communities. In other words, the contours of our political practice are so dependent on antecedent social constraints that it is pointless to include them in our efforts to theorize democracy. This defense is of little use, however, in excusing us from discussing the practical issues involved in globalizing environmental democracy. The social and economic variables that determine political practice at the national level vary so widely at the global level, and the bonds of community at that level are so weak, that every institutional possibility would seem to be on the table. Moreover, we find ourselves in a time of rapid social and political change, when constitutional issues are in play in virtually every nation. In these circumstances it can be argued persuasively that communities do not predate politics but, rather, that politics leads to the formation of new communities (Hajer and Wagenaar 2003).

It is incumbent on deliberative democrats, therefore, at least to suggest institutional designs and political processes that might capture some of the theoretical ether that they have generated. Few of these theorists have been as active in this practical endeavor as James Fishkin. Fishkin's experiments with a procedure that he refers to as deliberative polling constitute one of the most creative approaches to deliberative politics. Deliberative polling assembles a stratified random sample of citizens to discuss the policy positions of competing candidates or parties (Fishkin 1995). This group of citizens is brought together, at the investigator's expense, to participate in a weekend of small-group discussions and larger plenary sessions that allow them to assimilate extensive and well-balanced information about their subject, exchange competing points of view, and come to considered judgments that represent a consensus of the group. In other words, deliberative polling is a procedure that explores what public opinion would be like if the public were motivated to behave more like deliberative democrats (Ackerman and Fishkin 2003).

Citizen juries, as Fishkin's small-group discussions are sometimes called, engage in a very particular form of reasoning. As with juries in civil and criminal courts, they work to arrive at deliberative judgments through a collective, interactive discourse. This process is easily distinguished from the kind of systematic, principled reasoning that is typical of traditional moral philosophy. It is an effort to find workable definitions of a problem

that yield solutions that can command the unforced assent of the deliberators. These concrete situations are characterized by what Hilary Putnam has called the "interpenetration" of fact, value, and theory, an interdependence of elements that often cannot be distinguished even notionally (H. Putnam 1995). Experience with citizen juries in the United States, Great Britain, and Australia suggests that the approach enjoys a number of significant advantages over other policy processes.

First, although allowing for a significant level of direct democratic participation on the part of average citizens, service on a citizen jury is no more intrusive than ordinary jury duty and far more educative than are ordinary political campaigns (Gutmann and Thompson 2004). Second, citizen juries tend to produce consensus rather than polarization (Fishkin and Luskin 1999). This can be traced to the fact that citizen juries do not begin their deliberations with votes but, rather, with discussion. Moreover, the plenary groups within which citizen juries operate are large enough to contain representative samples of public opinion and are led by moderators who ensure that all perspectives receive a fair hearing. Experts are available to clarify questions of fact, and all participants receive extensive information on the subject in advance (Gutmann and Thompson 2004). Third, unlike mechanisms of political representation that are closely identified with the particular experiences of national populations, the citizen jury is a broadly deployable approach that will resonate in the widest variety of cultures. (The use of the term *jury* is solely to fix the concept in the Western mind. Deliberative polling is another way to describe the process. How it is presented to participants or sponsors can be tailored in ways that are culturally specific without any loss of conceptual clarity of practical value.) In fact, the use of citizen juries is one of the few techniques that allow us to imagine a form of world assembly in which citizens could deliberate as members of the whole order of humans rather than as representatives of particular nation-states (Laslett 2003). Finally, the deliberative form of rationality that citizen juries promote is more than just talk. It is an accomplishment in itself, forged by the direct efforts of citizens to deal with concrete, ambiguous, tenacious, practical problems (Fischer and Forester 1993). In short, the judgments of citizen juries transcend the forms of interest aggregation that are typical of interest-group liberalism. For this reason, the deliberative process exemplified by citizen juries has come to be regarded as an especially appropriate response to the environmental problematique, in the face of which existing political institutions (both domestic and international) are obsolescent (Laslett 2003).

But when we come to the matter of using deliberative democratic procedures like the citizen jury to address problems of environmental protection at the international level, we face a daunting challenge. It is difficult to imagine a more convoluted set of policy issues, more thoroughly entangled with concrete economic and political interests, than those involved in preserving the global environment. When one compares this policy arena with those in which domestic issues are addressed, it is hard not to be discouraged by its complexities. Even at the national level, the difficulties involved in legislating for a modern industrialized society have created a pattern of decision making that entails stating legal obligations at relatively high levels of generality and relying upon members of executive and regulatory agencies to fill in the details in the exercise of what Kenneth C. Davis has referred to as discretionary justice (Davis 1969). This trend in interest-group liberalism has been criticized most trenchantly by Theodore Lowi, who has called for a "juridical" form of democracy. Lowi's approach would require legislatures to adopt far more concrete and specific rules of behavior that both constrain the exercise of administrative discretion and put citizens on notice as to the particulars of their legal obligations (Lowi 1979). Lowi's proposal is one response to the growing concern that modern regulatory regimes are insufficiently grounded in law and that, as William Pitt the Elder warned in a 1770 speech to the House of Lords, "where laws end, tyranny begins" (J. Bartlett 1968, 426). So the complexities of environmental regulation at the international level are more than practical problems. They pose a challenge to our theoretical account of the legitimacy of international law in the same way that the vagaries of domestic legislation challenge the legitimacy of the democratic nation-state.

Negotiation of international environmental agreements that spell out in detail the legal obligations of the parties has been discussed quite thoroughly in the realist literature. It has produced a body of generally unenforceable law with which the parties comply because it requires little of them that they are not already willing to do. In that respect, international environmental law is less a body of law than it is a collection of contracts. Bringing to this collection of agreements the questions of legitimacy involved in democratic politics would seem to be senseless. But even in the world of contracts, there must be a background of law that is obligatory. In thinking about the law of contract, it has long been recognized that the law "does not enforce every promise which a man may make" (Holmes [1881] 1991). It is the collective genius of generations captured in the tradition of the common law that it allows us to decide,

on the basis of tens of thousands of practical judgments, which promises we should be held to and which we should not. The vast majority of those rulings were arrived at by judges rather than juries. But the work of citizen juries suggests that the effectiveness of judges can be approximated by the rest of us if we are provided with sufficient information and an adequately structured decision environment. What, after all, are our rules of civil and criminal procedure if they are not systems that provide judicial decision makers with appropriate information and rules of choice?

It is important to point out, however, that the law of contract is similar to all other areas of common law in that it developed as a series of quite limited responses to particular problems encountered by real parties to actual legal disputes. The work of either judges or juries in resolving those disputes is rarely done with the idea that over the course of centuries a coherent body of general legal propositions will result. The coherence and legitimacy of the common law were hard won, but not by tackling big issues with big ideas. The common law was a bottom-up enterprise, much as empirical science tends to be. It involved repeated "observations" of what our senses (particularly our sense of justice) suggested about a particular set of circumstances. Are we not confronted with a similar challenge when we consider the practical impossibility of grappling with problems of environmental policy in their imponderably complicated entirety? Do we not also encounter, once again, Lowi's argument that to be enforceable law must be legitimate and to be legitimate law must be specific? The common law, after all, tended to be quite specific for centuries before it aspired to become general. So how are we to approach the need to create environmental law at the international level that is grounded in our shared understanding of reality and, yet, comprehensive enough to actually protect the environment?

A possible solution may be found in an idea advanced by Kenneth Davis that he intended to assist administrative law judges in their efforts to deal with the complexities of regulation through rule making. Davis suggested that it would be possible to capture something of the practicality of the common law by using hypothetical cases in administrative rule making. These cases would be designed to pose important, but limited, problems of regulatory policy. They would allow administrative law judges to rule on narrow and well-defined questions. Those rulings, if accumulated properly, would provide the precedents that regulators could rely on in exercising their administrative discretion (Davis 1969). They

would have an advantage over rule making in that they would be concrete rulings that would neither leave regulated parties wondering what specific obligations they imposed (the "Lowi problem") nor require decision makers to bite off more of the subject than they could chew (the "problem with the Lowi solution").

We suggest that the process of rule making through hypothetical adjudication can be married to the use of citizen juries to create what we call *juristic democracy*. Rather than ask citizen juries to weigh the arguments for competing solutions to big policy problems (like global climate change), it is possible to frame hypothetical disputes that would arise under a variety of regulatory approaches and then ask the world's citizens to apply the same common sense of justice that they already use when serving jury duty at their local town halls. The citizens would enjoy both the educative and expressive advantages associated with direct political participation. If a sufficient number of properly selected juries ruled on the same case across the globe, the international community would be provided with the results of a process of collective will formation unmediated by any elected elite.

It is worth pausing to emphasize several points. The range across which citizen juries can disagree would be limited by the simplicity and artificiality of the posed hypothetical cases. Moreover, the analytical task for these citizens can be focused through hypotheticals in a way that real courts never are able to do. Precedents would be of concern only for the agencies that posed the cases and attempted to restate or codify the normative principles that might emerge from a large number of juries, not for the juries themselves. The disinterestedness of citizens is not dependent on their assumption that no precedent is being created that might one day apply to them. Rather, it results from the fact that people adjudicating a concrete dispute engage in nothing more than first-order abstractions because resolving the case does not require them to do more and, in any event, they have no reason to see themselves in the place of the disputants and rarely do. Citizens would be motivated participants because they would expect that their decision, although only one data point, would directly contribute to the development of norms and laws of potentially major consequence.

It remains to describe the executive functions that would be appropriate to carry out this sort of collective will. How we answer that difficult question will, ultimately, determine whether an international environmental law capable of independently affecting the behavior of nations can be developed. But the fact that doctrines of common law form the foundation of

some of the world's most durable democracies should provide us with all the encouragement we need to explore these issues further.

Regulation as Interpretation

The idea of globalizing environmental democracy through the use of a deliberative approach such as the citizen jury would appear to confront existing institutions of international governance with a challenge they are ill equipped to handle. The "executive" branch of international government is, at best, a collection of improvisations and compromises. Despite significant strides in recent years, there is a growing perception that the current international governance system remains weak and ineffective, resulting in a global environmental crisis (Speth 2004). Because there is no world government or sovereign global political authority, international environmental agencies often work at cross purposes and their efforts are frustrated by their reliance upon individual states to carry out their policies (Axelrod, Downie, and Vig 2005). It is not that we lack models for the development of effective international environmental organizations. Several options exist, from the speculative "Global Environmental Organization" that would exist as a wholly new comprehensive regulatory agency, to the proposed "International Environmental Organization" that would consolidate existing regimes in search of greater levels of mutual cooperation, to the suggested "World Environmental Organization" that would promote market strategies and environmental bargaining (Marshall 2002). Failing to adopt any of these approaches, it is always possible to resort to strictly bilateral or regional efforts to manage transboundary environmental problems (Parris 2004).

Neither is it a problem to find international environmental law to implement. One recent study identified more than nine hundred international agreements with some environmental provisions (Weiss 1999). So the adoption of new instruments may ultimately be less important than their effective implementation. After all, any form of international rule making that lacks a concern for the effectiveness of the norms already enacted, as demonstrated by the commitments of states to respect them, is self-defeating (Handl 1994). The challenge is to create international environmental institutions (like those created by the NAFTA environmental side agreements) that are able to coordinate treaty obligations and policy development in pursuit of agreements that synthesize competing interests and increasingly devolve monitoring and management duties

to environmental NGOs (Kelly 1997). This must be done in a way that rebuilds the legitimacy of international organizations, which has been undermined by a lack of transparency, accountability, and normative grounding (Nye 2001).

A potentially useful conceptual structure for this effort has been provided by Lynton Caldwell (Caldwell 1999). He has argued that the process of globalizing the human environment has been driven by six particular elements of the more general process of globalization. These elements include

1. the growth of science and its technological applications,
2. the ever widening dissemination of information,
3. increasingly organized public action in international public affairs,
4. the emergence of new international nongovernmental organizations,
5. global economic growth, and
6. global population growth.

These elements of globalization cluster around three general issues. First, the growth of science and the broad dissemination of information suggest that environmental management will become even more knowledge driven than it has been and that the knowledge base involved will be ever more accessible to the world's citizens. Second, the increase in direct public participation in international affairs and the emergence of new international nongovernmental environmental organizations means that the work of environmental management will increasingly be subjected to the pressures of democratic politics. Finally, the facts of global economic and population growth clearly suggest that it will become increasingly important that international policies, across the widest spectrum of particular topics, be developed in ways that are sustainable from an ecological perspective. Thus the challenge to international executives will be to manage knowledge resources in ways that produce policies that are defensible in terms of both their democratic content and their environmental sustainability.

Knowledge

That our focus at this point turns to knowledge production and dissemination is, in some ways, propitious. Not only is our ability to recognize environmental issues dependent on scientific knowledge, but also science has assumed an often decisive role in promoting environmental issues to the level of international significance (Rosenbaum 2002). Moreover, the

deployment of knowledge by networks of policy specialists in the global arena is critical to the idea of transgovernmentalism, which offers an answer to the most important challenges facing advanced industrial countries. These include the loss of national regulatory power under conditions of economic globalization, perceptions of a deficit of legitimacy as international institutions step in to fill the regulatory gap, and the difficulties involved in bringing less than fully democratic states into regulatory regimes (Slaughter 1997). The institutions of science and technology link people together through extensive systems of communication and commerce, serving as the basis of authority for a wide range of emergent institutions of global governance (Miller 2004). But a primary focus on science and information is a mixed blessing.

As a general matter, theories of international relations tend to ignore the social processes involved in the production of scientific and technical knowledge, assuming that knowledge production occurs outside the processes of international conflict and cooperation that are central to their analyses (VanDeveer 2004). As a consequence, our view of international environmental law frequently overlooks the facts that value-free science is an illusion, that scientific expertise is unevenly distributed both within and between countries, that the generation of environmental information is insufficiently interdisciplinary, and that economic analysis is often employed prematurely to limit the debate over regulatory alternatives (Zapfel 2002). From nearly any perspective, these blind spots are ultimately self-defeating. They generally result in a shift in focus from dialogue on matters of evidence and principle to an exchange of accusation in which objectivity is the first casualty and stalemate is the final result (Najim 2002).

The institutionalization of scientific research can either reinforce exploitive patterns of the past or introduce greater reciprocity in the interaction between global and local knowledge (Scholtz 2004). Despite the efforts of industry to globalize and standardize expertise, local and global knowledge increasingly depend on each other for their existence. Finding ways to build upon and use this interaction can help advance the cause of environmental protection in significant ways. Local activists can strengthen their ability to participate in international decision making by combining scientific and technical resources with their situated knowledge. Creating new social, political, and cognitive institutions (joint employee-activist teams or citizen inspectors for example) can challenge previously constructed boundaries and put greater pressure on both industry and governmental regula-

tors to engage citizens in environmental protection (Iles 2004). In addition to enhancing the democratic content of international environmental politics, this kind of science-based approach holds the promise of more environmentally sustainable outcomes. International environmental agreements are not self-implementing. As a consequence of the particular dynamics of any negotiating forum, apparently standardized terminology and requirements tend to be locally contingent in practice. Even where such agreements arose from particular local issues, they will require "relocalization" if they are to be effectively applied in specific contexts (Gupta 2004). Moreover, local knowledge has become more than just a basis for competing knowledge claims; it is now a tool for exercising voice in global politics (Miller 2004).

According to some scholarly accounts, globalization is a process (or collection of processes) that simply happens to people, shaping the circumstances in which they live. But attempts by international environmental and developmental institutions to preserve traditional ways of life show that globalization can be a powerful tool for constructing as well as questioning the meaning of the local as well as crafting and negotiating the meaning of the global (Lahsen 2004). Science-based techniques like risk assessment are not tools for making decisions but, rather, for illuminating decisions. Whatever enlightenment risk assessment offers should not be a benefit for the elite few but a means by which public concerns and attitudes may be better integrated into risk-control strategies (Case 1993).

At this point it should be clear that the relationship between global and local knowledge is both promising and problematic from both the democratic and ecological perspective. Even in the presence of relatively unchallenged scientific consensus, local assessments of environmental challenges and obligations will be comprehensible only in light of their surrounding political culture (S. Beck 2004). As an example, environmental management is a prerogative that flows from some system of land tenure. Every system of resource management is, therefore, based upon certain assumptions, frequently unstated, according to which social organization, political authority, and property rights are closely related in culturally significant ways. Thus, cultural diversity is as critical as biological diversity and must be manifested in our methods of relating to the land and its inhabitants (LaDuke 1994). In this context, the challenge to transnational networks of environmental experts is to develop governing institutions that will "relocalize" global knowledge by

translating and extrapolating the outputs of global regulatory models into locally relevant information, transmitting this information from sites of production to sites of consumption, and helping recipients interpret and make use of the information in relation to local environmental problems (Miller 2004).

Democracy

The global changes that humankind is now experiencing are being produced, to a very great extent, by what hundreds of millions of individuals are doing. The pace and direction of these changes can be affected only by what hundreds of millions of individuals stop doing or chose to do differently (Cleveland 1993). This realization leads to the conclusion that the concept of national interest, which has long been used to address discussions of foreign policy and international affairs, is not a very useful construct for analyzing global environmental problems. Thus we have seen many international environmental agreements negotiated over the past thirty years in which states have agreed to constrain their operational sovereignty while maintaining formal sovereignty and the rhetoric that supports it (Weiss 1993). This development, however, does not squarely address the problem of creating international environmental law that directly controls the behavior of individuals through mechanisms of democratic self-government.

The most optimistic claim that could probably be made at this point in the history of international environmentalism is that our existing agreements represent important statements concerning emerging global expectations. But candor would require us to add that these expectations have not so far allowed the leaders of the developed nations to recreate even the superficial consensus that linked environment and development at the 1992 Rio Earth Summit (Bryner 1997). In fact, it may be that some of our efforts over the recent decades have been counterproductive in at least one way. Efforts to address environmental problems from the top down, through international and national institutions, have led to a weakening of local environmental institutions and a concomitant decline in the effectiveness of environmental laws and policies in the Third World, for example in efforts to preserve species or maintain forest productivity. This is especially unfortunate because it is at the local level that the institutions for resource ownership and control could be brought together to provide for integrated environmental management of a genuinely democratic nature (B. Richardson 2000; Gupte and Bartlett 2007).

Even among First World publics, the dynamics of direct political action are often difficult. An example of the problem is provided by the fate of the Transatlantic Environmental Dialogue (TAED). The dialogue was an experiment in cooperation among environmental NGOs in Europe and the United States that was intended to set policy priorities for government action. The TAED fell victim to differences in policy-issue agendas (such as a lack of interest in international issues in the United States), the frequently adversarial character of NGOs, and a preference within the NGO community for global rather than regional policy approaches (Lankowski 2004).

If in the face of failures like that of the TAED one were looking for reasons to abandon the idea of countering globalization through greater use of democratic participation, certainly the reasons would not be difficult to find. There is no universally agreed upon definition of globalization, but it clearly embraces vast changes in both economics and culture. Moreover, there is no corresponding global governance mechanism to cope with the multinational and transboundary issues that those changes produce. Intergovernmental organizations of various sorts have been given mandates to deal with certain of those issues, but none has been created with corresponding new powers of governance or organizational structures that would allow them to act decisively on those mandates (Guruswamy 2003).

A determined democrat, however, might counter that this discouraging recitation is merely evidence that democracy has not been given a fair chance. Among its other results, globalization has changed the fora in which nations, organizations, and individuals operate. As a consequence, nongovernmental organizations play an increasingly important role in the international arena, reconfiguring communities across traditional and national boundaries to such an extent that the continuing relevance of states has been called into question (Pagnani 2003). A note of caution, however, is in order. By themselves, social movements and the organizations of civil society they produce may fail to democratize environmental discourses. In fact, they may strengthen preexisting discourses (and their potentially repressive impacts) by reinforcing conventional conceptions of ecology that overlook the underlying complexities of the relationship between nature and human interests. The solution is wider participation in the formation of ecological concepts. This is a practical necessity if temporal and cultural specificity is to be minimized in our pursuit of ecological rationality (Forsyth 2004).

This need for the widest possible participation is the underlying logic of the Aarhus Convention and is widely seen to be a solution to the challenges faced by international environmental NGOs. In order to overcome the numerous obstacles to fundamental change in environmental policy, NGOs must form broad-based coalitions among those affected by environmental hazards. NGOs can accomplish more through networks and alliances with other groups in civil society than through their own efforts at elite bargaining (Dhanapala 2002). In the interpretation and implementation of international environmental law, the important objectives of coherence and predictability will require that decisions be made on the basis of community-accepted norms. What is needed is not a passive dispute resolution body, but rather a mechanism that is able to articulate the aims and objectives of the communities in which it operates (Craik 1998). This is especially true where, as is often the case, local-level institutions for ecological management are informal, based on cultural norms and social conventions rather than the positive enactments of legislatures (Colding and Folke 2000). We must confront the fact that the behavioral rules needed to preserve the environment must be attuned to the conditions of each distinct ecosystem and the human cultures they contain. No general recipe is available, both because of the various types of legal systems involved and because of the varied socioeconomic and environmental conditions presented (Brunnee 1993). Moreover, local knowledge is required to relate ecological concepts to the particulars of specific environments, to place, to history, and to identity. The content of ecological expertise is, therefore, a matter of continual negotiation between universal and particular conceptions of the environment. The mere fact that this pattern is likely to recur globally does not mean that the content of each instantiation can be predetermined in the absence of local input (Lachmund 2004).

As challenging as this "custom-made" approach may be, it offers several distinct advantages if it is seriously undertaken. It is widely accepted that differences between the legal frameworks in force at the national and global levels suggest that different considerations should go into the choices of the instruments of environmental policy. Underlying legal structures do matter. Global environmental regulations must, therefore, be conceived differently from national regulatory schemes (Wiener 1999). But accepting this abstract proposition and acting on it in concrete circumstances are two different things. One example is the relationship between trade and the environment. In the ministries where trade

agreements are negotiated, ecology is of limited interest. But in communities around the world, local environmental activists seek to intervene in these negotiations. They understand that there are no environmentally neutral trade issues. They also know that better-quality decisions and a less adversarial relationship between business and environmental groups result from public involvement in trade negotiations. And they are a constant reminder that trade decisions must be viewed as equitable if they are to be politically sustainable (Powell 1995).

Another example of the importance of adapting global policy to local circumstance is presented by the increasing role played by indigenous peoples in international affairs. Around the world, indigenous populations have declared their distinctive identity and existence and the importance of their contributions to the human experience. They have also asserted their right of self-determination and the concomitant rights of political participation. By demanding that international decision makers acknowledge the imposed risks they face, indigenous peoples have mounted a powerful resistance to the global as it is defined by economists, scientists, and policymakers, many of whom are responsible for denying them basic democratic rights in their own countries (Fogel 2004). The importance of this new political force is evident, for example, in the Prior Informed Consent Provision of the Convention on Biological Diversity. The structure of the convention reflects the long-standing tension between local communities and national governments. Its focus on the "fair and equitable sharing" of the benefits of development has produced a complex power struggle between public officials, who see biodiversity as a source of much-needed revenue, and traditional communities, which are the guardians of ancient knowledge of medicinal plants and other biological resources. Requiring the consent of indigenous peoples before development projects are approved is an increasingly important mechanism for ensuring that adequate environmental and social-impact assessment is conducted and that community involvement and self-determination is guaranteed (Firestone 2003).

Sustainability

It remains to describe what a form of environmental policy implementation conceived as interpretation would look like and to suggest how it would make sustainable policy development more likely. Were international environmental norms to be established by thousands of citizen juries across the globe, what would (or could) existing international

organizations do to render those norms into effective environmental regulations? Happily enough, we have a model at hand that can help us answer that question.

In 1923, a group of prominent American judges, lawyers, and teachers established the American Law Institute (ALI). The intention of the founders of the ALI was to address what they took to be the two chief defects in American law at that time: its uncertainty and its complexity. Uncertainty in the law, on the one hand, was attributed to a lack of agreement among members of the profession on the fundamental principles of the common law, a lack of precision in the use of legal terms, conflicting and badly drawn statutory provisions, the large volume of reported cases, and the relentless march of novel legal questions. The complexity of the law, on the other hand, was attributed largely to its lack of systematic development and to its numerous variations within the different jurisdictions of the United States. The ALI set as its objective the improvement of law and its administration by promoting the clarification and simplification of the law and its better adaptation to social needs. The ALI uses two major techniques to pursue this objective: restatement and codification.

A *restatement* is the result of a careful survey of the existing state of the common law in a particular field of practice. Its purpose is to tell judges and lawyers what the law is in its current form. Between 1923 and 1944, the ALI developed its "Restatements of the Law" in the areas of agency, conflict of laws, contracts, judgments, property, restitution, security, torts, and trusts. In 1952, the Institute began work on the "Restatement Second," reflecting new analysis employing an expanded list of authorities and adding coverage of areas such as landlord and tenant law and the foreign relations law of the United States. The "Restatement Third" was inaugurated in 1987, adding coverage of unfair competition, the law governing lawyers, and employment law, as well as expanded coverage of topics in the existing areas covered by prior restatements. The singular characteristic of restatements has been their descriptive character. Where significant differences exist among jurisdictions on important points of law, those differences are noted and the restatement report generally limits its editorializing to characterizing one view as the majority position.

A different approach to the progressive improvement of law is the ALI's codification projects. In the most prominent example of this process, the institute has collaborated for over fifty years with the National Conference of Commissioners on Uniform State Laws in developing the Uniform

Commercial Code (UCC). The UCC is a comprehensive code covering most aspects of modern commercial law. It is generally viewed as one of the most important achievements of American law and has been enacted (with some variations) in forty-nine states, the District of Columbia, and the U.S. Virgin Islands. The ALI has pursued other codification projects that have resulted in the development of other model statutes, including the Model Code of Evidence, the Model Penal Code, the Model Code of Pre-Arraignment Procedure, the Model Land Development Code, and a proposed Federal Securities Code. The common characteristic of these documents, which distinguishes them from the restatements, is their prescriptive character. They go beyond describing the law as it is (including its areas of conflict) to propose a unified approach that would comprise, in the institute's view, the legal best practices in a given area of law. In pursuing its codification projects, the ALI has concentrated on areas of the law where uniformity of approach is a substantively desirable goal in itself or where there is a general view that significant reforms are needed. This measure of self-restraint, together with the credibility resulting from the restatement process underlying codification, has served to make the model codes some of the most influential documents in American legal history.

It might be useful at this point to contrast the American Law Institute with its closest global cousin, the International Law Commission (ILC). Established a quarter of a century after the American Law Institute, the ILC is charged by its founding charter with the promotion of the progressive development of international law and its codification. While the distinction is largely one of convenience, the statute distinguishes between progressive development as the preparation of draft conventions on subjects that have not yet been regulated by international law and codification as the more precise formulation and systematization of rules of international law in fields where there already is extensive state practice, precedent, and doctrine. In practice, the commission's work typically involves some elements of both progressive development and codification, with the precise balance depending upon the circumstances in a given area of law. The drafters of the statute conceived of progressive development as a conscious effort to create new rules, the culmination of which would be an international convention. In the case of codification, on the other hand, it was imagined that publication of a report and possible adoption of it by the UN General Assembly was an alternate outcome. The ILC has indicated that the distinction drawn by the statute between progressive development and codification has proven unhelpful in practical

terms and it has developed a consolidated procedure and applied that idea to its work in a flexible manner, making adjustments as circumstances demand.

The most obvious point of contrast between the ILC and the ALI is the absence of any correlative at the international level to the process of restatement. Both progressive development and codification as carried on by the commission are forms of advocacy of best practice, as is the codification procedure used by the institute. The ILC was undoubtedly correct in its conclusion that the distinction between development and codification in its statute was not useful. It was based on a distinction between two alternate means by which the proposals of the commission might be adopted, which for our purpose is uninteresting. What occupies our attention is distinguishing between the description of law that goes into a restatement and the proposal of legal reforms that comprise codification.

Relying as it does on the work of thousands of judges and juries, the restatement process serves a legitimation function that may not be entirely unintended. Although the American Law Institute has never (to our knowledge) directly addressed the issue of political legitimacy, others have done so in helpful ways. To cite but one classic example, Alexander Hamilton argued in *The Federalist* #17 that the duty of the states to provide for the "ordinary administration of criminal and civil justice" is the "most powerful, most universal, and most attractive source of popular obedience and attachment" (Hamilton, Madison, and Jay 2005). The intimate involvement of average citizens in this process and the immediacy of its benefits to them were more important, in Hamilton's mind, than any other circumstance in promoting "affection, esteem, and reverence toward the government." *The Federalist* #17, it should be remembered, was an essay put forward in defense of the proposition that the new central government could be allowed the power of "legislation for the individual citizens of America" without the risk of it usurping the legitimate authority of the states.

It is important not to conflate codification and restatement. Restatement is no more than an analytical summary. It does not (necessarily or appropriately) attempt to force a greater degree of coherence or consensus on a body of decisions than the substance of those decisions actually warrants. It is, in that way, descriptive only. Codification attempts to go one step further to suggest how new cases would be decided, based upon what are taken to be the most relevant elements of the "legal database"

that the adjudicatory process has accumulated. It is both descriptive and predictive. When that codification is presented as an "ideal code," it also stakes out a normative claim on its own behalf. A juristic democratic process of formulating global environmental norms through the use of citizen juries (as we have described them above) would allow the International Law Commission, for the first time, to pursue restatement activities that would provide a form of democratic legitimacy for its codification efforts independent of any charge from the United Nations or request of member states. With this foundation, progressive development and codification could entail not only pursuit of new international conventions, but also the adoption at the level of the states of model environmental codes that reflect the considered judgment of the world's citizens (in congress disassembled). It could also feed back into environmental practice in the states the collective wisdom of our species as it struggles to master the environmental challenges that manifest themselves everywhere in their various guises. This approach to formulating, interpreting, and implementing ecological norms offers obvious political advantages. It makes it possible to produce rules that are binding (in at least a minimally legal sense) on all nations without unanimous consent in a formal process of negotiation (Palmer 1992). It provides for the creation of an intermediate governing process to supplement states and markets that are neither completely domestic nor fully international and which have been regarded as essential to global environmental governance (Lahsen 2004). These processes will, in turn, allow for the change of policy boundaries and the building of linkages between local, national, and international institutions that any successful environmental regime will require (B. Richardson 2000).

The approach to building and implementing environmental norms that we have been describing also offers advantages in terms of producing more sustainable policy outcomes. For one thing, the effectiveness of compliance-control procedures depends to a significant degree on cooperation and flexibility with regard to response measures. Responses to noncompliance need to be appropriate to the cause, degree, and frequency of noncompliance and they must provide international assistance based upon the assumption that more effective response is a shared objective of all parties. This attitude requires a dialogue within the community of parties rather than conventional approaches to enforcement (Ehrmann 2002; Faure and Lefevere 2005). The added legitimacy provided by a juristic approach to establishing global norms and the implementation strategy it

suggests would seem to be the technique most likely to produce such a community dialogue.

A useful example involves the globalization of environmental impact assessment. In the United States, the National Environmental Policy Act (NEPA) requires all federal agencies to prepare environmental impact statements for any action with potential environmental consequences. This requirement, replicated in the American states, has become ubiquitous in development planning in the United States. But virtually every federal agency with domestic NEPA responsibilities has refused to enforce its provisions with respect to its overseas activities (Manheim 1994). This is true despite the fact that a growing global commitment to environmental impact assessment provides an increasingly important safeguard against ecologically irresponsible decisions. While the particulars of this safeguard vary among states (and rightly so), the basic requirements of transparency, public participation, environmental screening, and post-project environmental monitoring are emerging as essential elements of the global environmental impact assessment (EIA) model (Gray 2000). This process has allowed at least one observer to conclude that transboundary environmental impact assessment is emerging as an important global phenomenon not as a function of any international regime but rather as an offshoot of domestic EIA laws (Knox 2002). Developments of this sort have even led the author of NEPA, Lynton Caldwell, to argue that an environmental common law for nations is in fact evolving, albeit without any general recognition of the fact or any dejure modification of the doctrine of national sovereignty (Caldwell 1999).

Against this global backdrop, there is a growing awareness that sustainable resource management requires that people who have traditionally "owned" resources and used them to meet their social and economic needs must enjoy community-based rights of management that give them the incentive to collectively conserve their resources and the political bargaining power to influence the conditions under which interests outside of their communities exploit those resources (B. Richardson 2000). It has even been argued that a global norm of environmental protection has emerged at the expense of international economic law relating to development. This is attributed to the increasing participation of transnational civil society in international environmental lawmaking and the attractiveness of the language of rights and the idea of a right to a healthy environment (Fuentes 2002). If, indeed, the assertion of local rights against global processes has grown so potent, then the time is approaching to close the

circle. Local institutions must relate to the global aspects of environmental management by participating in the emerging transnational networks that allow for the generation and exchange of new understandings about environmental management (B. Richardson 2000). It is at this point in the process of developing regulatory practices that the procedure of codification can feed back environmentally rational norms from the global arena into the decision-making activities of local institutions.

7

Juristic Democracy and International Law: Diversity, Disadvantage, and Deliberation

In the previous chapter, we outlined an approach to collective will formation that we characterized as *juristic democracy*. By way of summary, juristic democracy presents citizen juries with a concrete (but hypothetical) problem of international environmental protection and asks them to come to a unanimous resolution of that problem. Then a substantial number of these deliberative outcomes can be aggregated through a process of restatement into a general description of the considered judgment of a representative sample of the population regarding the question of policy that underlies the adjudicated case. The objective is to use the discursively constrained environment of the jury, and the neutrality resulting from the hypothetical nature of the case, to allow ordinary citizens to contribute to a collective process that strives to achieve what John Rawls calls *reflective equilibrium* (Rawls 2001, 29–32).[12]

In chapter 8 we will further examine the alternatives for implementing an approach like juristic democracy within the context of the existing institutions and processes of international governance. First, however, it is necessary to address the many serious criticisms that have been lodged against the very idea of deliberative democracy. Most of these criticisms allege that deliberative democracy is either not very deliberative or not very democratic. In this chapter we shall detail these complaints, offer a response to them on behalf of deliberative democracy, and refine our model of juristic democracy to more directly address the concerns of deliberation's critics.

Is the Jury Out?

For purposes of theoretical development, it is a fortunate coincidence that our model of deliberative democracy relies on the idea of citizen juries.

The image of "twelve angry men" is deliberative democracy's least appealing face, the one most certain to raise the hackles of deliberation's critics. Deliberation's other guises seem more congenial. The town hall meeting is a comfortable armchair for democratic theorists, particularly in America. Even when a real town convening in a real hall is involved, any less than fully democratic results can be rationalized away. Locals, after all, are assumed to know their own interests and issues better than outside observers. Democracy's discontents are always free to relocate when their concerns occur at the neighborhood level. What the town hall meeting may lack in terms of deliberative purity, it more than makes up in its democratic authenticity (Bryan 2004).

At the other end of democracy's spectrum, the model of the multimember court is often invoked as the paradigmatic case of deliberation. In the abstract, a panel of judges is a defensible model of decision making because the parties are disinterested, similarly skilled and situated, and held in a structure that ensures their relative equality. When actual courts act, they are generally constrained by policies established by the representative institutions of government and their actions are subject to review by higher courts (including, ultimately, the court of public opinion). So we can often accept the seemingly antidemocratic qualities associated with judges (both as individuals and as courts) because they play a limited role in existing political systems.[13] In short, on the one hand, judges can deliberate legitimately and well because we do not ask them to do democracy's heavy lifting. As with the town hall meeting, they enjoy a pass (to a degree) on part of the deliberative democratic promise. Juries, on the other hand, are more problematic. They seem neither as democratic as the town hall meeting nor as calmly and competently deliberative as the panel of judges. But herein lies an opportunity. If the citizen jury (disfavored as it may be) can be acquitted of the charges against it, other models of deliberative democracy should enjoy the benefits of collateral estoppel. That a theoretical and, perhaps, practical opportunity exists in this regard, however, should not blind us to the dilemmas that juries represent.

The American founders thought so highly of the institution of the jury that they made its availability a constitutional right in *both* criminal and civil cases, though the guarantee of a civil jury came in the Bill of Rights as an afterthought and was the subject of some disagreement. Indeed, the absence of an explicit guarantee of a trial by jury in civil cases was one of the concerns raised by anti-federalists about the new Constitution. In *The Federalist* #83, Alexander Hamilton declared that both the advocates and

opponents of the U.S. Constitution set a high value on the institution of the jury. He then went on, however, to express doubts about the jury's utility in a class of civil cases including tax collections and prize cases involving the laws and interests of other nations. In these cases, respectively, the costs of jury adjudication would often exceed the amounts at issue and the intricacies of the legal questions involved would present average citizens with too challenging a task. More revealing is the fact that Hamilton also included, in the category of matters inappropriate to the jury system, cases dealing with the law of equity.

According to Hamilton, equity jurisdiction presents a problem for the jury system for two reasons. First, juries do their best work when they are asked to decide questions that are relatively simple, few in number, and covered by generally accepted rules of law. Questions of equity, however, arise from extraordinary problems that involve making exceptions to general rules of law. Hamilton argued that it is unreasonable to ask people who have been drawn away from their usual occupations, and cannot return to them until the matter is decided, to endure the complicated and time-consuming process of resolving the novel and fact-rich problems that a case in equity presents. Even if it were not impractical to ask this of juries, there is no reason to think that juries would bring to the adjudication of extraordinary matters the special advantages that they do to the resolution of problems more characteristic of everyday life.

Second, precisely because a case in equity requires an exception to the general rule, it represents a danger to the general rule. The general rules that govern the outcome of cases in common law courts have become general rules because they are serviceable, though imperfect, resolutions for common problems. Even when they yield manifestly unjust results, we must proceed with a due regard for their average utility (Posner 1981, 101–107). Cases in which we deviate from a general rule must remain extraordinary and be seen as such, if the salutary effects of having general rules are to be preserved. In Hamilton's time, several of the states of the American union accomplished this, in part, by holding to the English tradition of lodging equitable litigation in courts of chancery. These courts were separate from those of legal jurisdiction and, without exception, denied litigants the right to trial by jury. This institutional bifurcation, soon abandoned in America, allowed both for trial by jury in the run of the main cases *and* for deviations from what the law appeared to require where considerations of justice seemed to demand it. With equity and law combined in our contemporary system of courts, however, we

are left with the struggle to balance the advantages and disadvantages of the phenomena of jury nullification (Sunstein 1996). This would seem to prove Hamilton's point about keeping equitable issues out of the hands of juries so as to protect the general rule (or rules) of law.

Our discussion of the jury to this point is intended to be more than historical diversion. It serves several important purposes. First, it places the idea of juristic democracy (employing citizen juries) along a deliberative continuum between the most democratic model of deliberative democracy (the town hall meeting) and the most deliberative model of deliberative democracy (the multimember court). Second, it establishes the democratic bona fides of the jury system. In its criminal variant, trial by jury was regarded by the federalists as a "valuable safeguard to liberty" and by the anti-federalists as "the very palladium of free government." In civil matters, the founders were so at pains to reassure critics of the U.S. Constitution that the new plan was no threat to trial by jury that they eventually devised the Seventh and Tenth Amendments to protect the jury in federal and state courts, respectively. Third, the limitations that even so ardent an admirer of the jury system as Alexander Hamilton felt compelled to place on that institution serve as a foundation for the criticisms of the work of juries that we hear today as well as for the doubts that have been expressed about using the jury as a model for deliberative democracy. It is to those criticisms and doubts that we now turn.

Juries on Trial

Criticisms of the work of juries in the real world are, by now, relatively familiar. For one thing, there are at least two ways to evaluate the decisions that juries produce. At its most basic level, the jury verdict provides a single, binary input into the complex and extensive system of adjudicating disputes between parties. The most common form of jury verdict is the general verdict; guilty or not guilty, liable in this amount or not liable. So simple an action can be criticized for providing no grounds upon which to assess its value, discover its error, or reveal its bias (Frank 1949). Yet, the general verdict can also be praised for its ability to introduce compromise into an otherwise uncompromising system and for not forcing juries to say more than they can agree on (Casper 1993). Does a jury do violence to the complexity of the world by reducing it to a verdict, or does it add value to human existence by disposing of a problem in a pragmatic, if imperfect, manner?

Another question, or series of questions, can be raised regarding the composition of juries. In Hamilton's time and before, jurors were selected for their personal knowledge of the circumstances of the case at trial and only propertied males were qualified to serve (Dawson 1960). Even today, the process of assembling jury pools and selecting jurors can produce substantial demographic differences between juries and the population at large (Fukurai, Butler, and Krooth 1993). More may be at stake than merely squandering our best opportunity for nurturing a genuinely representative and participatory institution of government. A lack of jury heterogeneity may actually undermine the jury trial as a technique for accurately resolving problems.

With respect to race, for example, there is significant evidence to suggest it plays a role in determining the outcomes of criminal trials. Some studies have suggested that white jurors produce higher conviction rates for black defendants than for white defendants (Poulson 1990). Other research has failed to produce a consistent pattern of the effect of race on criminal conviction rates (Mazzella and Feingold 1994). Despite this general pattern of mixed results, one particularly troubling regularity has emerged from the research on juries and race. There appears to be a consistent tendency for some juries to acquit defendants where both defendant and victim are black (Kalvern and Zeisel 1966; Myers 1980; Foley and Chamblin 1982). This result, to the extent that it is true, is evidence of something more than unfairness to one party or another in isolated cases. It suggests a systemic indifference to the costs imposed upon society, not to mention the pain inflicted on individuals, resulting from black-on-black crime. It would be hard to imagine a more damning indictment of any system of justice than that it tended to create a legal ghetto in which discrimination and disadvantage were magnified by disinterest.

A similar picture emerges with respect to juries and gender. Much of the research fails to produce evidence of consistent and significant relationships between gender and jury verdicts (Hastie, Penrod, and Pennington 1983). Exceptions, however, emerge in two areas. In the case of both sexual assault (Sealy and Cornish 1973; Bottoms and Goodman 1994) and domestic violence (Pierce and Harris 1993), female jurors are more willing to convict male defendants than are male jurors. As in the case of race, we are left to wonder about the precise mechanisms involved. Are the varied life experiences of men and women (like those of whites and blacks) simply combining in the jury room to produce different and more accurate results than would be the case were the jurors all of the same

gender? Or is it a less cognitive, more affective, matter of identification with and sympathy for the victim? In either event, we have empirical evidence to support the theoretical complaint that the jury system is inaccurate and unjust precisely to the extent that it remains unrepresentative.

A third set of questions about the jury system has to do with the normative assumptions we make about jury deliberations. Juries are supposed to be composed of fully independent and equal individuals, all of whom are open to the information provided by the trial itself and to the views of their fellow jurors. Moreover, jurors are supposed to respond only to the force of the better argument, never to coercion or inducement (Kassin and Wrightsman 1988). But how seriously can we take this idealized model? Hollywood has given us the image of a single juror, standing alone, who converts eleven others to his or her point of view through relentless but respectful logic. But if the member of a minority needs to have the performance skills of Henry Fonda to prevail in the jury room, does that not make the jury critics' argument for them?

There is, indeed, research indicating that the power of minorities to influence majorities may be at its lowest ebb in the jury room. Where a group task is purely judgmental (rather than an *intellective* task that has an objectively correct answer), there is evidence to suggest that we rely on socially contingent conceptual structures in ways that might systematically disadvantage those who do not share the perspective of the majority (Kerr 2001). Simply by virtue of their difference, therefore, minorities on juries may face an uphill battle. This might be the case not because the view of the minority is inferior but, rather, because the members of the minority do not share the conceptual framework and habits of interaction that are the dominant patterns of the majority. To the extent that this is true, it undermines the claim that a jury trial is an especially accurate or even a particularly fair method for adjudicating disputes or determining guilt or innocence.

Each of the criticisms of the jury system we have discussed has a parallel in the literature on deliberative democracy. Just as juries in the judicial system have been criticized for reducing complex problems excessively, discriminating against minorities, and privileging particular styles of argumentation, the various approaches to deliberative democracy have been accused of depriving political discourse of its rich detail, ignoring difference and diversity, and compounding the disadvantages against which the powerless already struggle. We turn now to those complaints.

Deliberation in the Dock

The recent ascendance of deliberative democracy in the literature on democratic theory has produced a vociferous response, often (and ironically) from some who have spent years looking for alternatives to interest-group liberalism. At a general level, deliberative democracy, especially in its juristic form, can be criticized for reducing politics to an unnecessarily narrow range of concerns. According to Chantal Mouffe, deliberative democracy is dominated by "an individualistic, universalistic, and rationalistic framework" that renders it unable to grasp the true nature of the challenges facing democratic institutions today (Mouffe 1999, 745). Mouffe focuses her criticism on forms of deliberative democracy that she identifies with the work of Jürgen Habermas. But it is only fair to concede that, by its very nature, the model of juristic democracy we have advanced belongs directly in her crosshairs.

It is probably true that Mouffe's sweeping criticism of deliberative democracy bears more strongly on some deliberative approaches than on others. Perhaps the town hall meeting lies outside her line of fire, allowing as it does a far wider range of arguments and appeals than other deliberative models. And, perhaps, Mouffe would concede that the judicial panel is permissibly narrow in its approach because of its narrow jurisdiction and its justifiable emphasis on deliberative purity over democratic authenticity. But she would not be obliged in any way to make those concessions to juristic democracy, aspiring as it does to bring together a broadly representative group of citizens to engage in an exercise in collective will formation constrained by the substantive boundaries of a specific case and the procedural restrictions of the jury room.

In pursing her critique of deliberative democracy, Mouffe takes as her indicative case the ideal speech situation described by Habermas. This standard for democratic discourse can, she argues, be criticized from a Wittgensteinian perspective. According to Mouffe, Wittgenstein held that for there to be an agreement in opinions there first had to be an agreement on the language used, and this, in turn, required an agreement in forms of life (Mouffe 1999). The "fusion of voices" that rational consensus aspires to is made possible only by a common form of life, not the exercise of reason (749). To this, Mouffe adds the argument that "discourse itself in its fundamental structure is authoritarian since out of the free-floating dispersion of signifiers, it is only through the intervention of a master signifier . . . the signifier of symbolic authority founded only on itself . . . that

a consistent field of meaning can emerge" (751). On Mouffe's account, we run several risks by making reason the master signifier of political discourse. One is that we blind ourselves to the place of the passions in the construction of collective political identities. As a result, we fail to see that the main challenge to democracy is not discovering ways to eliminate the passions in order to create a rational consensus, but rather how to mobilize the passions in service of democratic designs (Mouffe 2002). In so doing, we deprive ourselves of the capacity to imagine a global "pluriverse" that would allow us to oppose the hegemonic project of the totalizing forms of globalization with a vision of a multipolar world order (Mouffe 2005).

Without necessarily conceding that the work of Habermas is deliberative democracy's best representative (though we certainly might), let us mount our defense on the ground chosen by Mouffe. Without claiming that Habermas can speak for all deliberative democrats (which he certainly would not), let us allow him to do the talking. We are fortunate in this project that Habermas has taken Wittgenstein seriously, discussing him extensively in at least six of his recent books. Like many other theorists, Habermas relies on Wittgenstein primarily for the concept of language games. According to Habermas, Wittgenstein conceives of a language game as a complex of language and praxis (Habermas 1988). Both he and Wittgenstein regard the intentional contents of language as independent of intentional experiences, having nothing to do at first with "acts of consciousness or inner episodes" (Habermas 2001c, 52).

For Habermas, Wittgenstein's approach constitutes a philosophical turn that is both linguistic and pragmatic. This dual quality of his work is captured in his own words when he defines a language game as "consisting of language and the action into which it is woven" (Wittgenstein 2001, 4). So language is not a tool that we use to pursue a social consensus, rational or otherwise (Habermas 1988). It is, rather, a collection of "symbols and activities" that are "already linked under the reciprocal supervision of an accompanying consensus of all participants" (131). For Habermas (2003) this consensus is linguistic: it is the "world-constituting" quality of language that is able to serve this purpose because the foundational understandings of language are not, in themselves, "capable of being true or false" but rather determine "a priori the standards for the truth and falsity of propositions" (Habermas 2003c, 68–69).

Contrary to Mouffe's suggestion that shared language constitutes an ethics that prejudges all questions, making the distinction between

procedure and substance impossible, language games are ontologies (Habermas 2001c). These ontologies ground our use of languages. Our understanding of language is evidenced by our ability to take "communicative action," which is itself "linked to a symbolized expectation of behavior" (Habermas 1988, 131). We then concretize these expectations by creating the language game that is law (Habermas 1996). In this connection, Habermas draws on Wittgenstein's idea of the language game to describe legal rules as "rooted in a practice that, although described externally as a fact, is taken by the participants themselves as self-evidently valid" (202). The rules of language games are normative only in the weakest sense. They are "untouched by any connotations of binding or obligatory practical norms" (Habermas 2003c, 122–123). They bind a subject's will only by channeling intentions in directions that hold out the possibility of justifying one's actions to possible critics and of succeeding in meeting the intersubjective expectations of a community of practitioners. Herein lies the response to Mouffe's second criticism, that discourse itself is authoritarian because it elevates reason to the status of a "master signifier."

If there is, indeed, a master signifier in the practice of discourse ethics as imagined by Habermas, "action" is a better candidate for the job than "reason." We can distinguish action from mere behavior, which is not rule-governed (Habermas 1988). Rule-governed action is "always communicative action, because rules cannot be private rules for one individual but rather must have intersubjective validity for a life form in which at least two subjects participate" (127). So it is inaccurate to say that the ideal speech situation imports some version of rationality that is alien to the lived experiences of discourse participants. The very idea of reasoned discourse can have no substantive meaning outside the structure of intersubjective validity that enables the participants to arrive at a common plan of action. The fact that one language is subject to translation into another is evidence that reason is both "bound up with language" and capable of extension "beyond its languages" (144). It is only this communicative form of reason, as a constituent element of languages generally, that is essential to communicative action.

To go behind reason at this level, as Mouffe attempts to do, is to risk a philosophical regress that is as pointless as it is endless. It is also to depart from the view of Mouffe's own philosophical touchstone, Wittgenstein, who urged that we not attempt to "refine or complete the system of rules for the use of our words in unheard-of ways." For his part, he sought only an understanding "that makes me capable of stopping doing philosophy

when I want to . . . that gives philosophy peace, so that it is no longer tormented by questions which bring *itself* into question" (Wittgenstein 2001, 44). In this passage we hear a poignant prelude to Habermas's argument for a form of "communicative reason" that is unconditional without being metaphysical—a sense of reason to which all can subscribe because it is grounded not in any particular form of life, but in our shared capacity for reciprocal understanding (Habermas 2002a).

Diversity's Deliberative Potential

If we take the view that deliberative democracy (as practiced in a policy jury) is an exercise in what Habermas called communicative reason, what roles does that suggest for diversity of race, culture, and gender? Here we discuss what we take to be diversity's three most significant sources of deliberative potential: its tendency to promote language innovation, its utility for testing emergent consensus, and its contribution to political legitimation.

Language Innovation

The role of language in politics, and the potential of language innovation to reorder politics, has two important elements. First, language can be seen as a constituent element in our political ontology. This view suggests a somewhat counterintuitive reason why important political issues are sometimes neglected. It is not so much that we fail to discuss issues because we don't see them but, rather, that we fail to see political issues because we lack any language to describe them. Politics and political phenomena do not simply exist. They are "carved out" through a process of boundary drawing (Gieryn 1995) that partitions reality and assigns labels to the demarcated elements. This work creates a discursive space in which we can intelligibly refer to political categories like the public and the private, the political and the nonpolitical. So our ability to focus our attention on discrete political issues depends crucially on the prior ability to mark out a "political realm" linguistically.

Second, our ability to imagine potential solutions to political problems and to weigh their desirability is also dependent on our linguistic abilities. Language does not so much reflect reality as it structures the way we perceive reality and the choices with which reality confronts us (Fischer and Forester 1993). The manner in which we represent reality, to ourselves and to each other, is necessarily selective. And the way we select which

options to consider and which to dismiss reflects assumptions about causality, values, and legitimacy that are built into the very structure of our language. As with so much of the contemporary analytic tradition, the value of this insight is more therapeutic than constructive, disabusing us of what we thought we knew. Just as the "linguistic turn" has undermined our confidence in "the mind" as something about which we could have a philosophical view and "knowledge" as an appropriate object of theorizing (Rorty 1979), so too "politics" loses its valence as a coherent system of thought and is increasingly revealed as a collection of conventional categories that often masks patterns of power and privilege behind a façade of facially neutral terminology. To the extent that these insights have any constructive potential, it consists of their tendency to lead us beyond the boundaries of the language games within which we are comfortable and fluent, in search of policy options that arise from discursive traditions that are not our own.

Consensus Testing

Diversity of race, gender, and ethnicity is conventionally taken to be one of deliberation's most important limiting factors (Bohman 1996). Indeed, it would be difficult to claim that diversity makes it easier to achieve consensus. It can be argued, however, that diversity makes genuine consensus possible. In the first place, an ever-present risk in any form of democracy is that the participation of minorities will, over time, come to be no more than formal. There is, and always has been, reason to be concerned about what has often been called the tyranny of the majority (Guinier 1994). At its most oppressive, the majority generally acts on behalf of a "public" that Lippman characterized as a phantom (Lippman 1925). The contemporary concern with representative democracy is that it fails to give substance to this phantom because it represents only those interests that already enjoy power and privilege in any given society. Whether the result is active hostility to minority interests, or simple indifference to the very existence of minorities, the solution would appear to be the same. Neither hostility nor indifference long survives immersion in the political solvent of difference (Gutmann 2003).

Moreover, there is a growing body of empirical evidence (admittedly anecdotal to some degree) that deliberation among diverse groups of citizens can go beyond merely representing public opinion more accurately. It may also promote the development of new areas of political consensus by allowing citizens to modify and integrate their preexisting preferences

into something more closely resembling considered judgments. A series of recent experiments with deliberative polling leads one to conclude that citizens are both willing and able to weigh their own views against those of others and develop "verdicts" that capture a consensus regarding the most appropriate course of action in the circumstances presented to them. During these experiments, it has been observed that participants made significant efforts to prepare for the sessions by reviewing background information on the issues they would be asked to consider. A large percentage of participants actively engaged in the subsequent conversations, during which many took extensive notes and very few behaved in ways that were uncivil. Participants generally indicated a willingness to participate in similar experiments in the future and, most importantly, experimenters were able to measure significant changes in participant attitudes as a result of the deliberative experience (Fishkin 1991, 1995, 1999; Fishkin and Luskin 1999; Leib 2004).

Results such as these lend credence to proposals that have been advanced by some of those who have warned us most strongly about the tyranny of the majority. As an example, it has been argued that persistent problems of political underrepresentation can be addressed by restructuring legislative decision-making processes. Drawing upon research in both jury behavior and small group process, it has been suggested that legislative committee members be held to a consensus standard of decision. Legislators would be forced to actually reconcile majority and minority views in much the same way as compulsory service on civil and criminal juries requires jurors to set aside biases and focus on evidence and court instructions (Guinier 1994). This creative use of gridlock has produced positive results in policy arenas ranging from small-group management (Wysocki 2002) and social services delivery (Fatout and Rose 1995) to environmental mediation (Rydin 2003; van den Belt 2004) and city and regional planning (M. Hanson 2005; Faga 2006). It is hard to believe that a capacity that can be seen at work in so many arenas suddenly vanishes in jury chambers or in a legislative committee room.

Political Legitimation

The potential for juristic approaches to public decisions can be seen most clearly when compared to other suggestions for overcoming the political disadvantages faced by minority groups. Although it is clearly beyond the scope of this chapter to discuss all of the ideas that have been advanced to address the political underrepresentation of minorities and the

resulting challenges to regime legitimacy, it is possible to describe the general approaches that have been offered. These fall into two broad categories. First, there are several ways that elections might be manipulated to produce outcomes that are more favorable to minorities. Second, it is possible to leave electoral systems as they are but to exempt minorities (in some way or another) from the powers that those elections confer.

The history of gerrymandering in the United States is one particularly sad example of how elections can be manipulated to the disadvantage of minorities and how difficult it is even for well-intentioned reformers to address the problem. It has never been difficult to design electoral districts in ways that dilute the voting strength of minorities. The difficulty arises when redressing those grievances becomes the issue. Is it better to concentrate minority votes in just a few districts in order to ensure the election of at least some minority officials? Or does this merely "ghettoize" minority voters? Is it preferable to distribute minority voters strategically to create districts that will ultimately be represented by members of the majority who, nevertheless, will provide "virtual" representation to the minority voters without whom they could not be certain of reelection? Lani Guinier has argued persuasively that the entire debate may miss the point for two reasons (Guinier 1994). First, those who advocate both approaches underestimate the extent and tenacity of racial animosity that is unleashed in the privacy of the voting booth. Second, the number of minority representatives in a legislative body is not particularly important if the rules and organization of that body replicate the isolation and powerlessness that afflicts minorities in the society at large. One is tempted to add to this the argument that in modern democracies people are truly free only on election day. Thereafter, they suffer the consequences of having allowed their representatives to steal from them the ultimate responsibility for the values, beliefs, and actions that will characterize their commons. In many important ways, to exercise the franchise is also to renounce it (Barber 2004). This is as true of the majority as it is the minority.

Providing political exemptions (of one sort or another) from the vicissitudes of democratic politics is a second approach to the problem of protecting minorities from tyranny. In the case of deliberative democracy in particular, there have been complaints that a single, homogeneous public sphere dedicated to rational unanimity ignores cultural specificity in favor of social hegemony (Bohman 1994; I. Young 1990). This concern has produced an argument for *deliberative inclusion* (I. Young 1999), which

requires not only that all interests, opinions, and perspectives be present in the deliberation but also that disadvantaged groups have a veto power over policies that affect them (I. Young 1989). This demanding version of inclusiveness would be in service of a more general politics of diversity that would resist any attempt to impose universal identities that are rational or neutral on members of minority cultures, as some critics of deliberative democracy have accused it of doing (Mouffe 1996).

The danger inherent in both electoral tinkering and political exemption is that they risk undermining the political legitimacy of the entire political system. To do so would be both unfortunate and unnecessary. It would be unfortunate because a delegitimized government leaves minorities with recourse only to the forces of economic markets and social hierarchies that have disadvantaged them in the past (or to revolution). And it is unnecessary because the political protection being sought can be found in the universal veto imposed by the requirement of consensus decision making suggested by a juristic form of democracy. As we have already suggested, this approach allows institutions of the political realm to "borrow" from the reservoir of legitimacy that the judicial institution of the jury has been accumulating for hundreds of years.

Environmental Justice: An Illustrative Example

It might be helpful at this juncture to provide a concrete illustration of some of the points we have advanced. It has been observed that the environmental justice (EJ) movement has been led precisely by those who are generally underrepresented in mainstream environmentalism. The most active representatives of the EJ community are often women of color who are economically disadvantaged and often motivated (at least in part) by underlying religious convictions (Di Chiro 1998). This pattern suggests that the EJ movement can be a vehicle for bringing together the richly diverse discourses of ecofeminism, environmental racism, socialist-inspired critical ecology, and the more "spiritual" strains of deep ecology into a potent new world view that challenges the individualism and materialism of liberal democracy and establishes the groundwork for a new environmental collectivism.

Before taking to the barricades, however, it might be worthwhile to develop a somewhat longer view of how the disadvantaged (or anyone else for that matter) might best orient themselves to their own interests

and to those of other citizens. Part of that view might come from Sheldon Wolin, who provides a useful distinction between an inheritance and a birthright (S. Wolin 1989). In most contemporary legal systems, estates are transferred from one generation to the next in the form of inheritances of essentially fungible resources (commonly money). When an estate is divided among the heirs, its contents become (at least potentially) connected horizontally with all of the other goods for which those contents might be exchanged. A birthright, on the other hand, is transferred whole. The birthright is as much a burden as a bequest. It comes to the recipient still bound vertically to both one's ancestors and one's future offspring, a trust inappropriate by its nature to the logic and language of contract and exchange. It is this quality that lends meaning to the biblical story of Esau, who sold his birthright to Jacob for a bowl of pottage. To appreciate the narrative and to live by its wisdom, it is unnecessary to renounce one's individuality or to forgo material possessions. Indeed, taking both of those values seriously is part of the lesson of Esau.

According to Wolin, the birthright modern humans have sold is the capacity for politicalness—the ability to know and value what it means to participate in and be responsible for the care and improvement of our shared experience. As with any birthright, we are entitled to this upon reaching the age of majority. But we can only enjoy its benefits it by making it our own, by mixing it with our own effort, by sacrificing something for it as Esau refused to do. Here, in this account of seizing one's birthright, we also have a reasonably accurate description of the successes that environmental justice advocates have enjoyed. Theirs have been triumphs of local organizing, of appealing to individuals to deliberate together across the boundaries of their differences (Schlosberg 1998). Had EJ activists pressed their perspective as a comprehensive world view, had they aspired to convince others to abandon individualism or materialism, they would still be waiting for their first victory. EJ activists have succeeded best where they have been able to confront those in power with concrete demands, in face-to-face encounters, using the vocabulary of the majority (in the form of individual rights and interests), under circumstances that encourage (in one way or another) consensus decision making. Of these conditions, consensus is obviously the hardest to satisfy. It is also the most important, particularly to those whose hopes depend on changing existing patterns of political influence. So those at the greatest disadvantage in politics should not fear the juristic model. They should embrace it.

Implementing Global Juristic Democracy in the Real World

To recapitulate: the more significant criticisms of the juristic form of deliberative democracy fall naturally into two broad categories–problems with juries and problems with deliberation. Jury problems include difficulty dealing with questions that are novel or complex. These sorts of problems, critics allege, are more appropriate to trial by judges or panels of judges. This approach, however, diminishes the democratic quality of deliberation that we seek to maximize. Critics also allege that jury heterogeneity is a problem. A lack of jury heterogeneity, it is suggested, casts doubt on both the fairness of the judicial process and on the likelihood that its results are accurate. Moreover, critics have cast doubt on the normative assumptions commonly made about individual jurors—that they are fully independent and equal individuals who are open to the evidence adduced at trial and to the opinions of their fellow jurors.

Problems with deliberation are of a different character. Critics assert that deliberative democracy, particularly in a juristic form, imposes a cramped and constraining rationalistic framework on political discourse. One result, it is argued, is an undue reliance on universalistic forms of argument that ignore the unique qualities of particular cases. Another is the encouragement of a rampant and rapacious form of individualism that denies people a vision of their common humanity. While it is indeed a challenge to understand how deliberative democracy could be both too universal and too particular, we have not relied on that apparent contradiction to dismiss complaints about deliberation entirely. Each prong of the criticism must be taken seriously on its own, and this we have tried to do.

What jury problems and deliberation problems clearly have in common is a concern for the value of diversity. To address this obviously legitimate concern, while rebutting the critics of deliberative democracy, has been the *second* task of this chapter. We have described diversity's deliberative significance by briefly discussing three of deliberative democracy's key processes—language innovation, consensus testing, and political legitimation. Drawing on the views of Ludwig Wittgenstein and Jürgen Habermas, we have conceptualized law as a language game of particular importance. Law is a language through which diverse social groups communicate their needs and expectations to one another. Where political processes take on a "monolingual" character, it is no longer appropriate to assert that they are either democratic or deliberative. This is made all the clearer when one considers the problems of consensus testing and legitimation. A "monolingual"

law and politics will never know whether any level of consensus it appears to achieve is genuine or merely an artifact of exclusion. And to the extent that consensus is less than genuine, it will fail to provide political legitimation to the course of action it dictates.

In order to illustrate the importance of deliberative diversity, and its compatibility with the evidential and relatively impersonal patterns of discourse involved in juristic democracy, we have provided the example of environmental justice. It is our argument that had environmental justice advocates not perfected a "legalistic" approach to their quest for justice, had they not persuaded others to deliberate across the boundaries of their difference, they would have enjoyed far less success than they have to date. So not only is a juristic approach, one that emphasizes universally accessible decision criteria, compatible with the needs of diverse populations, it is indispensable to it.

It now remains for us to indicate how our model of juristic democracy can be refined so as to take adequate account of the concerns that critics of deliberative democracy have raised. We do this briefly here, and at greater length in the next chapter, by applying the juristic approach to the problem of providing democratic content to international environmental law. In the process, we address three challenges that concern both deliberative democrats and their critics. First, how can we provide institutional mechanisms that will allow members of civil society to develop and refine democratic inputs to existing international environmental law without the use of formal governmental authority? Second, how can processes of formalizing those democratic inputs be cultivated transnationally? Third, how can those who wield governmental authority (particularly those in developed nations) be persuaded to recognize and formalize these emergent principles of law?

Although creating entirely new institutions is a venerable and attractive strategy for changing the world, there already exists a transnational institution that has the capacity to serve as an "access portal" for democratic inputs on the subject of international environmental law, namely, the International Law Commission (ILC), discussed earlier. The ILC finds the raw material for this process in two places. First, there are treaties and conventions that have been negotiated directly among nations. When, as is often the case, the subject matter of these treaties overlap but the rights and obligations established by them differ, there is an opportunity for the ILC to clarify and reconcile matters. Second, the ILC is capable (at least theoretically) of developing international standards from the patterns of

interaction between sovereign states that have developed over time into unwritten but recognizable standards that are referred to as "customary law." In principle, therefore, the ILC enjoys a significant opportunity to contribute to the growth of international law.

The commission's effectiveness, however, is constrained by the fact that its agenda is set for it by the UN General Assembly. Moreover, the ILC is subject to the same limitations as courts and their auxiliaries around the world. It can only deal with problems and principles of law as they present themselves in the form of actual cases. At the international level, cases come along at a slower pace than they do in national courts simply because there are fewer courts with less law to enforce and fewer actors to enforce it upon. Finally, the work of the ILC is not especially sensitive to issues of democracy and diversity because the parties in its cases are generally organizations and governments rather than individuals. It is simply assumed, contrary to obvious evidence, that the member nations of the UN adequately represent the diversity of interests present in their respective populations.

All of these problems could be addressed if the ILC were to employ a juristic democracy approach to the development of international environmental norms. Citizen juries could be marshaled to represent the true diversity of the global population (that is, a large number of juries collectively, not each jury individually) and they could deliberate on hypothetical cases designed by the commission itself to squarely address important normative questions in international environmental law. These deliberative processes could be repeated until they generate a genuinely representative sample of considered opinion. An approach of this kind would allow the ILC to become proactive in the area of environmental protection as well as to add much needed democratic content to its resource base.

Were the ILC to actually adopt a procedure of this sort, our second major challenge would immediately arise. How can the results of broadly democratic deliberations over fundamental normative questions regarding global environmental protection be aggregated into formal principles of international governance? The answer will depend, of course, on the level of consensus that an adequately representative collection of deliberative trials produces. Disagreement can occur both within juries and between juries, even from the same locale, that individually have arrived at consensus. In the presence of basic disagreements across national and cultural boundaries, we would at least have a more informed view of the

nature of the disagreement. Moreover, disagreement among state representatives would be clarified and legitimated in ways that might ultimately facilitate compromise.

Where global deliberation reveals a significant level of consensus, an agenda for ongoing diplomacy is clearly established. In fact, the democratic character of any such consensus would constitute a fundamental challenge to those views of international relations that proceed from an assumption of anarchy. The suggestion that there may, indeed, be a collection of normative commitments that are transnational (even if not fixed or absolute) would constitute a significant challenge to the *real politic* theories of diplomacy that we discussed in chapter 2. The result, we suggest, would be an altered political dynamic both within and between sovereign states.

Any juristic approach to international law will confront the challenge of political power. Any deliberative democratic approach deployed at the international level will certainly encounter this problem. For one thing, our experience at the national level suggests as much. For another, it is entirely likely that a leveled international playing field would be to the advantage of countries that suffer competitive disadvantages under the current system of nationalistic power politics. Ultimately, our answer to this challenge will be essentially a pragmatic one. It may be true that the advantages of a more democratic and ecologically rational global regime would disproportionately benefit those countries (and those groups within countries) that presently are at a disadvantage in terms of both political power and natural resources. But that does not mean that regional and global powers would not also enjoy advantages over the status quo. Political power is seldom zero sum and rarely blatantly coercive, and becoming even less so. Some political actors can become more powerful without others becoming less powerful. Whether the powerful like it or not, they nevertheless will continue to participate as new channels and processes of exercising power evolve. When the costs of resisting international norms are added to the downside of further environmental degradation, we may discover that even nations that harbor highly competitive and individualistic political cultures can be encouraged toward more responsible global citizenship.

Ultimately, political contests have to become about something other than power. Substituting rationally defensible rules that all can regard as legitimate is what the legal enterprise is all about (Habermas 1996). Legalization is a process characterized by obligation, precision, and delegation,

all of which constrain, redirect, and realign power (Goldstein et al. 2001). Moreover, power in all of its conventional forms is of diminishing value, especially as we look at the nature of asymmetrical conflicts and the enhanced roles of small groups. As the world becomes more and more a collection of networks and less a hierarchy of nations, anyone who can martial a plausible public consensus on any question of policy will be well positioned to back recalcitrant state actors into political corners from which there is no escape short of acquiescence.

In the next chapter, our discussion of each of these important challenges—providing for democratic input into the creation of international environmental norms, creating a process for codifying that input, and developing means for encouraging compliance with the resulting codes—will receive more extended attention. Our objective is to describe a plausible scenario for democratizing international law, beginning with the law of the environment.

8

Nature's Regime: Think Locally, Act Globally

A recurring theme in international law is the absence of democratic content in its basic principles and procedures. To the extent that international law captures anything of the political attitudes and preferences of the world's citizens, it does so only in an indirect and coincidental way. Even within the European Union, the world's most highly developed institution of international governance, the existence of a "democratic deficit" is generally acknowledged (Hix 2005). In fact, the relationship between citizens and their representatives on the international stage is so attenuated that the notion that the consent of states to international rules imparts to those rules any normative legitimacy is highly dubious (Buchanan 2003). In light of this, it is commonly argued that because there is no international institution that can legitimately speak for the entire global electorate, the traditional principle of state sovereignty relieves the nations of the world of any moral or ethical obligation to accept a system of global norms (Keohane 2005) even if one were to emerge.

If it is, indeed, the democratic deficit that robs international law of its moral authority and gives states the room they need to evade their international obligations, then the solution must be (at least in part) to provide a direct, participatory element for the world's citizens in the making of international law. This might be accomplished by recreating at the international level the process of doctrinal development observed in the common law of most English-speaking countries. Nearly every American who has been blessed (or cursed) with formal legal training is familiar with Oliver Wendell Holmes Jr.'s aphorism that the life of the law is not logic but, rather, experience. Most could not recite, however, the next sentence of Holmes's *The Common Law*. There Holmes asserts the fundamentally democratic character of the common law. In spite of the fact that it is handed down by judges, the common law reflects "the felt necessities of the time, the

prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen" (Holmes [1881] 1991). The sense of justice that Holmes is describing is the unwritten and yet binding system of obligations that the English common law has developed over the last millennium. [14]

Developing a contemporary international equivalent to the common law would require us, of course, to deviate from the haphazard pattern of development that characterizes historical systems of law if it is to produce useful results over an acceptable frame of time. As we have imagined it, the use of policy juries to adjudicate concrete (but hypothetical) cases of international environmental disputes can provide a substantial collection of decisions that can be aggregated to form a system of legal doctrine in the same way that the resolutions of actual cases were first restated and then later codified.

It is not hard to imagine how the policy specialists working in existing international organizations could develop and administer such an adjudicatory procedure. In the area of environmental protection, the United Nations Environment Programme has the technical capacity to prepare hypothetical cases touching on any of the major issues of the day and the Commission on Sustainable Development could oversee the deliberations in any of the hundred countries where it supports local organizations. Agenda setting would not be controlled by any single body. Other international organizations and nongovernmental organizations could develop hypothetical cases and commission policy juries as well—the more iteration tried on any given normative principle, the firmer the confidence in the result and the better the understanding of its limits of application. The more challenging question is how the resulting decisions could be aggregated into a coherent body of legal doctrine and how that doctrine could be related to the continuing problem of constraining nation-state behavior. To shed some light on those questions is the objective of this chapter. We discuss both the present practice and political potential of the International Law Commission (ILC). We propose direct citizen participation in a transnational process aimed at developing fundamental principles of international obligation for the conservation of environment and nature. We anticipate the criticisms of elitism and insensitivity to cultural diversity commonly directed at deliberative democracy. We conclude by addressing the challenges of bringing the global system of state sovereignty within an emerging framework of international norms that aspires to be more than merely hortatory.

The ILC and Global Environmental Democracy

The International Law Commission consists of thirty-four individual members. They represent each of the world's major regions and serve for staggered terms of five years. They are elected by the UN General Assembly from lists of distinguished jurists and legal scholars submitted by national governments, but they serve in their private capacities rather than as the representatives of their nations of origin. Created in the aftermath of World War II, the ILC is charged with the codification and progressive development of international law. This dual competency relates the commission's work to the two major sources of international law. First, international law has originated in treaties and conventions negotiated directly between nations. Each individual treaty may be clear enough on its face, but the historical accumulation of agreements on related and overlapping legal topics can produce a thicket of confusing, often directly contradictory, rules of state obligation. Second, customary patterns of interaction between sovereign states have evolved over time into recognizable standards that, although unwritten, guide the interpretations of judges and arbitrators as well as the states themselves. The ILC is charged both with distilling systematic treaty law from the multiplicity of existing treaties and with codifying customary principles of international law (Mansfield 2002; Morton 2000).

Scholarship on the ILC can be divided into two general categories. First, there are a number of studies of the commission's organization and operation (Graefrath 1991; Hafner 1996; Morton 2000; Sucharitkul 1990). Some of this research has examined the expansion of the ILC. The commission has grown from a membership of fifteen at its establishment in 1949 to its current size of thirty-four. This growth in membership, and the concomitant growth of the commission's professional staff, has allowed for an increase both in the diversity of the ILC's membership and an expansion of its work. However, this growth has also complicated the task of achieving consensus within the commission, an objective for which few UN organizations strive (Sucharitkul 1990). But beginning in the 1990s, the ability of the commission to resolve matters that had spilled over from the previous decade and to undertake new projects suggests that it has adjusted to its new size and the complexity of its working environment. Turnover in commission membership is also declining, indicating that a greater level of stability and efficiency is in the offing (Morton 2000).

The ILC membership itself is another focus of attention. In principle, at least, members of the commission are independent of their national governments and serve uninstructed based upon their personal expertise in international law. There have been, nevertheless, many members who were foreign ministry personnel in their home countries at the time of their election. This arrangement is obviously a mixed bag. On the one hand, the closer the connection between commission members and their respective governments, the greater the likelihood of self-serving behavior of the sort that has plagued the development of the international criminal court (Best 1997). On the other hand, it is probably the case that some influence over members by their national governments has a salutary effect on the efficacy of commission work, as it is likely that states are more inclined to respect rules they have some role in developing (Morton 2000). Another critique of commission membership is that it possesses little of the expertise required to deal with any but the most general matters of international regulation (Hafner 1996). This critique suggests the need for further increases in both the size and independence of ILC membership, notions that would exacerbate many of the problems discussed so far.

A final area of discussion of the ILC itself has to do with its methods of work. The ILC's program of work is largely determined by a long-term plan that dates back to 1949. The topics included in that plan (state responsibility, jurisdictional immunity, and so forth) were thought to involve primarily the codification of existing rules of customary law that had in common their importance to the maintenance of the continuing system or relations among the sovereign states (Graefrath 1991). The commission's agenda has been supplemented since its initial work plan largely by the addition of topics by the Sixth Committee of the United Nations General Assembly. The work pattern of the ILC is easily described. It proceeds through four stages: issue development, general debate, drafting, and final adoption.

When the ILC takes up an issue, it normally begins by appointing one of its members as a special rapporteur. The rapporteur is responsible for assembling the research necessary to begin formulating the individual elements of eventual articles of a final report. This process includes circulating preliminary drafts for comment by states. In its general debate, the ILC plenary takes up the reports submitted by its special rapporteurs, including comments made by states on questionnaires concerning earlier drafts. At the conclusion of debate, the ILC will normally forward proposed draft

articles to a drafting committee, even if there is significant division over the articles among commission members. The drafting committee (normally comprised of fifteen or more members) is the primary forum for negotiation over the content of any eventual report. Its time is used to debate the relevant articles and to develop compromise wording that will reconcile the divergent points of view held by ILC members. The committee produces a report to the ILC plenary, which eventually adopts the final text of the articles that have been developed. This is more than a pro forma matter. Final adoption of articles to be included in the ILC's annual report to the UN General Assembly involves an examination of the commentaries attached to each draft article (Morton 2000).

As one might imagine, every stage in this work process has come in for criticism and has been the subject of proposals for improving the ILC's work. At the very outset, the establishment of the ILC's agenda is problematic in a variety of ways. Early in its history, the commission discovered that maintaining a clear distinction between its dual responsibilities of codification and progressive development of law was virtually impossible. The realization that legal "development" played a role in nearly all of the commission's efforts revealed the inherently political and "legislative" character of its mandate. An instructive illustration is the effort by the United States to narrow the reach of the ILC's codification of the rules of state responsibility by denying standing to complain of a breach of those rules to only those states that are "specially affected" by the breach (Murphy 2001). Much time and effort is necessary to ensure that the ILC is not charged with a task so characterized by political disagreement that its subsequent work on the topic is wasted, inasmuch as the politically neutral expertise that would allow for the creation of a more reasonable issue agenda is present to a much greater degree in the commission than in the Sixth Committee of the UN General Assembly, where the actual responsibility lies (Graefrath 1991).

The work of the ILC's special rapporteurs is also problematic in a variety of ways. For one thing, it is far from clear that the members of the commission possess either the technical expertise or the research support necessary to address any but the most general issues of law. As the global system of politics and economics becomes increasingly complex and integrated, it becomes more doubtful that any collection of international lawyers, however distinguished, can be masters of the technical information generated by that system (Hafner 1996). Moreover, special rapporteurs (like all commission members) are part-time employees. The time

available to them to accomplish their tasks is generally quite short. Converting the commission membership to full-time status has been suggested. But such a step would, it is feared, reduce the willingness of international lawyers to fill those positions (appointment to which is for a fixed term of only five years). The ability of rapporteurs to produce quality work is further limited by the availability of resources in their home countries, a problem that obviously has a disproportionate impact on commission members from the developing world (Graefrath 1991). To illustrate this point, consider the recent work of the ILC in the area of ground-water protection. The ILC has a long-standing interest in surface waters, particularly as they often constitute international borders. Surface waters, therefore, have long been a concern for the states that establish the issue agendas of international organizations. Ground water, however, is an integral component of life for a majority of the world's population and has become humankind's most extracted natural resource. To adequately address this emerging issue will require both enormous technical capacity in hydrology and other natural sciences and the careful extrapolation of existing surface water law to the special requirements of groundwater protection (Eckstein 2005). The analytical challenges in both areas would seem to confront developing states with insurmountable obstacles to the effective representation of the interests of their citizens. How ILC rapporteurs are to address this challenge within the limits of their own capacity is far from clear.

The general debate of the ILC can be subjected to a variety of criticisms as well. The sessions are frequently characterized by inadequate preparation and insufficient allotments of debate time. Rapporteur drafts often reach commission members at the beginning, or even in the midst of, debate sessions. As a result, members often limit themselves to "preliminary remarks." In effect, they reserve the right to lodge serious and substantive objections later in the process. The potential for wasted time in the drafting committees is clear. In addition to this, drafting committees conduct their work in circumstances of both information deficit and information overload. Commission staff is so limited as to make it difficult for the ILC to track developments of law at the national level. The research on topics of international law and the social processes with which it is concerned is conducted by so dispersed a network of university, government, and nongovernmental organizations that it is virtually impossible for the ILC to track, let alone use, the torrent of material issuing from those diverse sources (Graefrath 1991). As an example, there has been significant support in the ILC and the Sixth Committee for

protecting the interests of developing nations under the evolving rules governing international liability for harms resulting from acts not prohibited by international law. The trend has been to eschew express benefits for developing nations in favor of criteria for assessing damages that tend to reduce the amount of reparations required of developing nations in the event that activities within their boundaries cause transboundary harms. As appealing as this approach may be, it requires a very close analysis of the potentially detrimental effects of those criteria on aggrieved states that may be just as vulnerable as their offending neighbors (Magraw 1986). The inherently contingent quality of this kind of analysis suggests just how politically and ethically sensitive the challenges facing the commission really are.

The overwhelming impression one takes away from a look at the ILC and the challenges it faces is one of growing consensus on the existence of problems and persistent disagreement as to their solutions. Sometimes the disagreement arises from an inability to recognize (or agree upon) the relevant issues of law presented by a particular set of circumstances. The world rarely provides us with clean points of legal decision, stripped of the complexities and vagaries that law professors love using to distract their students from the main issues of a case. On other occasions, the inability (or unwillingness) of states to look past what they perceive to be their own interests leads to behavior that others regard as unreasonable and prevents the adoption of measures that enjoy wide support and promise shared benefits. In still other instances, the issues at hand are clear and parties are both able and willing to look for shared ground. But even under such propitious circumstances, states can fail to reach an accord because of a genuine and well-intentioned difference about how to balance the equities of a given set of circumstances—often resulting from an underlying disagreement about fundamental principles of right.

In the domestic arena, deliberative democratic approaches have addressed each of these challenges. The need to agree on the basic facts of a political or legal question (and, among those facts, to agree on which are the functionally significant ones) is the foundation for what has been called the epistemological justification for participatory democracy (Westbrook 2005). The necessity for moving beyond naked self-interest to levels of political discourse in which political actors offer each other reasons in support of their positions that all can regard as reasonable is often cited as an essential element of any form of government that is genuinely democratic

(Barber 2004). The ability of citizens to agree upon norms of behavior that express their consensus on fundamental matters of mutual recognition and obligation is taken by many to be the defining quality of a politics that is democratic in a fully inclusive and deliberative (rather than merely aggregative) sense (Habermas 1996). So it would appear that deliberative democracy might be good medicine for at least some of what ails the ILC. The remaining concerns are how, more specifically, deliberative democracy might be helpful at the international level and how can states be persuaded to allow themselves to be bypassed by their own citizens on their way to the global commons.

From Policy Juries to International Law

Assuming that the ILC were to initiate a project using citizen juries to search for consensus on basic norms of environmental regulation, what would the commission do with the results? That, of course, would depend on what the results were. It may be that the diversity of cultures and histories among the nations of the world precludes the citizens of those nations from arriving at any shared understanding of what would be fundamentally fair standards of environmental regulation. Or, it may turn out to be the case that when citizens of any country deliberate a well-structured hypothetical case they tend regularly to arrive at a single conclusion. The most likely alternative is that each of these results would be produced across the broad range of environmental issues that might be subjected to such a procedure. So we should think through the consequences of both outcomes.

Where repeated administration of a test case reveals fundamental disagreement, the ILC would at least be able to map the structure of public opinion on the matter in question. This may seem to be a very modest accomplishment. But its potential value can be appreciated if we consider several aspects of the ILC's performance to date. First, empirical evidence suggests that commission members behave as representatives of their national governments, regardless of their formal status as private individuals (Morton 2000). This is sometimes regarded as a failing of the ILC system. If, however, the divergent positions of ILC members were shown to be related to the underlying opinions and values of their countrymen, that democratic legitimation would be well worth demonstrating. To the extent that the popular will were actually shown to be reflected in commissioner behavior, it would require all involved to acknowledge the validity

of their opponents' positions and the necessity for genuine compromise (Knight and Johnson 1994, 282, 286).

Second, it has been noted that the legislative processes of the commission, the choice of topic it will take up, and the ordering of its priorities are heavily influenced by the states of the Sixth Committee and the UN General Assembly (Graefrath 1991). In this relationship between the ILC and other UN bodies, the ILC has practically no grounds for asserting a role in establishing its own agenda. If the ILC could provide data indicating that a particular issue was the subject of significant international dissensus, it would be in a stronger position to ward off the assignment of a task that would consume commission resources without offering the prospect that its work would ultimately be accepted.

Finally, it has been argued that the ILC works within a more constricted arena than its formal charge would suggest. Specifically, the commission might be criticized for limiting its activity to "secondary rules," that is, rules concerning the practice of states in implementing the preexisting structure of primary rules of state obligation (Hafner 1996). The premise here is that the age of creating international law is essentially over, there being no substantive disagreements left to resolve. In such a circumstance, codification of existing practice becomes the only legitimate activity for the ILC. Any attempt at progressive development would imply that gaps in substantive international law exist that need to be filled. Finding fundamental transnational disagreement on an important issue of environmental protection would suggest that either a genuine gap of this sort remains or that the nations of the world had foreclosed discussion of that issue prematurely (from a democratic point of view). Where a deliberative democratic experiment both identifies such a gap and isolates its underlying divergence of opinion, progressive development of international law would seem to be more likely.

A different set of considerations is presented by the case in which deliberation across national boundaries reveals a fundamental agreement on some measure of environmental protection that is not currently found in international law. Clearly, an unmet transnational mandate for environmental regulation would present the ILC with an opportunity to add an item to its agenda with reasonable hope that its efforts would ultimately be rewarded by agreement of the states to its recommendation. But it might do even more. Focusing international attention on issues that enjoy broad, cross-national and cross-cultural support could free the ILC from its current conceptual straitjacket. Most scholarly and legal

studies in the area of international law have focused exclusively on the supposed absence of any restraining capacity of international law, chiefly its inability to exercise an independent control on the actions of nation-states (Morton 2000). As long as one accepts the assumption that the only source of international law is the self-interested agreement of governing elites (Goldsmith and Posner 2005), this is an entirely reasonable position. This approach reduces international law to an anemic version of contract law. According to this view, states enter into agreements for their own reasons and violation of an agreement is to be expected whenever the advantages outweigh the risk of retaliation and the loss of future advantages that might have resulted from continued cooperation. There is nothing for the ILC to do in this realm of law other than to document the patterns that underlie these contracts and try to reduce (in so far as possible) the confusion that results from the fact that each contract employs slightly different language even when their objectives are fundamentally similar. This sort of task is perfectly consistent with the "positivist" school of thought that dominates scholarly thinking about international law (Morton 2000).

The difficulty with this approach is that it would appear to leave little room for the progressive development component of the ILC's charge. If the commission pursues progressive development only along lines that states have indicated a willingness to accept, then its "development" efforts can be explained in the same positivistic terms that are used to account for the resulting treaties and accords. But this sort of development is hardly "progressive." It reduces the ILC to nothing more than a soliciting agent, placing willing parties in contact with one another and processing their paperwork. If, however, the commission were able to pursue the development of legal rules based upon a normative consensus at the level of participating citizens, new possibilities would arise.

Without relying on the development of a "new paradigm" or a new "world order" (Falk 1989), a transnational consensus on some specific norm of environmental protection would allow the ILC to "restate" international law found in the judgment of citizens rather than in the behavior of states. As the commission continued to develop this international common law (as opposed to customary law) it would become possible to prepare a "restatement" of that law. Built from specific disputes settled by concrete judgments, this form of common law could provide international tribunals (whether permanent or specially created) with raw material for their deliberations that would enjoy the legitimacy conferred by a demo-

cratic pedigree. Moreover, the focus on concrete (if hypothetical) international disputes might have one further advantage.

International environmental problems, like their domestic counterparts, usually involve disputes between private parties. The only added element is an international border. It would be fanciful to say that the nation-states involved in such disputes are innocent bystanders pulled unwillingly into the fray. But such fancies are not unknown in the history of law. William Blackstone commented on some of the legal fictions used by the common law to get around dysfunctional precedents handed down from the medieval law of feudal societies. Most interesting for our present purpose is his discussion of the maxim that the king can do no wrong (Blackstone 1979). It might seem that the purpose of this rule is to place the sovereign above the law. The opposite is more nearly true. If one takes the maxim to mean that it is *logically* impossible for the king to commit a wrong, then any evil done in the realm can only be attributed to the king's counselors or retainers. This legal fiction allowed the king's behavior (if not his person) to be subjected to the control of law without producing direct confrontations between the sovereign and the legislature or courts. A similar legal fiction might well evolve in international environmental law if today's "sovereigns" were confronted with adjudications grounded in the judgments of the world's citizens, including those of their own countrymen. Under such circumstances, a sovereign might well stand aside in deference to the considered judgment of the polis against one of his subjects while insisting that his sovereignty remain intact because he was never a party to the dispute.

Global Environmental Democracy in a World of Sovereigns

A favorite tactic of defense attorneys in arguing against a plaintiff's prayer for relief is to argue both that what the plaintiff seeks is impractical (or impossible) and that the plaintiff wouldn't really want what he was asking for if he just knew his own interests better. Among the defenders of state sovereignty, the first prong of this tactic takes the form of argument that the legalization of international politics (in the form of commitments that actually bind sovereign states in the same way that municipal law binds individual citizens) can never be effective. The second element of the defense of sovereignty is that sovereign states protect important democratic values in ways that international regimes cannot and, therefore, democrats should not actually want to develop such regimes. Most critics

of international law at least touch upon both of these themes. But to appreciate them, and do them justice, we shall concentrate on arguments for each of these ideas that have been advanced by theorists who concentrate closely on only one.

Goldsmith and Posner offer a forceful claim that international law does not have an independent effect on state behavior (Goldsmith and Posner 2005). They argue that international law is nothing more than a codification of behavior regularities that arise as a result of states maximizing their own interests. This occurs in four ways. First, states often behave in similar ways "simply because each state obtains private advantages from a particular action (which happens to be the same action taken by another state) irrespective of the action of the other" (27). Where this occurs, the states involved may appear to be following a rule, but no such obedience is involved. Second, a state will sometimes find itself subjected to the coercion of another state. The coerced state might appear to be serving the interests of the stronger state, which may even offer a rule in excusing its coercion. But no rule is at work other than the rule of the jungle. Both the coercing state and the coerced state are merely acting rationally "to further their interests based upon the perceived interests and strengths of the other state" (29). Third, states sometimes find themselves in a "bilateral repeated prisoner's dilemma" (42). Under such circumstances, states refrain from cheating one another over a significant period of time, not out of any sense of obligation, but simply because the continuing cooperation that they would forfeit by cheating is worth more than the temporary gain that cheating would yield. Finally, circumstances in which states coordinate their behavior over an extended period of time, each for their own advantage, can be mistaken for the kind of rule-following behavior we normally describe as obedience to law. The claim made by Goldsmith and Posner is that these four patterns of state behavior can account for all instances that others might cite as respect for international law and that they can do so without positing any "exogenous influence" on state behavior resulting from law conceived of as a normative obligation (43).

It is important to be clear about the argument Goldsmith and Posner are making. They do not deny the existence of international law. They merely argue that "international law scholars exaggerate its power and significance" (225). More important to our present purpose, they also aver that they "know of no global democracy approach that spells out how or why states, especially powerful states like the United States (or,

for that matter the EU), would submit to a broader form of genuine global governance" (223). Even granting for the sake of argument that Goldsmith and Posner have not overlooked some especially promising approach that would answer their concerns, their quandary may tell us far more about the state of democratic theory than it does the importance of international law. To think of law as nothing more than rules backed by coercive force is a habit of long standing. But there is no reason why the entity that pronounces legal judgments must necessarily be responsible for the enforcement of judgments. Recall that "a number of societies that we would not call stateless, including those of ancient Greece and Rome and Anglo-Saxon England, left prosecution of criminal cases to private individuals" and that in yet other societies all judicial decrees were enforced, if at all, privately (Posner 1995, 313). In fact, all that any form of law enforcement ever does is raise the costs of noncompliance. In governing the behavior of individuals, "coercive law overlays normative expectations with threats of sanctions in such a way that addressees may restrict themselves to the prudential calculation of consequences" (Habermas 1996, 116). Likewise, the "enforcement" mechanisms of international law combine dispute settlement processes with the existence of "countermeasures" (Schachter 1994) that allow aggrieved states to pursue private enforcement under color of official adjudication. So it might be fair to say that if Goldsmith and Posner have erred in any respect it is not in underestimating the robustness of international law but, rather, overestimating the essential differences between international and municipal law (to municipal law's undeserved advantage).

In assessing the argument that friends of democracy around the world would be advocates of state sovereignty if only they saw the question more clearly, we take as our point of departure the work of Jeremy Rabkin (2005). His analysis, unlike that of Goldsmith and Posner, is unabashedly American in perspective. One regrettable consequence is his tendency to generalize about other national cultures in ways that are as unhelpful as they are uncharitable and unfortunate. Nevertheless, Rabkin forcefully presses an argument that no committed democrat can afford to ignore. It is Rabkin's view that the contemporary movement for global governance is a direct threat to the existence of the sovereign state, and moreover, that threat to sovereignty involves an unavoidable threat to democracy. This is the case because democracy is a function of constitutional government and "a world that is equipped to sustain global governance is a world that does not need constitutional government—and

probably cannot tolerate it" (38). The obvious and immediate threat is, of course, to democracy of the American sort. Rabkin assumes, perhaps correctly, that the movement for global governance has as its primary target the recalcitrance of the United States. But the long-term threat is, in his view, a threat to every person who values liberty and security. This is because, in the absence of a sovereign to guarantee that law is made and enforced in an orderly manner, the citizen's obligation to obey is forfeit and our remaining choice is between anarchy and arbitrary coercion (with some combination of the two being most likely). In this way, according to Rabkin, international law tends toward lawlessness that is as much a threat to citizens of the developing nations as it is to privileged Americans.

It is difficult to know where to begin discussing Rabkin's views because, in comparison with those of Goldsmith and Posner, his claims are broader and his arguments more strident. It would appear that, like Goldsmith and Posner, Rabkin exaggerates the difference between international and municipal systems of law because he also emphasizes coercion and its legitimacy (as functions of state sovereignty) rather than the more subtle effects of law as a system of behavioral incentives. A useful contrast in this regard is the theory of law in primitive societies advanced by Richard Posner (1983).

Posner's discussion of "primitive" societies and the systems of law they live by is illuminating for our purposes precisely because these systems develop in the absence of a sovereign state or any of the institutions normally associated with them. As an example, Posner describes the legal traditions of the Yurok tribe of California. When a legal claim arose among the Yurok, each of the principals would retain the services of two to four men (neither his relatives nor residents of his village) who would pass back and forth between the litigants collecting evidence and hearing arguments. These private jurors would then render a judgment. A losing party who refused to abide by the judgment was condemned to be the wage slave of the prevailing litigant. Continued refusal to submit rendered the recalcitrant an outlaw who could be killed by anyone without incurring liability for the deed (Posner 1981). Informal institutions of this sort have allowed stateless societies to develop sophisticated systems of property, contract, and family law–even tort law that recognizes the modern doctrine of strict liability.

Even more intriguing is Posner's observations regarding the emergence of criminal law. Stateless societies tend to have well-developed systems of

private law but limited or nonexistent criminal law. The development of criminal law, as a system of official violence, replaces (or supplements) pecuniary compensation for personal injuries where there arises a sovereign who comes to view "an act of violence directed at a private citizen to be an offense against him" in his sovereign capacity. Dismissing the notion that protection from harm is part of the bargain between sovereign and subject,[15] Posner's explanation for this development is that the sovereign "owns" an interest in his subjects that is impaired by acts that reduce their productive capacity. This economic interest is not accounted for in the private system of compensation for injury, so the sovereign establishes criminal sanctions that serve as "a method of internalizing this externality" (204). This perspective would explain why the transfer of sovereignty, as when the thirteen states adopted the U.S. Constitution, did not diminish the rights and privileges of Americans generally. The economic interest protected by the coercive power of the sovereign was simply aggregated in a large polity. Moreover, this view suggests that an abrogation of sovereignty at the level of the nation-state is not necessarily a corollary of global governance. If extended to regulate the transboundary relationships between individuals, international law could be considered to be an evolving system of quasi-private law meant to acquit limited and specific rights through mechanisms of collective but private action.

Residua Imperium: Or, "Yes, But What's in It for Us?"

It should be clear by this point that the primary advantages of introducing forms of participatory democracy into international law making would be likely to accrue to states that operate at a political disadvantage under the current system of nationalist power politics. In particular, weaker states that seek to impose a regime of environmental protection on global economic and political powers are likely to enjoy significant public relations advantages from deliberative democratic experiments that lend scope and substance to general public sentiments in favor of environmental protection. These states may even be able to introduce environmental norms that are produced through such processes into proceedings that currently exist to adjudicate disagreements in other areas such as trade and human rights. But this begs the question, why would a powerful state, particularly one that is an environmental recalcitrant, subject itself to such processes, or even tolerate their continuation? It is our argument that even nations with something to lose in a thoroughly democratized global politics have still

more to gain. Those potential gains are analytical, political, and, ultimately, environmental.

No discussion of deliberative institutional alternatives could be considered adequate if it omits a comparative or international perspective. To believe that deliberative democracy can be analyzed solely on the basis of domestic experience is simply irrational. How could it be that the comparison of citizen juries in Great Britain and deliberative polling in the United States (Laslett 2003) would fail to yield useful insights? The concept of reciprocity that is central to deliberative democracy knows no logical limit. It "extends to all individuals, not just to citizens of a single society" (Gutmann 1999, 309). Moreover, environmental problems (among many others) depend for their resolution on far more "cross-national deliberation" than can be accomplished within any single set of domestic political institutions (Gutmann and Thompson 2004, 61). This imperative reflects back on the ability of individual states to achieve their domestic environmental objectives. Environmental ends can be assured to a national population only if its government "negotiates and consistently maintains agreements with other governments for the purpose" (Laslett 2003, 217).

Comparative analysis of deliberative democratic experience can serve at least two important goals. First, it can provide a body of analytical comparisons that will aid both theorists and government officials as they try to work out the institutional details of more fully democratic processes. As an example, the state of Oregon established a Health Care Services Commission to set priorities for health care services under Medicaid. Meanwhile, halfway around the world, the British government created the National Institute for Clinical Excellence to provide assessment and treatment guidelines for that country's National Health Service. Both of these bodies sought to incorporate expert and lay opinion into a system of rational priorities for husbanding limited health care resources. They were intended to be deliberative institutions in that they were supposed to provide an "analytical filter" (Gutmann and Thompson 2004, 14) for public opinion that would justify policy outcomes through the imposition of a form of procedural rationality. But the public outcry that resulted in both cases required each group to engage in significant participatory back-filling and ultimately resulted in legislative intervention in both instances. Certainly a careful comparison of these cases would be of interest to public health planners in the future who wish to avoid making the same mistakes thrice.

A second use to which comparative analysis of deliberative institutions can be put is somewhat more theoretical, even normative. A comparison of the Canadian and American experience concludes that institutions for applying the notion of sustainable development are relatively underdeveloped in the United States (John 1994). On the basis of this evaluation, John suggests that the American states follow the example of the Canadian provinces in establishing environmental roundtables to bring together environmentalists, corporations, and government officials to discuss how economic and environmental values might be integrated. Such parallel development might encourage greater transnational environmental cooperation. A pertinent example would be the International Joint Commission, which operates as part of a bi-national and multi-institutional system of regional governance incorporating more than six hundred and fifty stakeholders in the Great Lakes Basin (Rabe 1999).

The South African Truth and Reconciliation Commission represents a form of deliberative institution with even greater normative potential. Unlike a trial court, the commission achieves an "economy of moral disagreement" by eschewing definite binary choices between guilt and innocence in favor of accommodations of conflicting views that fall within the range of "reasonable disagreement" (Gutmann and Thompson 2004, 185). Truth commissions of this sort are not entirely rare. An examination of this form of deliberative institution may provide the model for a normative stance that international environmental monitoring groups might adopt in support of deliberative bodies, like the Green Parliament in the Czech Republic, when they find themselves at odds with their own national governments (Axelrod 2005). It might also lead deliberative democrats in the direction of transferring the insights into democratization at the domestic level to the international arena.

Deliberative democracy's emphasis on justifying collective decisions to the people who must live with the consequences of those choices would seem to argue for extending the requirements of democratic deliberation to the international arena. Yet "most theorists of deliberative democracy apply its principles exclusively to domestic systems of government" (Gutmann and Thompson 2004, 36). This is, to say the least, ironic. While the aggregation of interests across boundaries is hard to conceptualize, "deliberation across boundaries is relatively straightforward" and deliberative theory would seem to be more useful in the international system precisely because it lacks "alternative sources of order" (Dryzek 2000, 116). If we can set aside (for our purposes at least) the fact that the idea

of introducing democratic principles abroad can be used to legitimate dubious military adventures (Zolo 1997), there would still seem to be two fundamental reasons to limit deliberative democracy to the national stage.

First, it could be argued that the justification of preferences through public reason demanded by deliberative democracy is owed only to those who share with us the burdens of a common citizenship. Second, the absence of sovereignty at the international level might be thought to deprive deliberative democracy of the background conditions for its success that a stable legal order provides. Gutmann and Thompson (2004) find these objections largely unpersuasive. The differences between domestic and international society are often exaggerated, particularly with respect to the reliability of legal institutions. The argument from shared citizenship, while it may apply to matters such as taxation, is far less convincing with respect to issues such as war, trade, immigration, economic development, and (most especially) the environment. After all, environmental damage can occur virtually anywhere and "environmental liability affects every single citizen of every single state in the world, along with other humans who do not belong to nation-states at all" (Laslett 2003, 217).

Fortunately, there are abundant examples of deliberative democracy's various institutional elements that can be identified on the international environmental stage. Much of the recent progress in international environmental governance (as well as issues like children rights, population control, and social development) has been due to the involvement in collective decision making of nongovernmental organizations (Camilleri, Malhota, and Tehranian 2000). Moreover, this activity has evolved from its earlier reactive form to seize the policy initiative in a number of areas (Snidal and Thompson 2003). For instance, throughout the 1970s the International Whaling Commission was plagued by environmental protesters who would drench its members in faux whale blood at every opportunity. But by 1981, the commission's meeting offered representation to fifty-two nongovernmental organizations ranging from species preservation and animal rights groups to religious organizations and groups representing indigenous peoples. In this more open and democratic environment, the commission agreed to a zero quota for the 1985–1986 season (Birnie 1985). In fact, in this area it is the state actors that are the weak links. Setbacks in whaling regulation after the 1985 moratorium can be attributed to a lack of state follow-through in enforcement and accommodationist backsliding among state members (Vogler 1995).

Our experience with whaling suggests not that deliberative participation in international civil society is futile but, rather, that it must penetrate international governance more deeply to be fully effective. Environmental NGOs now routinely enjoy observer status in international organizations and conferences, sometimes even serving as members of state delegations. Some deploy a level of environmental expertise matched only by the largest and most developed states. Many are able to mobilize consumer boycotts that make them key policy actors (Thomas 1992). This provision of observer status and the increase in NGO participation is one of the most significant trends in international environmental law since the 1970s (Vogler 1995). But environmental interests in international civil society have not been satisfied with this.

By the time of the Earth Summit in 1992, international environmental NGOs had mobilized and coordinated sufficiently to stage a parallel Citizens' Forum that was, in many ways, more promising than the official meeting itself (Susskind 1994). In the absence of central monitoring agencies, much of the international environmental work is likely to fall to NGOs. As an example, the Arctic Treaty System has had to substantially modify its "working rule" of secrecy in response to pressure brought by NGOs. NGO pressure seems to have been the determining factor in changes in the London Convention outlawing the disposal of low-level radioactive waste at sea (Vogler 1995). These experiences have led to the call for a full-fledged advisory and monitoring role for nongovernmental interests in the environmental treaty process (Susskind 1994). A model for civil societies' role in global environmental governance already exists in the EU's European Environmental Bureau, an umbrella organization for over one hundred and forty environmental organizations in both EU countries and neighboring states that monitors the performance of the EU's Environmental Directorate (Axelrod, Vig, and Schuers 2005).

Conclusion

Whatever we may think about the relative merits of (or actual necessity for) some form of international sovereignty, relying on the spontaneous collaboration of individual nation-states seems inadvisable if we wish to move environmental matters in the right direction in the flawed world we now inhabit (Laslett 2003). From the environmental perspective, waiting for the creation of an ideal world order is allowing the perfect to become

the enemy of the good. The main hope for democratizing global governance, across a wide range of issues, lies in a partnership between government, industry, and the popular forces of civil society (Camilleri, Malhota, and Tehranian 2000). We concur that institutions of deliberative democracy should be more at home at the international level than liberal aggregative models of democracy precisely because "there are no constitutions worth speaking of in the international system" (Dryzek 2000, 115–116). Dryzek proposes the development of a "network" form of international discursive organization (133), based on exactly the existing institutional models we have been discussing. Whatever particular form they take, we are convinced that deliberative democratic institutions offer an approach to environmental challenges that, if applied internationally, offer an escape from "the trap of nationalism and crystallized community aggressiveness" that seems to both dominate world affairs and threaten the global ecology (Laslett 2003, 220).

We are not postulating how far down that path we can go simply with citizen juries deliberating on hypotheticals. But we are suggesting that we put to the test the notion that, whereas people may not be able to formulate an affirmative statement of what constitutes justice, they are far more likely to be able to recognize the absence of justice and to identify the features of a concrete situation that amount to injustice. At some point, governance institutions must reenter the picture to refine and to solemnize whatever principles seem to enjoy consensus support. This would be true no matter how strong and widespread the consensus was. Regardless of how coherent and complete the results of citizen deliberations are, they give agents of governance genuinely democratic raw material with which to construct positive law. Distilling the collective wisdom contained in the muddied reservoir of public opinion is the best democrats can hope to do.

9

Democracy and the Environment: Fruitful Symbiosis or Uneasy Truce?

Democracy is not a pathway to the stars but only the articles of war under which the race fights an endless battle with itself.

—Bernard DeVoto

At the conclusion of chapter 1, we advanced three preliminary observations about the protection of the global environment. To be effective, international environmental law would have to encourage the formation of transnational collective will in the absence of sovereign authority, incorporate local ecological knowledge, and respect a regulative norm of democratic consensus. We have tried to substantiate those claims theoretically and to suggest how they might be redeemed empirically.

We began (in chapter 2) by discussing some of the conventional views of politics at the global level, views that would lead one to believe that developing a genuinely democratic international environmental jurisprudence is beyond our capacity. These views we found wanting in several important respects.

Next, we substituted for political realism a more hopeful view of international relations grounded in philosophical pragmatism (chapter 3). We contrasted the views of the democratic theorist David Truman with those of deliberative democrats such as Jürgen Habermas and John Rawls. We compared political realism (which we characterized as aggregative democracy) with deliberative democracy along several dimensions. These included the prerequisites for successful politics, the appropriate style of political reasoning, the role of self-interest, the role of scientific experts, and the standards for what outcomes count as political success. Along these dimensions we argued that deliberative democracy is more likely than aggregative democracy to produce results that are both fully democratic *and* protective of environmental

resources. This advantage we attributed to the roots in philosophical pragmatism that deliberative democracy enjoys.

Then (in chapters 4 and 5) we began the effort of applying deliberative democratic reasoning to the problems of international law, particularly as they relate to environmental protection. First, we subjected the statist assumptions of conventional international relations theory to a critique from the perspectives of both the deliberative democrat and the environmentalist. In sum, statism was found wanting as a description of reality, as a predictive theory, and as a prescription about how things should be. Next, we suggested a conceptual framework for international politics that offers the hope of producing outcomes that are both more democratic and more environmentally friendly. And we assessed the prospects for a deliberative international politics by examining how rule-governed behavior has actually emerged from the supposedly chaotic maelstrom of state action on the global stage and whether that behavior has ever risen to the level of substantively democratic action in pursuit of environmental protection.

In chapters 6, 7, and 8, we turned our attention more fully to the development of an international environmental jurisprudence and the changes in international institutions that this objective would require. We argued that the differences between domestic and international law have been exaggerated in ways that obscure the need for democratic legitimacy in international jurisprudence. Future iterations of international law will have to play the dual role of both fact and norm. The inadequacies of international law as a fact—its inability to alter state behavior or achieve its stated objectives—are reflections of the democratic deficit at its very core. International law fails as law, not because insufficient coercive force backs it up, but because it fails as a norm that can promote the voluntary compliance upon which all forms of law ultimately rely. Addressing this democratic deficit is possible, we contend, within the boundaries of existing international institutions (both governmental and nongovernmental) if certain techniques employed by deliberative democrats at the domestic level are appropriately adapted for global application, techniques that we have collectively labeled "juristic" democracy.

Juristic democracy draws from the Habermasian approach to deliberative democracy in important ways. A persistent challenge to deliberative democracy is to encourage levels of impartiality sufficient to eliminate personal and ideological bias from processes of collective will formation while conserving "the cultural sources that nurture citizens' solidarity and their normative awareness" (Habermas 2008, 111). A juristic approach

to deliberation accomplishes this by posing a hypothetical problem that does not touch deliberating citizens' individual interests and by asking only for the disposition of this concrete problem rather than a general policy statement of abstract principle that would engage their political or ideological commitments. In this way, the "neutrality of state power vis-à-vis different worldviews" is achieved without imposing "the political generalization of secularized worldview" upon citizens as the price of entry into the deliberative arena (113).

Juristic democracy is also Rawlsian in this sense: instead of asking participants to imagine themselves without interests, it asks them to imagine a situation in which they actually have no interests. It asks them only to arrive at a disposition of that situation without necessarily finding a generalized account or justification of that disposition about which they all can agree. It is, in this sense, a Rawlsian overlapping consensus. It yields a principle of justice only insofar as it produces a rule or decision that commands general assent from a broad, representative sample of the deliberating public.

Juristic democracy provides a response to the communitarian complaint that deontological ethics, such as advanced by Rawls, denudes citizens of the group affiliations and resulting elements of selfhood that allow them to respond intelligently (and intelligibly) to questions of policy. Not only does the hypothetical case construct eliminate the role of self interest, it does so without stripping deliberating citizens of their identities. By asking only for a disposition of the concrete case at hand, it dramatically reduces the role of ideology (by not asking respondents to generalize) without asking deliberators to give up their concept of the good.

Finally, a juristic approach to deliberative democracy is also very much in keeping with the work of theorists such as Amy Gutmann, Dennis Thompson, and James Bohman. These second-generation deliberative democrats, whose views we have characterized as "full liberalism," have made valuable efforts to give more concrete form to the foundational theories of Habermas and Rawls. They have tried to reimagine deliberative democracy in ways that make deploying the theory seem more plausible in the face of social complexity and political pluralism. The juristic approach we have described advances that agenda by showing how well-understood techniques such as jury deliberation, restatement of law, and model code construction can be combined to allow average citizens to participate directly in developing fundamental principles of law. This use of "off-the-shelf" techniques for the creation of a new process of

collective will formation provides a means for redressing the democratic deficit in international law that is both philosophically defensible and politically practical.

By following the sometimes reflexive logic of these arguments, it is possible to glimpse a fundamentally different international politics immanent in the institutions of the present. However, the reader who has accompanied us this far is entitled to more than the hopeful sense that a more democratic and environmentally rational future is possible. He or she also deserves our best estimate of the lurking dangers in what we propose. For this purpose, we return to where we began—to the notions of encouraging transnational collective will formation, incorporating local ecological knowledge into international environmental regimes, and respecting a regulative norm of democratic consensus.

Transnational Collective Will

The idea of a transnational collective will that is not subject to the mediation of domestic political institutions is both stirring and unsettling. Ever since the advent of the internet, there have been those who have dreamed of a direct, participatory democracy constrained in its size only by the distribution of hardware and in its immediacy only by the speed of light. This fantasy is particularly compelling in America, which has both the experience of the town hall meeting as an element of its political genetics and an abundance of computer hardware (though, perhaps, the speed of our digital democracy generates more heat than light). But it is far from clear that a global plebiscite would be inherently more democratic, or more environmentally friendly, than the aggregative alternatives that currently produce the policy positions adopted by nation-states in international negotiations. This is true for at least two important reasons.

First, direct participatory referenda are subject to biasing by the structure of the propositions presented for consideration. Ever since Kenneth Arrow's demonstration that there is no way to formulate a collective welfare function that does not ultimately produce inconsistent results, policy scientists have had that unpleasantly queasy feeling one gets from having stayed on the merry-go-round too long. In a world where people's first, second, and third choices among ways to solve any given problem of public policy are influenced by their imperfect estimates of their particular stakes in the outcome, there is seldom a way to structure a public decision that does not unfairly (and inefficiently) privilege at least one alternative

over at least one other. If this problem is insurmountable in the small-n world of the public choice theorist, imagine it written across the pages of newspapers around the world. Certainly, the political legitimacy of any such procedure would likely be forfeit before it had resolved its first policy question.

Second, the idea of direct referenda as a solution to the democratic deficit would seem to assume that there is little more to democracy than voting (not to mention the assumption in our present context that majorities are always environmentally rational). As the George W. Bush administration's unhappy experience with Iraqi domestic politics amply demonstrates, ink on your finger doesn't make you a democrat. This is certainly a familiar problem for all who have spent any time contemplating the history of their own country's politics. It is an essential part of the argument in favor of an independent judiciary as a necessary feature of any democratic scheme of government. But even more important for our purposes is the argument that the political culture and practices that constitute genuine democracy can only exist within a framework of constitutional government, which in turn can exist (today, at least) only within the confines of sovereign states (Rabkin 2005). The clear implication is that the stateless environment of global civil society and transnational networks of policy specialists cannot be relied upon to do the one thing that democracy absolutely requires—protect the rights of the individual.

Our response to these admittedly serious difficulties is twofold. First, the problems of collective choice that plague democracy generally are controlled in the juristic model of democracy by asking citizen lawmakers to adjudicate hypothetical concrete cases rather than to formulate general policies. The model depends not on some new mechanism for negotiating rules of right and obligation, but on a method of resolving specific disputes that has been developed and tested over the course of a millennium. This approach benefits not only from the collective rationality that face-to-face deliberation in the jury environment promotes, but also from the impartiality that results from the fact that the dispute being adjudicated is hypothetical. The international law that a procedure of this sort would yield can best be characterized as "general principles of law," which are necessarily subject to further analysis and refinement by existing international judicial institutions. This, of course, reawakens the issue of democratic legitimacy as government officials begin to manipulate the deliberative input of citizen juries. It also introduces our second

concern, the problem of protecting the rights of the individual in the stateless international arena.

Democratic legitimacy and the protection of individual rights pose a challenge to the juristic model of democracy for essentially the same reason. The involvement of officials in international organizations introduces questions of political legitimacy into the process of collective will formation because they have not been elected to occupy offices in the structure of a sovereign government and because they cannot be relied upon to protect the rights of individual citizens for precisely that same reason. But notice two things. As the decisions of citizen juries are accumulated and analyzed, the nature of the process shifts from one of data gathering, through a "restatement" procedure that identifies the continuities that emerge from citizen decisions, to a stage at which these restated conclusions are codified and become the raw material of international negotiation and adjudication.

Recalling our discussion of international judicial procedure, the work of international courts (when effective) is generally the result of a prior agreement by sovereign governments to be bound by a particular act of adjudication. It resembles less the work of an Article 3 court in the American federal system than it does a process of negotiated regulation in administrative law. The legal "precedents" generated by the deliberations envisioned by juristic democracy would enter into the legal system in the same way that "customary" international law now does. Sovereign nations, on behalf of their citizens, would have a continuing opportunity to disavow the general principles of law that juristic democracy would create. As a final observation, the sovereign state (as a global/historical institution) is often something less the champion of individual rights than its boosters would have us believe. Indeed, an area of international law where the application of juristic democracy would seem to be both natural and needed is the realm of human rights. As a practical matter, problems of environmental protection and human rights often present themselves joined at the hip, as the environmental justice movement has amply demonstrated.

Local Knowledge and the Problem of Diversity

The second of our fundamental observations about the future of international environmental law is that to be both effective and genuinely democratic it will need to incorporate local ecological knowledge into its information core. There are a number of ways in which this necessity

might be in tension with the methods of juristic democracy. It has been argued, for example, that jury-based processes privilege a certain kind of thought and communication that disadvantages the emotive, the instinctive, and the sensual. Much of this complaint is based upon claims about the dynamics of actual juries. Jury deliberation, so the complaint goes, discriminates against those whose style of reasoning and communication rely on affective judgments and emotional appeals. In the environmental realm, this is supposed to be the unique territory occupied by advocates of deep ecology and ecofeminism as well as those who battle environmental racism. As we have discussed, however, the research on juries does not support the notion that they are dominated by the cold, dead hand of logic. There is also scant evidence to suggest that the ability to persuade (dependent as it is on both a wide array of personal qualities and the specific demands of various situations) is differentially distributed across the population in patterns that distinguish between race, ethnicity, or gender (Vidmar and Hans 2007). As for the various "isms" associated with the environmental movement, we have characterized them elsewhere (Baber and Bartlett 2005) as political metaphysics. It is fair, we believe, that they make do with the influence on environmental law that their representation among stratified random samples of the population provides for them. If that is insufficient to their purposes, certainly the answer is better proselytizing on their part rather than greater deference to their beliefs on the part of others.

A more serious problem with loss of local ecological knowledge is the fact that juristic democracy is critically dependent on the written word. The hypothetical cases that citizen juries would adjudicate would not be presented in courtrooms, but in briefs and pleas provided in writing. Obviously, this will pose significant challenges of translation as multiple iterations of jury deliberation are staged in various countries. The choice of locations for deliberative juries will need to be made carefully so as to include any perspectives on the problem at hand that might be culturally or geographically specific. But an even more fundamental and troubling bias is introduced by this approach—bias in favor of literacy, in favor of the written word over the oral tradition.

The dependence of modern forms of adjudication on the written word is so fundamental as to be virtually invisible. This is particularly true in the case of the common law tradition which, to a far greater degree than civil or roman law, was an integral element of the evolution of England from an oral to a literate society. Indeed, the development of written legal

documents memorializing the judgments of juries in late twelfth-century Great Britain was crucial to the establishment of reliable relationships between the Crown and landholders who needed the institutions of purchase, marriage, inheritance, litigation, and gift to establish and maintain a stable society (Cantor 1997). But in today's world, the gulf between the global information society and the oral traditions of Earth's remaining tribal cultures is so vast as to be virtually unimaginable. The problem is not that hypothetical cases cannot be rendered as fables and told to the inhabitants of tribal villages. The problem is, rather, the anthropological challenge of documenting and interpreting the responses of those inhabitants in ways that will allow their perspectives to be related to those of citizens in modern industrial states. It may be small comfort as the difficulty of this is contemplated, but it is at least true that a juristic model of democracy is more amenable to this challenge than aggregative forms of politics that require citizens to be familiar with fully developed questions of public policy and the social and economic circumstances that give rise to them before their views can receive a hearing.

Consensus: Be Careful What You Wish For

The increasingly rich literature on deliberative democracy has performed a number of useful functions over the past two decades. One of the most interesting of these is that it has revived discussion of the idea of consensus in democratic theory. Given up for dead by interest-group liberalism, consensus may be the next big thing. It may, in fact, be the battleground upon which deliberative democrats and communitarians (two closely related but sometimes warring clans) are destined to decide their differences. Can consensus be a practical political objective, or must it remain nothing but a regulative norm of political debate? Or does it remain, as the advocates of aggregative democracy have left it, a burned-out shell—useful only as background scenery for the self-serving performances of political charlatans?

To address this question seriously would require (what else?) another book. Fortunately, that complex problem is not the most important one for our present purposes. To understand why this is true, consider the plight of the preliterate society we have just discussed. Its social and economic circumstances have not yet required it to develop written language. Perhaps its members have not even entered that transitional stage that the anthropological record suggests humans travel on their path to literacy—

they don't even make lists of physical objects conceived of as possessions. How is the rest of humanity to treat the members of such a culture? Are we to decide their fate, either by dragging them into our modern world or walling them off in their own? The committed democrat is likely to suggest that they be given the right of self-determination. But in realistic terms, where will that lead? Experience suggests the answer: to the lingering death of their indigenous language, the slow erosion of their social structures, and the eventual loss of their cultural traditions.

We who think of ourselves as environmentalist democrats are capable of at least two reactions. We may embark on a grand project of environmental tourism in an effort to split the difference between life in a tribal society and modernity. Imagine those small fragments of the ancient world that remain preserved as a global EPCOT center, complete with pennant-wielding tour guides escorting visitors through a new corporate empire of English on which the sun would never set. Humankind has done as much for other endangered species; it certainly could do the same for tribal cousins.

If, however, the environmentalist in us triumphs over the democrat, we may come to a different conclusion. We may decide that all human institutions (including language, culture and social relations) are nothing more than adaptations to the demands of the environment. Human diversity is, in this view, simply another kind of biodiversity. Particular characteristics either have survival potential or they do not. Just as those human characteristics that contribute nothing to our survival are simply weeded out of the human gene pool and never missed, human values and traditions that no longer serve a purpose should be allowed to wither without regret.

But what is a democrat to do if he is neither arrogant enough to think that he can manage the cultures of others as if they were amusement parks nor callous enough to sit idly by while traditional societies disappear like disfavored genes? This is not a question that so limited a tradition as law can reasonably hope to answer in its entirety. But part of the answer must surely be something like this: we should never conclude that the unique perspectives of a preliterate society, borne through time in its oral traditions, could ever be dismissed as of no further use. After all, those of us who are products of the Western tradition will still occasionally refer to the multilayered wisdom of Solomon when asked to adjudicate positions so absolute and incommensurable that no compromise between them is possible. Did that ancient king ever truly hold his sword over a child that two mothers longed to possess? Does that even matter?

The story of Solomon is, first and foremost, a human narrative. Its meaning and continuing relevance is not that it is an account of historical fact, much less the resolution of an actual dispute. It is, rather, a brief entry in the journal of human experience. We refer back to it, when needed, to gain a better understanding of our own lives and the challenges they present. The doctrines of the common law are much like this. Collectively, they represent a vast and continually developing consensus about the dimensions of the just. They provide rules for conduct in the same sense that rules of language allow us to understand each other—imperfectly, but well enough. Moreover, these rules of law and our rules of language come together to tell us stories about ourselves that we use to create our political relations, which are nothing more than narratives that describe the areas of our shared existence in which we engage each other in argument and agreement (Lakoff 2002).

The implications of this perspective for the problem of consensus are clear. The danger associated with consensus is not that we may fail to achieve it. It is, rather, that consensus can so easily be achieved (given enough centuries of shared experience) that there is a danger that it may become so all-encompassing that we no longer notice or question it. That outcome is more likely if we allow culturally specific perspectives on the question of justice to disappear from our intellectual gene pool. Here we find the appropriate mission for the environmental democrat. The environmentalist knows that a species with a narrow gene pool is less adaptable and, consequently, in greater danger of extinction. And the democrat knows that the marketplace of ideas upon which we rely to provide solutions to public problems will produce its best results when the largest number of voices is heard. Are we, then, so sure that the global elite can solve all of the world's environmental problems that we will consign to oblivion the inherited wisdom of a tribal kingdom whose name may be known only to anthropologists and its few remaining subjects? If we choose to, we will certainly be the poorer for it. And it should never be claimed that the deliberative goal of consensus required that we do so.

Notes

1. Realist theorists do so while excusing their own behavior by pointing out that their intentions were pure, their methods nonviolent, and their ends highly desirable.

2. There are detailed summaries of realism as a philosophical perspective (Passmore 1957; Werkmeister 1949), so we will limit ourselves to only the briefest account of this venerable tradition. In its earliest form, realism was an opposing doctrine to nominalism. In this context, realism consisted of the view that universals have a real and objective existence beyond the mind of the knower. Realism was also equally opposed to the materialist doctrine that nothing exists beyond material objects and to the idealist view that nothing exists apart from our knowledge or awareness of it and that our ideas are the most real (perhaps the only) things in our lives.

In its more contemporary manifestations, philosophical realism has become almost exclusively a response to the predicament of egocentrism. This is the problem of finding some ground for understanding the world in a way that is not entirely dependent upon the characteristics of the knowing mind. What is sought is an understanding of reality as it exists apart from our own consciousness. To admit that nothing can be shown to exist apart from a perceiving mind is intuitively unappealing. It suggests, as did W. T. Stace (1934), that when I leave a fire burning in the fireplace and return some hours later, it cannot be shown that the fire continued to burn just as it had the prior evening when I stayed at home. Neither the ashes under the grate nor the residual warmth in the room *prove* (either inductively or deductively) that the wood continued to exist and the fire to burn in my absence.

Such a state of philosophical affairs is clearly unacceptable to anyone of even average common sense. But our common sense rejection of this counterintuitive skepticism need not lead us to accept the view that abstract ideas, like the classes into which we divide objects and the attributes we ascribe to them, enjoy the same ontological status as the objects themselves. Our terms for physical objects belong to the earliest and most basic stages in the development of our language capacities. Moreover, the most successful elements of our conversations tend to be about intersubjectively observable features of the environment, and the words we use in those discussions tend to be learned through direct conditioning by the

stimulatory effects of the denoted objects. It is, therefore, no wonder that more confidence should be felt in there being physical objects than in there being classes, attributes, and the like (Quine 1960). In short, one need not subscribe to G. E. Moore's realist refutation of the idea that things cannot exist unperceived in order to warm oneself by the fire (Moore 1959).

One additional variant of contemporary philosophical realism is worth mentioning. Critical realists have argued that our perceptions of physical objects should not be understood as attributes of those objects but, rather, as "character complexes" or features of our own mental states (Drake 1968). It is these intuited mental contents of which we are directly aware when we focus our attention on external objects. Illusions and hallucinations are not nearly so problematic to this form of realism. Neither is it plagued by an unavoidable skepticism. While it is true that our mental contents are merely taken as representative of the primary properties of objects, it is not unreasonable to rely upon them because the hypothesis that those objects actually exist in approximately the form we take them is the least taxing explanation for the generally high level of coherence our view of reality has and our success in discussing it with one another.

This limited and pragmatic approach is consistent with William James's refutation of the nominalist claim that "we really never frame any conception of the partial elements of an experience, but are compelled, whenever we think it, to think it in its totality, just as it came" (James [1890] 1952, 305). James observed that this error was not confined to nominalists. It is a common assumption that "an idea must be a duplicate edition of what it knows" and that "knowledge in any strict sense of the word, as a self-transcendent function, is impossible" (307). Once taken by the notion that "an idea, feeling, or state of consciousness can at bottom only be aware of its own quality" we will find ourselves unable to see how any idea can "become the vehicle of a knowledge of anything permanent or universal" (309). Any general propositions that seem to reach the permanent or universal must be regarded as the result of a conjunction of experiences that, through repetition, take on so high a level of cohesion that any deviation is experienced by us as unpleasant.

This interpretation would, however, leave us blind to an element of our mental structure, which expresses itself in aesthetic and moral principles, neither of which can be explained by the idea of "habitual experiences having bred inner cohesions" (James [1890] 1952, 886). That matters of such singular importance can be communicated in neither formal syllogisms nor empirical propositions underlies the view of many thinkers (Rorty 1989) that literature and other expressive forms of communication, rather than philosophy, can best promote the human solidarity needed for societies to cope with the growing awareness of their historical contingency. This insight leads to the conclusion that philosophical realism is inadequate unless it is supplemented by an aesthetic realism that makes sense of these other forms of communication.

3. Even a sympathetic observer of the arts and letters would have to admit that when the notion of realism fell into the hands of that community it took on a range of possible meanings that "runs from the pedantically exact to the cosmically vague" (Davies 1997). At least three of these possible meanings are worth discussing in our present context.

First, aesthetic realism can refer to accuracy of representation. Often referred to as *mimesis*, this quality of an artistic representation is what we might be searching for if we wanted to portray a historical scene (in an encyclopedia, perhaps) that had occurred prior to the advent of photography. In this context, we would praise an artist for his or her ability to capture an exact likeness of the principal players and place them in surroundings that recall the precise state of things long ago. Mimesis can be contrasted with a second form of aesthetic realism, *verisimilitude*. Here we refer to the artist's ability to render a work that has the appearance of reality (perhaps through the wonders of Hollywood special effects). The subject of realist art, understood in this way, need not have ever existed or may have existed in a form so distant from our experience that a literal representation is impossible. So whereas mimesis can represent to us a world from the distant past, verisimilitude shows us worlds that exist (if at all) only in galaxies far, far away.

A third form of aesthetic realism has, as far as we know, no handy Greek or Latin label. We refer to a form of realism most commonly associated with modern literature rather than with the fine arts. As a literary form, realism has come to be associated with the idea that art cannot turn its back on the sordid and sorrowful aspects of human existence in a constant pursuit of beauty and nobility (Morris 2003). The development of the realist novel, for example, has been characterized by a "democratization of subject matter," a tendency toward "confrontation with authority," and a "continuous experimentation with narrative techniques" (97). These trends have manifested themselves in a literary tradition that values, not the capacity for accurate reproduction, but rather the ability to render the familiar strange. As an example, the realism of Tolstoy has been celebrated for the shocking strangeness of his representations of the ordinary world. His was the art of describing familiar objects as if he were seeing them for the first time (Lodge 1972).

Morris argues that realist literature of the sort we are describing can have a number of important effects (Morris 2003). First, it has an *empirical effect*. Through its widely varied narrative techniques, realist writing has the ability to convey the experienced reality of our existence in social, physical, and temporal space. By continually shifting linguistic acts of "selection" and "combination" (101–103), realist literature is capable of representing our existence to us from angles as numerous as are those sharing that existence. Second, realist literature has a *truth effect*. Despite their frequent "here and now" feel, realist novels seem frequently to offer us more than merely empirical knowledge. They often suggest "truth claims," of a more "universal or ethical nature" than simple empirical generalizations (109). To this extent, they seem to satisfy the apparently ubiquitous human desire to impose meaning on the chaos of existence. Third, for many readers realist literature has a *character effect,* which is often the primary means of entry into the fictional world. By placing fully developed and comprehensible persons (albeit fictional ones) in a meaning-rich circumstance, the novelist employs a form of "psychological realism" (117) that assures the reader that the work as a whole makes available a valuable form of knowledge.

At this point, however, we face a conundrum. Aesthetic realism makes a multiplicity of perspectives available to us and validates them. It also proffers truth claims of a universal nature. But how do we reconcile this apparent conflict between the particular and the universal, between the many and the one? Are we not confronted, finally, with a problem very much like the philosophical question that asks: which is the more real—the objects of our daily experience or the categories and concepts we use to discuss those concrete perceptions? For aesthetic realism, the solution may lie in its character effect. We enter into fictional worlds not merely as individual readers but also as part of an interpretive community. That community is less a reader than it is a writer, drafting texts in ways that are consistent with the community's interpretive strategies (Morris 2003). The different views of texts sometimes held by one individual are accounted for by the fact that, in a pluralistic society, everyone is a member of more than one interpretive community. Differences at the societal level over grand narratives can be explained by this same interpretive pluralism. But we should not regard these differences as evidence of incommensurable points of view. If the languages of those whose differences are fundamental actually were incommensurable, they would have no common ground upon which to stand while pursuing their quarrel (Davidson 1984). While this insight does not give us a formula for resolving interpretive disagreements, it should reassure us that Derrida (1978, 1976) is indeed mistaken to argue that all we poor humans can do is exchange monologues and, ultimately, resort to naked power.

If we allow this same pragmatic light to reflect back upon the philosophical dispute between advocates of nominalism and realism, we may discern in that soft glow the outline of a view rather like Jürgen Habermas's notion of communicative reason. As an example, Habermas (1998d, 1998c) argues that we can accept the proposition that much of the linguistic furnishings of modernism hide unequal power relationships without discarding the universal values of free inquiry and individual autonomy that are modernism's unique contribution to human advancement. Thus, and parallel to a fundamental metaphysical principle of pragmatism articulated by Dewey and many others (discussed in the next chapter), we can see that if our intent is to deal with the practical problems that confront us as a species, we do not need to resolve the question of nominalism versus realism. We need simply to outgrow it. In much the same way, for many similar reasons, it is time for us to outgrow political realism as well.

4. In Truman's magnum opus (Truman 1951), he acknowledges a special indebtedness to the pioneering book on interest group politics, *The Process of Government*, published in 1908 by Dewey's contemporary, Arthur F. Bentley. Ironically, later in 1932, Dewey and Bentley began a correspondence that lasted until Dewey's death and resulted in many coauthored articles and one book (Dewey and Bentley 1949).

5. One might imagine that here would be a point about which Dewey and Charles Peirce might have agreed. It is possible, however, to discern subtle but important differences between the two. It was Peirce's view that scientific inquiry can be authoritative without being authoritarian because its conclusions are understood always to

be provisional and its methodology is subject to criticism and revision (Peirce [1877] 1992). The pronouncements of science are politically acceptable because they are subject to reexamination rather than because they are the result of broadly participatory inquiry. And it is the methodology of inquiry, rather than the mere fact of collaboration, that gives science its authoritative character. The idea of Dewey's that science in a democracy should be broadly participatory would strike Peirce as unreasonable. For one thing, Peirce thought that rigorous philosophical and scientific thinking had little to say regarding questions of morality, politics, and "all that relates to the conduct of life" (Peirce [1898] 1997, 29). Moreover, Peirce apparently thought very little of average citizens, consigning them to service of the intellectual elite with the remark that "if it is their highest impulse to be intellectual slaves, then slaves they ought to remain" (Peirce [1877] 1992, 118).

6. Logging is so place-specific and legal context-specific and so focused on a limited number of stakeholders (who share the desire to keep it local, each for their own reason) that it provides almost the prototypical problem that might be addressed by some version of deliberative democracy. If it never works there, it does not have a prayer anywhere. Global warming, on the other hand, is a textbook example of costs and benefits falling on billions of persons in far-flung places with different languages and cultures and the absence of any higher authority to encourage the development of a consensual resolution. Probably no one other than us is foolhardy enough to suggest that some form of deliberative democracy is even plausible in those circumstances.

7. It may be nothing more than practicing liberal tolerance for nonliberal regimes. You can be tolerant and still assert the superiority of liberalism over nonliberal institutions. That is what Rawls does, which is not much different from advancing a coherent and comprehensive theory of justice but declining to force it on people who do not (yet) follow your reasoning.

8. Realists do not necessarily claim that ethics and morality are irrelevant and unimportant, only that it is "naïve and dangerous to believe that morality, expressed through law and international institutions, can consistently restrain the pursuit of relative advantage" (Lebow 2003, 238). For Morgenthau and classical realists, "morality imposes limits on the ends that power seeks and the means employed to achieve them," but "adherence to ethical norms was just as much in the interest of those who wielded power as it was for those over whom it was exercised" (282–283).

9. For primers on the common law, see Holmes [1991] 1881; Cantor 1997; L. Friedman 2005.

10. By the end of the thirteenth century, three great courts had emerged in English law: the King's Bench, the Common Bench (or Court of Common Pleas), and the Exchequer. Each had its own identifiable sphere, but each extended its reach over time so that, by the end of the Middle Ages, a plaintiff often had a choice between any of these three courts. Each would deal with the plaintiff's case in much the same way using much the same rules. The law administered by these courts was part custom, part statute, and part the law common to all Englishmen that

was neither enacted nor statutory but, rather, developed by judges over centuries. The phrase used to describe this law, the *common law*, was already current by that time. But there was, as yet, no body of rules that bore the name of *equity*.

Of these three courts, the Exchequer was more than a court of law. It was also an administrative bureau from which the modern British treasury takes its name. Within this structure there existed a secretarial department, the Chancery, headed by the chancellor who might be characterized as the king's secretary of state for all departments of government. He kept the king's seal and supervised the great mass of correspondence and other writing that had to be done in the king's name. The chancellor was not a judge, but a great deal of his work brought him into close contact with the administration of justice. He supervised the process of preparing the writs that were required to initiate litigation, and which had to bear the king's seal. In the pursuit of this task, the chancellor was empowered to "create" such new writs as were necessary to meet the needs of new and unique cases as they arose. Innovative writs, which were granted without opposition on the testimony of the plaintiff alone, could later be quashed in courts of law as contrary to the law of the land.

In addition to the issuance of writs, the chancellor had the power to deal directly with contested legal matters. Though three great courts had been established to administer the law, there remained a reserve of justice in the hands of the king. Those who could not get relief elsewhere could present their petitions to him. Already by this time the number of these petitions had grown quite large and the work of dealing with them had fallen to the chancellor. In performing this task, the chancellor drew on two kinds of legal power. The first, the common law, was a body of judge-made law designed originally to resolve issues petitioners might have with the sovereign. These actions often raised points of fact that had to be resolved by jury. When matters such as these arose, the chancellor did not summon a jury or preside at trial. Instead, he sent the matter to the King's Bench. As the number and importance of this kind of proceeding grew, it became accepted practice to bypass the chancellor at the outset in such matters.

The second kind of law administered by the chancellor, in what came to be known as "courts of chancery," was the law of equity. The petitioner in an equitable action sought relief at the expense of some person other than the king. However, he complained that for some reason or another he could not get a remedy in the ordinary course of justice under the common law. The petition was often couched in pitiful terms and sometimes prayed for relief from the king as an act of Christian charity. As the number of these petitions grew, they came to be directly addressed to the chancellor. He had the option, of course, to invent a new writ to accommodate the circumstances of each case. But by the fourteenth century, courts of law had become quite aggressive in quashing innovative writs. Instead of pursuing this fruitless course, the chancellor could call in the defendant to answer the complaint against him.

This kind of extraordinary justice was generally triggered by a plaintiff who argued that he was poor and powerless and his adversary was rich and influential, making the matter inappropriate to the ordinary courts and the common law. As true as this often was, it was never destined to be popular with the rich

and influential. Consequently, courts of chancery were increasingly discouraged from taking up matters that the common law governed. In one area of law, however, chancellors did increasingly useful work. Courts of chancery increasingly became the forum in which uses (or trusts) were enforced. Fiduciary relationships presented issues of fact that were so tangled and complex that juries of the time seemed entirely incapable of dealing with them. As the importance of this area of law grew, rules of "equity and good conscience" evolved in chancery courts. It is no coincidence that this approach developed in courts governed by the chancellor. He was, after all, almost always an ecclesiastic. And ecclesiastical courts had long punished breaches of trust by spiritual censures and penance. Unfortunately, this moralistic distance between equity and the common law made for a confusing relationship.

Equity thus plays a strange role in the structure of law, separate from and yet part of existing legal norms. The relationship between law and equity in the modern era has never been clearly established. In the common law, equity is still looked upon (because of its association with a separate system of courts) as an auxiliary system of law, to be used only when other approaches would work a hardship so extreme as to shock the conscience of the court. In the American experience, this perplexity is increased by the fact that the fragmentation of courts that characterized the English experience was not replicated in this country and the same courts administered principles of both law and equity from our earliest years as a people. The rustic conditions of the American colonies created no demand for courts of chancery, which by that time had become elaborate mechanisms for resolving the disputes of wealthy families and large landholders. Moreover, the very idea of equitable discretion in the application of law ran counter to Puritanism, as evidenced by the increasing hostility to courts of equity in England. As a result, the American experience with equitable principles developed within the confines of common law courts. These courts were thus required to administer the continuing development of common law principles, inherited from their British progenitors, and to ameliorate the harshest outcomes generated by those same principles as they were applied to the American experience. See Pound 1999; Maitland 1909; Holdsworth 1956.

11. The Montreal Protocol and its implementation has been widely judged to be effective, but by using a fairly low standard of effectiveness. Depletion of the ozone layer is a continuing problem of policy concern for the ozone regime, which must contend with significant problems of implementation and ongoing problems in securing nation-state agreement to next-generation regulations as the issue of ozone depletion has become progressively less salient after initial successes.

12. Reflective equilibrium is equilibrium in that "our principles and judgments coincide" and it is reflective in that "we know to what principles our judgments conform" (Rawls 1999c, 18). Jurors of good conscience do that all the time, but not by starting with abstract principles and not in so sophisticated a fashion as we might expect of philosophers. Squaring moral judgments with abstract principles

is both an inductive and a deductive process. The whole restatement and codification process is designed to reconcile the fact-specific judgments made in courts and to harmonize the principles that those judgments evidence in such a way that future "litigators" can predict how new disputes will be adjudicated and how those decisions can be explained to the "client." The reason for using hypothetical but concrete cases (as Davis 1969 suggests) is to get judgments about cases that square precisely with the policy questions at hand without introducing extraneous concerns that will confound interpretation of the results and without requiring the adjudicator to wrap his intellect around the policy question in all of its complexity.

Most of the empirical research on the way actual juries operate paints a fairly positive picture of how average citizens tackle real-world problems involving difficult moral problems. Vidmar and Hans (2007), in a review of that research, conclude that, although not perfect, juries do at least as good a job as judges in resolving real-world disputes in ways that comport with the dictates of common sense and reflect reasonable interpretations of the available evidence. Moreover, the verdicts of adequately representative juries are seen as highly legitimate by the public. When looked at in comparative terms, the use of juries constitutes a move away from authoritarian forms of government toward more democratic arrangements. The available evidence indicates that meaningful jury service reinforces the democratic impulse in individual citizens (Vidmar and Hans 2007). This is consistent with the research on the effects of participation on policy jurists. It may be a result of deliberation as a generic experience.

13. The development of the tradition of common law, and the superstructure of statutory law that it supports, was a process of working upward from solutions to concrete problems toward general statements about the structure of disputes per se and the relationships among the principles that one could infer from those general statements. The fact that the process was driven largely by judges during most of that development suggests that judges function as good (thought not perfect) aggregators of the sense of justice shared among members of the communities to which they belong. If not, the structure would not have displayed the durability and flexibility that it has. Judges betray their understanding of this when they concede that they have little to rely on other than the inherent legitimacy of their institution in gaining acceptance of their pronouncements. This is why the judiciary may in fact be the most innately democratic branch of government. It comes closest to reflecting a considered social consensus and relies most heavily on universal acceptance of its decisions.

14. The date of birth of the common law is subject to a certain amount of disagreement. It can be traced back at least as far as the Plantagenet rulers of England in the twelfth century. Winston Churchill, however, sees its seeds planted in King Alfred's Book of Laws in the late ninth century (Churchill 1956). Alfred inverted the Christian principle of the Golden Rule ("do unto others as you would that they do unto you") into the less ambitious injunction "What ye will that other men should *not* do to you, that do ye not to other men." This can be seen as the prag-

matic (indeed, lawyerly) conversion of a maxim of positive religious obligation into a negative statement of individual rights more appropriate to the enforcement competencies of government.

15. Posner notes this would not explain the bargain between sovereign and subject because criminal law is no more effective (generally speaking) than primitive systems of private law when it comes to protecting individuals.

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