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The democratic potential of systemic pluralism

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Abstract: This article analyses how, and under what conditions, a systemically-pluralist structure of international law provides a springboard for global democratization. I argue that contestation and deliberation – core values of democracy – can and do arise within systemic pluralism. Specifically, I contend that institutional heterarchy between legal orders and forum shopping by different actors provide a means to engender these democratic values. I maintain that democratization can be sought on both horizontal and vertical planes: the former being the sphere of multilateral negotiations; the latter being governance which links individuals directly to sites of public power. In making this argument, I analyse recent developments within global intellectual property law, establishing and treating the multiple jurisdictions in this issue-space as an instantiation of systemic pluralism. This article thus provides a normative strategy for ongoing democratization of international law. Systemic pluralism must still prove its merits in terms of stability, the rule of law, and other values. However, I provide a method to advance transnational democracy that takes seriously empirical realities and competing normative visions.

Keywords: democracy; global constitutionalism; international law; pluralism; systemic pluralism

I. Introduction

As public power increasingly escapes the traditional confines of the nation-state, the boundaries between domestic and international law become blurred.[1] As such the postnational space is composed of overlapping legal arrangements that exercise authority in complex ways. While the

[1] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010). On the deep interdependence between domestic and international legal structures (and the political implications), see H Farrell and A Newman, 'Domestic Institutions beyond the Nation State: Charting the New Interdependence Approach' (2014) 66 *World Politics* 331–63.

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global landscape is characterized by diverse legal and political values, scholars are divided on empirical directions for change: some view a constitutional order in progress, others see further fragmentation taking hold.[2] Correspondingly, the normative potential of different pathways remains deeply contested. In this article I enquire about the normativity latent in one candidate: systemic pluralism.[3] Specifically I question whether a systemically-pluralist structure of international law provides a springboard for postnational democratization.[4]

This focus is motivated by the much-discussed global democratic deficit prominent in debates on international law, global governance, and (international) political theory.[5] Rule-makers who wield authority through regulatory institutions and informal networks are removed from rule-takers (the individuals they affect). Beyond this basic definition, the deficit is inflamed in three ways. First is an issue of procedure: international organizations (IOs) operate with unaccountable and non-transparent processes. Second is an issue of obfuscation: the complex nature of international politics makes it difficult to identify the steps in a causal chain which link rule-makers with rule-takers. Third is an issue of scope: current arrangements of transnational institutions seem incapable of tackling the most pressing issues of a globalizing world – climate change, spread of infectious diseases, volatile financial markets, enormous poverty rates, unjust supply chains, just to name a few.[6]

The concept of systemic pluralism – prominently formulated by Neil MacCormick and given renewed analytical rigour by Nico Krisch and Paul Schiff Berman – seeks a form of postnational law in which each jurisdiction claims ultimate legal authority for their norms and rules without being encompassed by an overarching framework (Grundnorm).[7] I argue that a set of democratic values can and should be pursued within

[2] T Isiksel, 'Global Legal Pluralism as Fact and Norm' (2013) 2 *Global Constitutionalism* 160–95.

[3] Krisch, *Beyond Constitutionalism* (n 1) 4.

[4] N Krisch, 'Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24 *Ratio Juris* 386–412.

[5] See G de Búrca, 'Developing Democracy Beyond the State' (2008) 46 *Columbia Journal of Transnational Law* 221–78, D Held, *Cosmopolitanism: Ideals and Realities* (Polity Press, Cambridge, 2010) and J Habermas, *The Divided West* (Polity Press, Cambridge, 2006).

[6] K Macdonald and T Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17 *European Journal of International Law* 89–119. This hinders rule-makers from enacting policies which rule-takers might demand.

[7] N MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 *Oxford Journal of Legal Studies* 528–32. Krisch, *Beyond Constitutionalism* (n 1). MacCormick uses the phrase 'radical' pluralism, which I take to be coterminous with 'systemic' pluralism.

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systemically-pluralist structures.[8] I identify effective *contestation* and authentic *deliberation* as relevant values. I maintain that democratization can be pursued on both a horizontal and vertical plane, the former being the domain of multilateral negotiations, and the latter being governance which links individuals directly to sites of transnational public power.[9] The core claim of the article is that institutional heterarchy between legal orders and forum shopping by different actors can engender democratic results. In order to make this argument, I analyse recent developments within global intellectual property law, establishing and treating the multiple jurisdictions in this issue-space as an instantiation of systemic pluralism.[10]

The article moves forward in four steps. First I sketch debates between global constitutionalists and legal pluralists. This orients and distinguishes the analytical structure of systemic pluralism. Second I argue that a set of democratic values can be advanced beyond the state. I outline the importance of this normative pursuit, and explicate the core principles of democracy sought. Third I apply these values to multilateral negotiations over intellectual property rights (IPR) at the level of inter-state negotiations. I analyse the relationship between the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). I emphasize how competition and regime shifting between these venues enables states and non-state actors to engage in contestation and deliberation. Finally I locate the same values between individual citizens and national, regional, and global legal authority. This last section draws upon another aspect of transnational IPR governance: the demise of the Anti-Counterfeiting Trade Agreement (ACTA) in 2012. I argue that heterarchy between the WTO, the WIPO, European Union (EU) bodies, and states enabled citizens to contest transnational authority through forum shopping and deliberatively shape future directions of public power.

This article should be understood as providing a normative strategy for ongoing democratization of international law. The empirical analysis identifies when, and under what conditions of systemic pluralism, democratic values can be ascertained in order to mitigate the normatively-problematic democratic deficit. I suggest that heterarchy between institutions and forum shopping under systemic pluralism can be employed to promote transnational

[8] de Búrca, 'Developing Democracy beyond the State' (n 5) 221.

[9] J Mitzen, 'Reading Habermas in Anarchy: Multilateral Diplomacy and Global Public Spheres' (2005) 99 *American Political Science Review* 401–17.

[10] For a similar argument, see LR Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1–83. As a strategy, it makes sense to constrain the vertical and horizontal dimension to the same issue-space in order to see connections between the planes.

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democratization. Although this article only engages in theory-testing within the issue-space of IPR governance, analysis of different systemically-pluralist spaces should represent a future direction for research to determine the scope of this argument.[11] Overall, systemic pluralism must still prove its merits in terms of human rights, the rule of law, stability, and other values.[12] However, I provide a method to advance transnational democracy that takes seriously empirical realities and competing normative visions.

II. Charting the global legal order

Changes within international law and international relations (IR) are inextricably bound up with globalization, which depicts the shrinking of space and time through diverse political, legal, cultural, and technological changes.[13] As Jan Aart Scholte notes, '[A]cross the various areas of social life, global connections have obtained historically unprecedented quantities, scopes, frequencies, velocities, intensities and impacts.'[14] One of the most prominent aspects of globalization has been the increasing number of institutions beyond the state. Today, formal IOs, non-state actors, public–private partnerships, standard-setting bodies, and networks occupy the international system and (re-)shape transnational power constellations.[15]

Visions for how globalization shapes the direction of international law range from global constitutionalism to global legal pluralism.[16] Global constitutionalism encompasses a broad interdisciplinary research agenda, while the camp of global legal pluralism has been noted to contain a 'pluralism of pluralisms'.[17] Most prominent for this article are systemic

[11] On the methodological point, see AL George and A Bennett, *Case Study and Theory Development in the Social Sciences* (Belfer Center for Science and International Affairs, Massachusetts, 2005).

[12] Though, to be sure, democratic legitimacy relates strongly to these other factors.

[13] M Zürn, 'Democratic Governance beyond the Nation-State: The EU and Other International Institutions' (2000) 6 *European Journal of International Relations* 183–221.

[14] JA Scholte 'Reinventing Global Democracy' (2014) 20 *European Journal of International Relations* 4.

[15] J Tallberg, T Sommerer, T Squatrito and C Jönsson, *The Opening Up of International Organizations: Transnational Access in Global Governance* (Cambridge University Press, Cambridge, 2013).

[16] For a good overview of global constitutionalism, see JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2010).

[17] A Wiener, AF Lang Jr., J Tully, MP Maduro and M Kumm, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1–15. Krisch separates between 'foundational' and 'limiting' versions of global constitutionalism.

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and institutional variants of pluralism.[18] It is useful to think of these positions as lying on a continuum: at one end, we find the hierarchy of global constitutionalism; at the other, we see the complete heterarchy of systemic pluralism. The mid-range is occupied by institutional pluralism. This first section provides a taxonomy of these three perspectives. It should be noted that these positions contain both descriptive and normative claims: they describe a particular state of the world, as well as make claims about the promise and pitfalls of that particular state. Turkuler Isiksel, and Gunther Teubner before her, describes this dualism as Janus-faced.[19] This distinction is important because, as I argue, systemic pluralism is empirically tangible as well as holding seeds for normative (democratic) growth.

Global constitutionalism

As an explanatory tool, global constitutionalism emphasizes the increased institutional density of world politics and the corresponding authority and legalization of those institutions. Although debates on global constitutionalism are relatively embryonic, at least three distinct strands of thought become apparent: legal process, subjectification, and objectification.[20] First, legal processes have begun to constitute a unified global order. This is leading to a hierarchically-structured system of international law in which legal rights and rules have been formally ingrained, and the jurisdiction between sub-parts are being demarcated. Second, and related to this, different sources of authority are being subsumed within the global constitutional framework to eliminate inconsistencies and secure a sense of mutual obligation. Third, global constitutionalism is itself becoming a source of normative convergence between actors (through *jus cogens* and other widely recognized beliefs).

Normatively, global constitutionalism 'carries the promise that there is some system in all the madness, some way in which the whole system hangs together and is not merely the aggregate of isolated and often contradictory movements'.[21] It could provide a safeguard for individual

[18] Krisch, 'Who is Afraid of Radical Pluralism?' (n 4) 387. Alec Stone Sweet has also documented a position called 'constitutional pluralism', which is similar to institutional pluralism. I leave it off the list to avoid confusing terminology. See A Stone Sweet, 'The Structure of Constitutional Pluralism' (2013) 11 *International Journal of Constitutional Law* 491–500.

[19] Isiksel, 'Global Legal Pluralism as Fact and Norm' (n 2) 160–1. Isiksel is referring specifically to legal pluralism in that article, but the logic also applied to constitutionalism.

[20] GW Brown, 'The Constitutionalization of What?' (2012) 1 *Global Constitutionalism* 205–6.

[21] J Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31–58.

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rights, help sovereign lawmakers keep pace with abuses of transnational public power, and crystallize values for a connected world. The project of global constitutionalism is often linked to calls for global democracy. As Anne Peters notes, global constitutionalism requires 'dual democratic mechanisms … which should relate both to government within nation states and to governance "above" states'.[22] This normative vision maps closely calls for cosmopolitan and cosmo-federal democracy stipulated by David Held and Raffaele Marchetti respectively.[23] These projects, developed in international political theory, call for a hierarchical system of global law to ingrain democratic rights, checks and balances, and a rule of law.

It is not the purpose of this article to dismiss global constitutionalism: I seek to show the value of systemic pluralism in its own right. But it is worth mentioning that scholars are heavily divided on the feasibility and desirability of a global constitutional system. In terms of feasibility, Jeffrey Dunoff argues that the centrality, authority, and hierarchical structure of the WTO within international trade should be an exemplary case of constitutionalism. In a constitutional setting, the WTO Appellate Body (AB) should be able to play a norm-setting role in trade law. However Dunoff argues that, because the AB has failed to resolve underlying value conflicts,[24] the WTO has not constitutionalized in any meaningful sense. Employing the example of amicus curiae brief submissions from non-state actors, Dunoff shows how member-states have rejected the AB authority on the issue. Moreover, in terms of desirability, Dunoff suggests that the attempt to sterilize politics through constitutionalism risks engendering the political backlash it seeks to guard against. Dieter Grimm, in a more theoretical piece, has succinctly argued that 'the achievement of constitutionalism cannot be reconstructed on the international or transnational level'.[25] This is because the historical conditions which enabled national constitutionalism are not present beyond the state (a feasibility constraint), and attempting to replicate these features would undermine the democratic and authoritative public power of existing national constitutional states (a desirability problem).

[22] A Peters, 'Dual Democracy' in J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) 264.

[23] Held, *Cosmopolitanism* (n 5). R Marchetti, *Global Democracy: For and Against* (Routledge, London, 2008).

[24] See JL Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization' in Dunoff and Trachtman (n 16) 178–205.

[25] D Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 21.

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Institutional pluralism

Legal pluralism describes a situation in which two or more legal systems coexist within the same social space.[26] In this, '[A] growing body of literature suggests that we live in an age of global legal pluralism. The heterogeneous, fluid, functionally fragmented, and uncertain architecture of international law gives rise to overlaps and lacunae in governance.'[27] Institutional pluralism offers an empirical and normative position between constitutionalism and systemic pluralism.[28] Instead of seeking a tightly unified and hierarchical structure, institutional pluralists accept the fluid architecture of international law and suggest that coordination takes place within a common framework of rules. This framework is not hierarchical, but provides a communal structure for interaction.

Empirically, scholars have pointed to the EU and historic developments at the domestic level as embodiments of institutional pluralism.[29] Within the US, for instance, the Constitution provides guidelines for interaction in which the Congress, President, and Supreme Court vie for final authority.[30] Similarly within the broader EU framework, the European Court of Justice (ECJ), the European Court of Human Rights, and domestic courts contest authority with loose rules for harmonization. On a normative level, institutional pluralism is supposed to help overcome the diversity of pluralism by allowing recognition of common rules and laws. This does not entail superimposing a hierarchical constitution on international law. At the same time, institutional pluralism avoids the pitfalls of a completely 'open' system of international law in which a lack of an overarching framework might actually generate conflict.

Again, I do not try to disavow institutional pluralism completely. However, there is reason to be sceptical of both the empirical and normative

[26] R Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science* 245. Private international law, as a conflict of laws approach, implicitly recognizes the notion of global legal pluralism.

[27] T Isiksel and A Theis, 'Changing Subjects: Rights, Remedies, and Responsibilities of Individuals under Global Legal Pluralism' (2013) 2 *Global Constitutionalism* 151.

[28] As suggested above, institutional pluralism closely resembles what Stone Sweet calls 'constitutional pluralism' and Matthias Kumm calls 'cosmopolitan constitutionalism'. Stone Sweet, 'The Structure of Constitutional Pluralism' (n 18). M Kumm 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Dunoff and Trachtman (n 16) 258–324.

[29] On the US case, see D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Dunoff and Trachtman (n 16). For the EU, see M Poiares Maduro, 'Europe and the Constitution: What If This Is As Good As It Gets?' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge, 2003).

[30] Over time, the US has become more constitutionalized and hierarchical, even though ultimate authority is left ambiguous.

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claims here. It is not clear that international law (or any postnational structure) provides a common frame of reference for actors. Across issue areas – trade, refugee politics, climate change, and many others – differentiated normative expectations arise. Indeed even within each issue area, values are shaped differently for those in the global North and the global South. Moreover, I agree with Krisch that institutional pluralism might not be able to provide the kind of fair and just common framework hoped for by proponents.[31] As the rational choice literature within IR has demonstrated, institutional design tends to reflect the balance of power between contracting parties.[32] Deliberately working to establish such a common framework is problematic and subject to unanticipated consequences. Determining a legitimate common framework will be very difficult, especially without pre-existing democratic mechanisms to handle the deep division that characterizes pluralist systems.[33] If the framework prescribes values that clash with the values of affected actors, this will prove empirically and normatively problematic.

Systemic pluralism

Systemic (or radical) pluralism accepts the messy and complex reality of world politics and seeks even further fragmentation and divergence between legal orders. This follows the pioneering work of HLA Hart and, more recently, MacCormick who, writing in the context of 1990s Scottish nationalism, sought jurisdictional distance from EU law and British sovereign authority.[34] Systemic pluralism understands international law as an extreme form of heterarchy in which no institution or regime stands in supremacy to others. While there might be power differentials between institutions, this does not mean that any claim to legal authority should be accepted by other legal orders.[35] As such, institutions often compete for relevance and legitimacy. Related to this, actors can forum shop between venues to locate and employ more favourable rules because there is no overarching framework to guide interactions. When autonomous legal sub-orders do interact, a set of interface norms should govern relationships.

[31] Krisch, 'Who is Afraid of Radical Pluralism?' (n 4) 387.

[32] B Koremenos, C Lipson and D Snidal, 'The Rational Design of International Institutions' (2001) 55 *International Organization* 761–99.

[33] Moreover, democratic mechanism can help sort out matters of distributive justice and aid in forming a 'common good'. On this point, see also L Valentini, 'Justice, Disagreement, and Democracy' (2012) 43 *British Journal of Political Science* 177–99.

[34] N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999). MacCormick eventually shied away from this systemic vision and accepted an 'institutional pluralist' stance.

[35] For a similar view in political theory, see C Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press, Oxford, 2003).

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These interface norms amount to moral respect and recognition, but not legal binds. The level of recognition varies on a case-by-case basis.

Instead of seeking a global constitution or a common institutional frame, systemic pluralism demands more devolution and contestation between sub-orders. Where Andreas Fischer-Lescano and Gunther Teubner understand systemic pluralism as giving up on normativity,[36] Krisch highlights how diversity, adaptability, stability, and potentially even democratic values come to the fore.[37] Systemic pluralism takes much support from excellent recent work by Paul Berman and Antje Wiener. Berman argues that, in response to the empirical condition of global legal hybridity, '*we might deliberately seek to create or preserve space for productive interactions among multiple, overlapping legal systems*'.[38] This position enables sub-orders to generate their own normative values without reimposing sovereigntist insularity (methodological nationalism) or striving for illusory universals (global constitutionalism). Wiener also maintains that the most viable solution for transnational politics and law is to be found in arrangements which accept diversity and defy attempts at uniformity.[39] This is because norm contestation is an essential element of generating robust social conditions.

In the remainder of this article, I probe whether systemic pluralism promotes or impedes democratization beyond the state. Given the power differentials which animate world politics, we might expect institutional harmonization or constitutionalization to help overcome these imbalances. However, there are good reasons to question this claim. The fact that the veto privileges of the permanent members (P5) of the United Nations Security Council have remained so sticky (even in the face of widespread calls for institutional reform) serves as a prominent counter-example.[40] The article thus takes up the challenge proposed by Isiksel: to show why global legal (systemic) pluralism is desirable, and to specify the desirable degree in the global legal sphere.[41]

[36] A Fischer-Lescano and G Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Suhrkamp, Frankfurt am Main, 2006).

[37] Krisch, *Beyond Constitutionalism* (n 1) esp ch 8. This article begins to build upon and test Krisch's claim about the democratic potential of systemic pluralism.

[38] P Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, Cambridge, 2012) 10. Italics in original.

[39] A Weiner, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press, Cambridge, 2008).

[40] This is a particularly prominent example of path-dependent lock-in effects following a critical juncture in the international system. See GJ Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton University Press, Princeton, 2001).

[41] Isiksel, 'Global Legal Pluralism as Fact and Norm' (n 2) 162.

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III. Pursuing democratic values

The global democratic deficit has become a focal topic of international law and global governance scholarship. Although a complete exposition is not necessary (or possible) here, the common method of prescription to counter this deficit involves drafting an idealized blueprint that can be superimposed on global system which helps link rule-makers with rule-takers. This blueprint is supposed to provide a 'terminal endpoint' that theorists and practitioners can strive toward.[42] Perhaps the most common prescription in the literature has been that of cosmopolitan democracy offered by David Held amongst others.[43] Cosmopolitan democrats seek to replicate the liberal model of democracy – developed within the nation-state – at the global level through a multi-level system of governance. This entails the instantiation of a hierarchical system of international law based on a statist body of institutions such as courts, a parliament, and a charter of rights.[44] However, there are complications with this method. Many scholars have noted that seeking an idealized blueprint in the non-ideal realm of global politics fails to take account of the problems of design under anarchy. Moreover, privileging (*ex ante*) a specific end-point for global democracy fails to appreciate the essentially contested and dynamic nature of democracy-building. Given that we cannot know in advance how democracy can or should play out at the global level, there are good reasons to step away from idealized blueprints and ask how different forms of democracy might be realized beyond the state.[45]

As a result, recent literature has turned away idealized blueprints and toward 'values' of democracy.[46] These values derive from core features of democracy without being tied to any specific institutional form. In this vein, Adrian Little and Kate Macdonald have argued that global democrats should search for 'a range of initiatives that are motivated by fundamental democratic principles'.[47] Similarly Gráinne de Búrca proposes a 'dynamic and inchoate' tactic called 'democracy-striving'. This approach seeks to

[42] D Archibugi, M Koenig-Archibugi, and R Marchetti, 'Introduction: Mapping Global Democracy' in D Archibugi, M Koenig-Archibugi and R Marchetti (eds), *Global Democracy: Normative and Empirical Perspectives* (Cambridge University Press, Cambridge, 2012) 1–21.

[43] Held, *Cosmopolitanism* (n 5).

[44] D Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (Princeton University Press, Princeton, 2008).

[45] This is especially relevant given that electoral mechanisms seems a distant, and perhaps even undesirable, mode of democratic politics beyond the state. Macdonald and Macdonald, 'Non-Electoral Accountability in Global Politics' (n 6) 89.

[46] JS Dryzek, 'Two Paths to Global Democracy' (2008) 15 *Ethical Perspectives* 469.

[47] A Little and K Macdonald, 'Pathways to Global Democracy? Escaping the Statist Imaginary' (2013) 39 *Review of International Studies* 789–813.

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translate the core values (building blocks) of democracy into realizable targets for global democratic governance.[48] De Búrca emphasizes political equality, participation, and self-correction as those values. This method conceives of global democracy more appropriately as an ongoing process of democratization. In the non-ideal world of international law, focusing on values over idealized blueprints seems a productive step.

In making this move, I suggest a basic definition of democracy as a system of governance which requires that individuals can participate as equals in the collective decision-making that affects their lives. This enables 'the people' to shape joint circumstance and govern the terms of their common life together.[49] This basic definition can be upheld by two values prominent in the existing literature on transnational democracy: *effective contestation* and *authentic deliberation*. For instance, James Bohman argues that for individuals to exercise control as a collective body, 'democratic activity, either in the form of effective contestation or effective deliberation', is required.[50] Bohman specifically applies this argument to the transnational domain. Krisch, whose work on the democratic potential of systemic pluralism informs this article, also identifies contestation and deliberation as central pillars of democratic practice.[51] Improving maximally upon the current situation to 'strive' for these values together reduces the democratic deficit in a tractable way.

Before outlining each of these values in more depth, it is important to discuss why affectedness should be utilized to delineate 'the people' in global democratization. Within the nation-state a unitary dêmos – defined by citizenship – has been considered the appropriate group due democratic standing. The global democratic deficit, resultant from authority escaping the nation-state, has reignited debates concerning these boundaries. Robert Dahl, with many others, has argued that because we cannot decide from within democratic theory what constitutes the proper boundary of democracy, then global democracy is stuck with a paradox: how can we decide who deserves democratic standing if we do not first know who should be included in the democratic process?[52] Employing affectedness as a way to

[48] de Búrca, 'Developing Democracy Beyond the State' (n 5) 129.

[49] Scholte, 'Reinventing Global Democracy' (n 14) 1. I employ the term 'the people' to refer to affected individuals who deserve democratic standing in decision-making procedures. See below for a more extensive discussion.

[50] J Bohman, 'Cosmopolitan Republicanism' in C Farrelly (ed), *Contemporary Political Theory: A Reader* (SAGE Publications, London, 2004) 172. Although Bohman is defending a conception of democracy based on non-domination, these two principals go beyond a republican view.

[51] Krisch, *Beyond Constitutionalism* (n 1) 270.

[52] R Dahl, 'Can International Organizations Be Democratic? A Skeptic's View' in I Shapiro and C Hacker-Cordon (eds), *Democracy's Edges* (Cambridge University Press, Cambridge, 1999) 19–36.

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determine the boundaries of 'the people' offers a partial response to this paradox. To be specific, I argue that affected individuals should be able to contest and deliberatively alter transnational authority.[53] In practice, this means that of multiple and overlapping dêmoi will exist beyond the state as individuals are affected in varied ways by sites of transnational public power.

Contestation

One way that individuals can jointly shape or alter public power is through effective contestation. This value has a central place in deliberative, republican, and (to an extent) liberal versions of democracy. Contestation enables affected individuals and groups to challenge authority, overturn power imbalances, and even displace hegemonic norms based on acts of resistance, voice, or exit. Philip Pettit is a recent proponent of public contestation in democracy – both within and beyond the state.[54] Pettit claims that democratization requires:

> institutions that are broadly contestatory in character. Those individuals or groupings who believe that power is not being exercised in the common interest – not being guided by public valuation – must be in a position to challenge a government decision, arguing with some prospect of success that it is not well supported by the public reasons recognized in the community and should therefore be amend or rejected.[55]

Pettit likens contestation by affected individuals to a form of editorship. Just as editors of a newspaper or journal have the ability to control the content printed by authors, affected individuals and collectives must be able to alter or discard laws and regulations of which they do not approve. The existence of adequate mechanisms of contestation also forces those who author laws to take (*ex ante*) consideration of how affected individuals may respond. This provides a form of accountability and responsiveness to the preferences and reasons of affected individuals. Similarly, Bohman argues that contestation operates as a 'corrective mechanism' which can be employed when the connection between rule-makers and rule-takers has 'broken down' and needs to be fixed. Bohman maintains that contestation can make sites of public power responsive to those people it affects.[56]

[53] J Bohman, *Democracy across Borders: From* Dêmos *to* Dêmoi (MIT Press, Cambridge, Massachusetts, 2007).

[54] P Pettit, 'Depoliticizing Democracy' (2004) 17 *Ratio Juris* 52–75.

[55] Pettit, 'Depoliticizing Democracy' (n 54) 61. Although this quote refers specifically to the public power exercised by a government, it could equally well refer to any site of authoritative rule-making.

[56] Bohman, 'Cosmopolitan Republicanism' (n 50) 176.

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Indeed Bohman specifically notes the importance of contestation for reducing the global democratic deficit and delineating who constitutes 'the people' in global affairs. By placing contestation at the core of democratization, it accepts that the boundaries of each dêmoi are themselves contestable as new sites of public power give rise to shifting groups of affected persons.

It is worth noting that beyond that state it is not always possible for individuals to participate directly in contestation. This puts a premium on representation. As Nadia Urbinati and Mark Warren have recently noted, representation should not be understood as a second-best alternative to direct action, but rather as an essential element of any well-functioning democratic system.[57] This enables actors such as states, NGOs, interest groups, and even other individuals to act as representatives for affected persons in contesting public power. Legitimate representation should be assessed on a case-by-case basis in which fulfilling the represented party's preferences is paramount. The more affected individuals can meaningfully contest the exercise of public power, the more democratic a system is. Although it is difficult to identify who the relevant affected parties are (i.e. which rule-takers are affected by rule-maker decisions), adopting a focus on values appreciates the dynamic and fluid nature of transnational relations.[58] The key point is that contestation to overturn unequal power and assert collective pressure is a core value of democratization.

Authentic deliberation

The second democratic value is that of authentic deliberation, which has taken centre stage in recent democratic theory.[59] The basic idea is that inclusive and reflexive political discussion on matters of common interest should mould individual preferences and shape law.[60] Deliberation should be as non-coercive as possible, with interlocutors prepared to change their mind when presented with better arguments. Agents should engage in this dialectic process to determine the 'common good' and laws should be accepted by affected parties. Those who wield public power should also

[57] N Urbinati and M Warren, 'The Concept of Representation in Contemporary Democratic Theory' (2008) 11 *Annual Review of Political Science* 407. Of course, this is also true within the state.

[58] J Cohen and CF Sabel, 'Global Democracy' (2005) 37 *NYU Journal of International Law and Politics* 763–97.

[59] On the 'deliberative turn' in democratic theory, see RE Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford University Press, Oxford, 2008).

[60] S Chambers, 'Deliberative Democratic Theory' (2003) 6 *Annual Review of Political Science* 307–32.

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offer transparent justification for their use of authority. A wide variety of speech acts, such as rational discourse, storytelling, narrative, and even rhetoric can be admissible so long as deliberators continuously link their position to more general ideas and norms (a form of reciprocity).[61]

Deliberation goes beyond contestation. While the latter seeks to overturn power imbalances and provide a mechanism to hold rule-makers accountable, the former enables each dêmoi to write laws, regulations, and rules to help determine their common destiny. In other words, deliberation goes beyond editorship and enables affected individuals to participate in authoring the cooperative conditions of joint agency. As with contestation, affectedness is the key criterion for determining whether individuals and groups can participate in deliberation over the terms of common life. The boundaries of the dêmoi are also subject to reason-giving about the issue of inclusion. This endogenous mechanism is therefore helpful in legitimately determining the scope of the dêmoi.

International lawyers and IR scholars have long discussed the importance of deliberation and reason-giving to global affairs.[62] This work has demonstrated the explanatory and normative worth of deliberation as a way to reach agreement and shape international laws. As a value of democracy, laws and policy should be increasingly generated through inclusive and non-coercive deliberation between rule-makers and rule-takers. The more negotiations reflect authentic deliberation, the more democratic it is. As with contestation, though, we should not expect all affected individuals to deliberate on all matters all the time. Representatives of affected parties in civil society and international negotiations can uphold key aspects of deliberation which enhance the democratic legitimacy of international laws. It is most desirable that affected individuals (each dêmoi) jointly authorize shared rights and responsibilities, but we could also expect representatives to fulfil a similar function by engaging in inclusive and transparent reason-giving. These two values – contestation and authentic deliberation – should be taken together to provide a normative baseline for the democratization of world politics.

IV. Horizontal democratization

It is the task of the final two sections to locate – and provide a scheme to enhance – democratic values within systemic pluralism. I undertake this analysis at two levels: horizontal and vertical. This follows a divide

[61] A Gutmann and D Thompson, *Democracy and Disagreement* (Harvard University Press, Cambridge, MA, 1996).

[62] Of the many examples, see J Habermas, *The Postnational Constellation* (MIT Press, Massachusetts, 2001) or N Deitelhoff, 'The Discursive Process of Legalization' (2009) 63 *International Organization* 33–65.

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explicated by Jennifer Mitzen and Nico Krisch in theoretical terms, and Pascal Lamy in empirical terms.[63] The horizontal plane encompasses multilateral negotiations between states, IOs, international NGOs, and private regulatory institutions. To narrow the focus, I look closely at the WTO–WIPO relationship and related agreements formed by states. In this section, multilateral actors are often functioning as representatives of affected publics and individuals. The vertical level connects individuals with national and global bodies that instantiate and uphold international law. To evaluate this plane, I focus on the collapse of ACTA negotiations in 2012. I describe how affected individuals constituted multiple dêmoi and employed contestation and deliberation to impact the trajectory of ACTA. I note the connections between levels of governance from individuals up to domestic legal authority, regional (EU) law, and the regulations of the WTO and the WIPO. These two sections make the empirical claim that global intellectual property is a good approximation of systemic pluralism, and provide a normative strategy for democratization. These claims intersect in the sense that competition and forum shopping between legal sub-orders – endemic to systemic pluralism – animates ongoing democratization.

Contestation

IPR governance covers copyright, patent, and trademark law in the international system. This has historically been the privy of inter-state negotiations. After the Paris and Berne Conventions – both signed in the late nineteenth century – the United International Bureaux for the Protection of Intellectual Property (BIRPI) was established to administer and monitor those pivotal agreements. This body eventually morphed into the WIPO, and until the 1990s, maintained norm-setting primacy over IPR standards in the international system.[64] However, in the 1970s and 1980s the US government became progressively dissatisfied with the WIPO as a multilateral venue due to its role as a specialized agency of the UN and its internal governance (i.e. voting) structure. This caused the US to shift away from the WIPO and toward the Uruguay Round in an attempt to find a venue more susceptible to their domestic preference of high global

[63] Mitzen, 'Reading Habermas in Anarchy' (n 9). N Krisch, 'Pluralism in Global Risk Regulation: The Dispute over GMOs and Trade' (2009) *LSE Working Paper* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491608>, accessed 4 March 2014. P Lamy, 'The WTO in Global Governance: Solid? Liquid? Gaseous?' (2013) *Global Policy* <http://www.globalpolicyjournal.com/blog/02/04/2013/wto-global-governance-solid-liquid-gaseous>, accessed 10 October 2013.

[64] C May, 'The World Intellectual Property Organisation and the Development Agenda' (2008) 22 *Global Society* 97–113. Though, to be sure, national systems were often highly self-contained.

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IPR standards.[65] In 1994, when the General Agreement on Tariffs and Trade (GATT) was brought within the newly-formed WTO, a key condition of WTO accession was the trade-related aspect of intellectual property rights (TRIPS) agreement. TRIPS established a new set of minimal global IPR standards, and was given legal standing through the Dispute Settlement Body (DSB). TRIPS largely reflected the preferences of the US government and European Commission, and by extension, the domestic lobby groups in those countries. Since this time, global IPR has become increasingly politicized and legalized.[66]

The division between the WIPO and the WTO reflects a systemically-pluralist shape, in which neither body (nor any state) upholds final authority.[67] When common ground has been established between the WIPO and the WTO, it is on specific cases through interface norms, rather than designated by an overarching framework. As part of the TRIPS package, the WTO and the WIPO signed the 1995 Cooperation Agreement.[68] This short accord is composed of just five articles which describe functional and generic issues of cooperation. Although the WIPO and the WTO have agreed on some (harmonized) policies, there has been disagreement (fragmentation) on many others: access to health and medicine has seen recent convergence between the WIPO, the WTO, and the World Health Organization (WHO); open-source innovation has been pushed by the WIPO and largely rejected by the WTO.[69] These are examples of how interface norms vary from one institutional relationship to the next, even if many of the multilateral players remain the same.[70]

[65] SK Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (SUNY Press, Albany, 1998).

[66] A Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 *Yale Law Journal* 804–84.

[67] Ruth Okediji argues that although the relationship is not formally hierarchical, in practice the WTO has supremacy. See RL Okediji, 'WIPO-WTO Relations and the Future of Global Intellectual Property Norms' (2008) 39 *Netherlands Yearbook of International Law* 69–125. This claim is contested – rightly, in my view – by KJ Strandburg, 'Evolving Innovation Paradigms and the Global Intellectual Property Regime' (2009) 41 *Connecticut Law Review* 861–920.

[68] WTO-WIPO cooperation agreement, <http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm>, accessed 15 October 2013.

[69] WHO, WIPO, WTO Trilateral Cooperation on Public Health, Intellectual Property, and Trade, <http://www.wipo.int/globalchallenges/en/health/trilateral_cooperation.html>, accessed 10 October 2013. On domestic legal acceptance of that policy, see 'Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade', <http://www.wipo.int/export/sites/www/freepublications/en/global_challenges/628/wipo_pub_628.pdf>, accessed 10 October 2013, 229.

[70] Krisch, *Beyond Constitutionalism* (n 1) 294.

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This diversity and heterarchy gives rise to competition between legal sub-orders. Under systemic pluralism both the WIPO and the WTO can form their own rules and norms. Because the WTO gained norm-setting supremacy when TRIPS came to pass, the WIPO has been amenable to changing its mandate to encompass and encourage new positions. The most notable example of this is the Development Agenda (DA), introduced by Brazil and Argentina in 2004, and supported by the 'Friends of Development' group. The recommendations of the DA – including technical capacity building, flexible rule-interpretation, and technology transfer – are designed to promote the interests and preferences of developing nations and indigenous communities.[71] While the WTO (through TRIPS) and the United States (through trade deals) continue to seek a mandate of IPR maximalism, the DA has enabled the WIPO to promote user rights, flexibility, and development.[72] Because only interface norms govern the WTO–WIPO relationship (and not firm constitutional bonds), the WIPO has been able to adapt their mandate in response to changing circumstances without global coordination.

The advent of the DA also shows the contestatory benefits of forum shopping. Developing states exploited the competition between the WIPO and the WTO to enhance their standing in global IPR governance. Acting as representatives of individuals affected by TRIPS, developing states and international NGOs deliberately regime shifted to the WIPO to stake their normative claim and build more amenable policy. Non-state actors – such as the Access to Knowledge (A2K) movement, Third World Network, and Electronic Frontier Foundation to name a few – were also able to join developing countries and use the WIPO to influence the DA recommendations and subsequent regulatory implementation.[73] Because developing states and their citizens are clearly affected by the one-size-fits-all standards of TRIPS, this representation of affected individuals in multilateral negotiations is a positive step.[74]

The mere introduction of the DA within the WIPO highlights successful contestation of hegemonic WTO rules. In this way, the *lack* of legal

[71] J de Beer, 'Defining WIPO's Development Agenda,' in J de Beer (ed) *Implementing the WIPO's Development Agenda* (Wilfrid Laurier University Press, Ottawa, 2009) 1–23. See also 'Overview of the Development Agenda', <http://www.wipo.int/ip-development/en/agenda/overview.html>, accessed 10 October 2013.

[72] L Dobusch and S Quack, 'Framing Standards, Mobilizing Users: Copyright versus Fair Use in Transnational Regulation' (2013) 20 *Review of International Political Economy* 52–88.

[73] The Geneva Declaration on the Future of the World Intellectual Property Organization, <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>, accessed 22 August 2013.

[74] On exactly this point of representativeness, see the A2K website which dedicates one strand of work to the 'representation' of consumer rights against WTO and ACTA policies. A2K, <http://a2knetwork.org/representation>, accessed 2 March 2014.

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supremacy across global IPR regulation is crucial for effective contestation. The WIPO offered a way for actors to 'partially exit' the TRIPS regime, voice dissatisfaction in multilateral negotiations, and 'edit' global IPR rules through reinterpretation of appropriate standards. And there are also national benefits stemming from forum shopping. Developing states have used assistance from the WIPO to take advantage of flexibilities in TRIPS standards that might otherwise have been unavailable. This has led to enhanced consideration of how traditional knowledge and indigenous rights can be balanced against TRIPS. These changes have been rolled back in to national law by many states and employed to fight multinational corporations that seek high IPR standards across the globe.[75] This contestation represents a form of editorship in which developing states can amend their own rules in light of formal and informal guidance from transnational sites of public power.

Democratic contestation through forum shopping is not confined to the WTO–WIPO relationship. Indeed it is a trend perceptible across much of global IPR governance. As Lawrence Helfer has explicated, conditions of fragmentation enable actors to regime shift and pursue their interests in more amenable venues such as the WHO. The WHO has served as a place for NGOs and developing states to act as a catalyst and seek a 'critical review of TRIPs'.[76] This led to a 1998 publication by the WHO which stressed how developing states could take advantage of TRIPS flexibilities on public health. Because the WHO was mandated with protecting public health and had permissive rules for non-state actor participation (especially compared to the WTO), this venue enhanced equality through contestation for various actors in global IPR governance when the WTO did not. This case also shows how affected parties (i.e. developing states and NGOs in this case) can edit parts of global IPR policy by changing WHO policy positions and seeking clarification over TRIPS flexibilities. In the absence of an overarching framework to settle jurisdictional battles or prescribe common norms, institutional competition and forum shopping offers weaker actors a chance to counter established power blocs as part of a broader strategy for democratic contestation.

Authentic deliberation

It is important, however, that systemic pluralism enables more than just contestation: it must also offer potential for authentic deliberation. After

[75] Brazil, Thailand, South Africa and especially India have successfully adopted this tactic. See D Dionisio, 'Trade and Access to Medicines: Things the WTO Should Consider', <http://www.ip-watch.org/2011/10/14/trade-and-access-to-medicines-things-the-wto-should-consider/>, accessed 31 January 2014.

[76] Helfer, 'Regime Shifting' (n 10) 42.

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all, the shift from the WIPO to the GATT/WTO was a form of (coercive) contestation by the US against what they perceived as unfair regulation of global IPR governance.[77] Changes due to contestation should not simply be grounded in power, but should be linked to reason-giving and reciprocity. There are many examples from the WTO–WIPO relationship (and elsewhere in IPR multilateralism) which indicate how competition between institutions and forum shopping promotes deliberative quality. This section focuses on one key example from the WTO–WIPO arrangement: how regime shifting to the WIPO enabled new arguments to be generated and then diffused back to the WTO through issue linkages. This has helped developing states (re-)assert their position against stringent TRIPS rulings in a way that exhibits reciprocity and argumentation. Even though systemic pluralism demands fragmentation, we can still see reason-giving emerging across institutions without a constitutional or institutionally-pluralist structure. Interface norms therefore seem amenable to providing distance between sub-orders while also engendering a mode to transmit the 'better argument' across fora.

I look briefly at the recent WTO DSB case, US-Gambling (DS285).This dispute pitted Antigua and Barbuda (Antigua) against the US over cross-border supply of online gambling. Antigua claimed that US restrictions decimated their domestic remote-gambling industry.[78] The US domestic policies were adjudged by the DSB in 2007 to be in violation of the most-favoured nation (MFN) principle. As the DA has gained traction within the WIPO, the DSB and the TRIPS Council recognized the importance of development-oriented issues. In the Antigua gambling case, 'development' has been a common trope in arguments from the twin island nations. Antigua noted the 2003 argument from the US that TRIPS would create benefits because 'cross-border services on trade could alleviate poverty and increase wealth in developing countries'.[79] The DSB explicitly recognized that raising tariffs or exercising trade sanctions – common methods of retaliation – would not help recoup losses, and would actually hurt the development of weaker (developing) states.[80] After negotiations failed in

[77] For an argument concerning the coercive nature of TRIPS compliance, see PK Yu, 'The Objectives and Principles of the TRIPs Agreement' (2009) 46 *Houston Law Review* 979–1046.

[78] There was, almost exactly, a tenfold reduction in staff employed in the sector in the early 2000s. See JD Thayer, 'The Trade of Cross-Border Gambling and Betting: The WTO Dispute between Antigua and the United States' (2004) 3 *Duke Law and Technology Review* 1–12.

[79] Communication from the United States, 'An Assessment of Services Trade and Liberalization in the United States and Developing Economies' TN/S/W/12 (31 March 2003), para 50.

[80] S James, 'U.S. Response to Gambling Dispute Reveals Weak Hand' (2006) <http://www.cato.org/publications/free-trade-bulletin/us-response-gambling-dispute-reveals-weak-hand>, accessed 13 October 2013.

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these cases, the DSB ruled in Antigua's favour and activated Article 22.2 for the suspension of TRIPS.

Shifting from the WTO to the WIPO has provided developing states with an outlet to align preferences and generate clearer arguments to overturn power differentials. Developing states – with the assistance of international NGOs, and strategically employing the WIPO mandate – successfully constructed a powerful argument: that because developed states reached their level of economic and social growth without being subject to TRIPS-like rules, developing states should have the same opportunities. Interestingly, this claim has fed back in to the WTO DSB and the TRIPS Council. As a result, decisions have gone in favour of developing states in cross-border retaliation cases such as DS285. This exhibits authentic deliberation because developing states are unable to rely on power to enforce policy revisability, but must rely upon previously agreed standards and the 'better argument'. This particular example shows a form of reciprocity in which developing states link their position to the history of developed states. It also exhibits generalizability in that developing states link their argument to previously agreed TRIPS rules that all states – developing and developed alike – have signed and ratified. As such, regime shifting to the WIPO provided a less coercive venue for developing states to forge new arguments, and interface norms between the WIPO and the WTO has allowed those arguments to hold weight in other venues without explicit legal ties.

Authentic deliberation appears in other ways across the systemically-pluralist terrain of IPR governance. Under TRIPS Article 67, developing states are eligible to take advantage of exceptions and receive technical assistance.[81] However immediately following TRIPS, the US attempted to undermine flexible interpretation of TRIPS by imposing bilateral 'TRIPS-plus' agreements. Over the past decade, though, this strategy has become less effective.[82] This is also due, in part, to the fact that other organizations – such as the WHO – have helped developing states and non-state actors interpret TRIPS flexibilities and mount new claims. For instance, as noted above, developing and least-developed states have obtained flexibilities in the areas of public health and access to medicine. The European Community, in the face of a growing HIV/AIDS crisis, has come to accept the importance of WHO in helping developing states make use of flexibilities in compulsory licensing regulations to increase access to patented medicine. Many scholars have characterized these changes as a major victory for weaker actors

[81] KM Koepsel, 'How Do Developed Countries Meet Their Obligations under Article 67 of the TRIPS Agreement?' (2004) 44 *IDEA: The Journal of Law and Technology* 167.

[82] Yu, 'The Objectives and Principles of the TRIPs Agreement' (n 77) 979–1046.

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(developing states and NGOs).[83] In several ways, these deliberative victories result from actors shifting away from the WTO and toward the WIPO and the WHO. More precisely, forum shopping allows weaker actors to put new issues on the global agenda which has feedback in related venues through issue linkages and interface norms.[84]

Without a single hegemon in global IPR governance, the heterarchy between – and autonomy of – legal sub-orders also promotes deliberation.[85] As Dunoff rightly argues, the DSB's failure to embrace a fundamental freedom to trade highlights the anti-constitutional nature of the WTO, and allows developing states a mode to deliberatively challenge established rules.[86] This is exemplified in the US–Antigua case in which the DSB allowed suspension of TRIPS standards for Antigua. Although systemic pluralism might not guarantee the clear and consistent rule-making that constitutionalists would like, the importance of providing adequate deliberation through forum shopping should not be underestimated. The examples here are just several from the horizontal realm of global IPR multilateralism.[87]As with contestation, it is plausible that state and non-states agents act as legitimate representatives of affected parties in negotiations. While this is not an ideal democratic situation, because states are often internally divided, it does reflect a general pattern across the global North and South that should be taken seriously.

V. Vertical democratization

Establishing democratic values within multilateral negotiations is a useful step forward. However, a more robust theory of democratization must account for how affected individuals can be incorporated directly into sites of authoritative rule-making. This is necessary to take seriously concerns over how dêmoi are formed beyond the state.[88] To quote Isiksel at length: determining how 'individuals can find meaningful channels through which to participate in the making and remaking of the rules that govern them … is perhaps the most relevant hypothesis for empirical investigations of global

[83] Helfer, 'Regime Shifting' (n 10) 42.

[84] Helfer, 'Regime Shifting' (n 10) 34.

[85] Krisch, *Beyond Constitutionalism* (n 1) 281.

[86] JL Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 *European Journal of International Law* 64.

[87] See also the WTO Shrimp–Turtle case in which the DSB Appellate Body pressured the US to change domestic administrative law procedures to address the concerns of developing countries and traders. G Shaffer, 'International Law and Global Public Goods in a Legal World' (2012) 23 *European Journal of International Law* 688.

[88] Bohman, *Democracy across Borders* (n 53).

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legal pluralism'.[89] But how does the unsettled landscape of systemic pluralism provide fertile ground for democratic interactions? This is the key question of the final section. Again, I suggest that institutional heterarchy, forum shopping, and resultant competition between legal sub-orders can all be employed to generate and promote democratization.

Contestation

As the WIPO has shifted toward balancing development with IPR, and the WTO DSB rulings have begun to reflect the interests of developing states, developed nations have turned toward alternate venues to enhance IPR standards. Prodded along by the Motion Picture Association of America (MPAA) and other lobby groups, the US and EU have attempted to push back against their loss of authority in global IPR norm-setting. Along with the ongoing Trans-Pacific Partnership (TPP), the most tangible example is ACTA. Comprising the US, EU, Australia, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, and South Korea,[90] negotiations began in 2004 and continued over the next seven years behind closed doors.[91] At its core, ACTA sought to establish 'a new and higher benchmark for international intellectual property enforcement'.[92] This agreement is supposed to raise legal standards against piracy, reverse engineering, and counterfeiting of intellectual property. ACTA, therefore, represents another battle between the normative interests of developed and developing states in global IPR governance.[93]

Under conditions of systemic pluralism, where no institution has final authority, the construction of ACTA is unsurprising. As Daniel Drezner has noted, strong actors – with large resource endowments and technical capacity – can regime shift to their advantage.[94] In the case of ACTA, however, powerful actors have faced staunch resistance. The strongest reaction has been from diffuse publics (dêmoi) across the US, EU, and Oceania (Australia and New Zealand specifically). Most contestation was

[89] Isiksel, 'Global Legal Pluralism as Fact and Norm' (n 2) 177.

[90] Of the now 22 signatories, only Japan has ratified ACTA. This occurred in 2011. In a notable shift, the EU Parliament rejected ACTA in 2012.

[91] 2004 was the same year that Brazil and other developing countries made public the pursuit of a Development Agenda in the WIPO.

[92] PK Yu, 'ACTA and Its Complex Politics' (2011) 3 *WIPO Journal* 1–16.

[93] For an early statement in this vein, see SK Sell and A Prakash, 'Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights' (2004) 48 *International Studies Quarterly* 143–75. See also Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (n 66).

[94] D Drezner, 'The Power and Peril of International Regime Complexity' (2009) 7 *Perspectives on Politics* 65–70.

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directed toward the lack of transparency offered throughout ACTA negotiations. A2K, Knowledge Ecology International (KEI), BoingBoing, and other NGOs have made public the exclusive nature of ACTA negotiations by leaking ACTA delegate emails and exposing minutes of secretive multilateral summits.[95] These revelations were followed by a high level of scrutiny from individuals, non-states actors, state officials, and even other IOs.

The EU offers the clearest example of contestation from affected individuals. Between late 2011 and early 2012, 22 EU member states and 9 other countries signed ACTA. And yet, despite seven years of negotiations and much momentum, ACTA collapsed in July 2012. Citizen groups began in 2009 to notice and contest the procedure under which ACTA was being negotiated.[96] The Foundation for a Free Information Infrastructure (FFII) filed a request to the EU Ombudsman for EU Council documents pertaining to ACTA but was denied. However, citizen groups stepped up their resistance. In February 2012, a series of anti-ACTA protests were organized. Hundreds of thousands of citizens from (amongst other states) the Czech Republic, France, Germany, Poland, the Netherlands, Switzerland, and the United Kingdom launched mass demonstrations against ACTA and its substantive policy implications.[97] At the same time Avaaz managed to collect nearly three million signatures in an online petition and many EU Parliamentarians recorded high levels of emails and letters on the subject of ACTA.

This intensity of contestation from affected individuals came as a surprise to major industries and multilateral negotiators. Even more surprisingly, though, was the rapid success of the movement. Countries such as Mexico withdrew from ACTA negotiations after initial revelations in 2010, and by June 2012 the Council of Ministers began to back away from ACTA. Finally in July 2012 the EU Parliament soundly rejected ACTA. Across many moments, individuals and citizen groups formed overlapping dêmoi with a clear anti-ACTA message and targeted specific opposition. This strategy managed to overcome strong industry pressure from bodies such as the International Chamber of Commerce, the Bundesverband der Deutschen Industrie, and film/music lobbyists.[98] This example highlights

[95] M Geist, 'ACTA's State of Play: Looking Beyond Transparency' (2011) 26 *American University International Law Review* 543–558.

[96] See, for instance, the Open letter from La Quadrature du Net, 'ACTA: A Global Threat to Freedom', <http://www.laquadrature.net/en/acta-a-global-threat-to-freedoms-open-letter>, accessed 19 February 2014.

[97] A Dür and G Mateo González, 'Public Opinion and Interest Group Influence: How Citizen Groups Derailed the Anti-Counterfeiting Trade Agreement' (2013) *Working Paper* available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376141>, accessed 12 February 2014.

[98] Dür and Mateo González, 'Public Opinion and Interest Group Influence' (n 97) 5.

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how individuals can collectively contest different layers of governance in a way that overturns seemingly overwhelming power differentials.[99] These dêmoi – which criss-crossed traditional national boundaries – managed to play an editorial function by initially demanding access to ACTA briefings and inclusion in the rule-making process. These groups then extended this editorial function to facilitate the rejection of ACTA through resistance and protests.

In several ways, then, the rugged and fragmented terrain of systemic pluralism opens avenues for democratic contestation over international legal standards. Again, this is partially due to institutional heterachy between sub-orders and forum shopping. In this case, individuals directed their message toward multiple sites of public power: local governments, interest groups, EU Parliamentarians, the Council of Ministers, the WIPO, and ACTA signatory states. For example, the Austrian group 'STOPP ACTA' was deliberately set up to contest the role of local and national Parliamentarians in passing ACTA.[100] La Quadrature du Net, in conjunction with well-known bodies such as Oxfam, confronted EU Parliamentarians with great effect.[101] Precisely because these bodies claim ultimate authority and only interact with other bodies through interface norms, each group can hold competing and differentiated normative positions. Individuals were able to constitute domestic and transnational dêmoi to exploit inconsistencies between positions to defeat ACTA. Using strong tactics – such as protests, petitions, email leaks, and internet blackouts – contestation played an effective editorial function to highlight the importance of user rights against business interests and IPR-maximalism. Because individuals could forum shop and direct attention toward varied sites of authority without a centralized hierarchy to determine rules, innovative strategies for contestatory democratization emerged and had a decisive impact in causing the defeat of ACTA and thus upon global IPR rules.

This effective form of contestation is not the only example from the systemically-pluralist world of IPR governance. The 'Wellington Declaration' in New Zealand was a successful case in which affected individuals demanded more ACTA transparency from their national government and opposed specific negotiation provisions.[102] Just as impressive for democratic contestation was the dual defeat in the US of

[99] K Weatherall, 'Three Lessons from ACTA and Its Political Aftermath' (2012) 35 *Suffolk Transnational Law Review* 575–603.

[100] STOPP ACTA campaign, <https://www.stopp-acta.at/>, accessed 2 March 2014.

[101] See La Quadrature, 'ACTA', <http://www.laquadrature.net/fr/ACTA>, accessed 2 March 2014.

[102] The Wellington Declaration, <http://acta.net.nz/the-wellington-declaration>, accessed 1 March 2014.

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House Bill 3261 – the Stop Online Piracy Act (SOPA) – and Senate Bill 968 – the Protect Intellectual Property Act (PIPA). These Bills, introduced in 2011, were designed to raise the bar of IPR maximalism beyond TRIPS to bolster IPR protection in US domestic law and their free-trade agreements. In this instance, a 'transnational coalition of engineers, academics, hackers, technology companies, bloggers, consumers, activists, and Internet users' defeated both Bills.[103] On 18 January 2012, this coalition – pushed along by individual entrepreneurs such as James Love (KEI), Jimmy Wales (Wikipedia), and the late Aaron Swartz (Reddit) – managed to orchestrate a 24-hour blackout of 15,000 websites in the US including Wikipedia, Mozilla, and Reddit. Google and Craigslist displayed censor bars against SOPA/PIPA and Google ran a petition which garnered seven million signatures demanding the US Congress reject SOPA and PIPA. Two days later the Bills were dead. These examples (and many more) show how affected individuals can contest forms of international law through different modes and institutional channels under systemic pluralism.

Authentic deliberation

It is important to go beyond contestation and examine whether reason-giving from affected individuals and their collective dêmoi were influential in authoring the policy positions which led to the collapse of ACTA. This section highlights several ways in which argumentation and reciprocity emerged and ties them back to institutional competition and forum shopping under systemic pluralism. This helps to show how individuals can build upon contestation to launch arguments under more equitable circumstances. This adds an important supplement to recent work done by Susan Sell who has noted how vertical forum-shifting has enabled powerful actors to 'go granular' and target individuals in their pursuit of ratcheting up global IPR. For instance, global corporations and IOs have (with varied success) pressured or sued patients, customers, activists, regulators, and civil servants in this pursuit. However, Sell also notes that 'the causal arrows are bidirectional' and that 'bottom up innovation is beginning to have an impact on the system as a whole'.[104]

Although ACTA negotiations were kept secret for several years, it is worth noting that proponents were increasingly pressured to offer a discursive rationale for their treaty. ACTA advocates underpinned their policy position by arguing that weak IPR standards led to criminalization,

[103] SK Sell, 'Revenge of the "Nerds": Collective Action against Intellectual Property Maximalism in the Global Information Age' (2013) 15 *International Studies Review* 67–85.

[104] SK Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP' (2011) 18 *Journal of Intellectual Property Law* 449.

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piracy, poor global health standards, and trade losses. Because organized crime, fake medicine, and economic crises negatively affect many individuals, these arguments were employed by rule-makers to justify going beyond TRIPS and institutionalizing ACTA. Specifically ACTA signatory states noted that the proliferation of counterfeit goods 'hinders sustainable economic development in both developed and developing countries and, in some cases, represents a health or safety risk to consumers'.[105] Because of arguments launched in the WIPO as part of the DA, these claims even represent a degree of reciprocity as the arguments were framed in terms acceptable to developing states.[106] Such justifications, largely offered in response to public demands, highlighted an initial connection between contestation and deliberative quality.[107]

Many of the claims launched by ACTA states, though, have been flatly rejected by developing countries. This is a marked shift from when the WTO commenced in 1995. At that time the US and other QUAD members [Canada, Japan, and the EU] were able to threaten isolation or sanctions if developing states refused to sign and ratify TRIPS standards. These threats were supported by the promise of Foreign Direct Investment (FDI) and technology transfer.[108] However, as Peter Yu rightly notes, after 'more than 15 years of disillusionment in the TRIPS Agreement, many developing countries have begun to realize that the oft-presented carrots may be illusory'.[109] This emphasizes that the reason-giving offered by developed states has failed to accord with past experiences or alter the preferences of affected agents. The fact that ACTA states cannot coercively impose their preferences through power politics is a desirable feature of systemic pluralism. Without an overarching framework to guide interactions, domestic and international legal jurisdictions are able to determine their own legal norms. Although the counterfactual can never be proved, it seems likely that if TRIPS was the only institutional framework for IPR governance – as constitutionalists and institutional pluralists might demand – contestation and deliberative quality would be severely diminished.

Democratic deliberation can be seen in myriad other ways during the defeat of ACTA. I emphasize how affected individuals directed arguments

[105] Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties, <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag>, accessed 18 October 2013.

[106] Gutmann and Thompson, *Democracy and Disagreement* (n 61).

[107] Dür and Mateo González, 'Public Opinion and Interest Group Influence' (n 97) 20.

[108] Indeed it was an implicit argument that high IPR standards would generate these benefits.

[109] Yu, 'ACTA and Its Complex Politics' (n 92) 7. Moreover, because the DSB has ruled several times in favour of weaker states, developing states are increasingly unable to wield the 'stick' of trade sanctions.

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at different levels of governance from the national to the global in an attempt to push back ACTA. Within the relatively uncoercive domain of civil society,[110] individual citizens clustered arguments around freedom of speech, the importance of net neutrality, the necessity of inclusive and transparent international negotiations, and many more. National Parliamentarians publicly accepted some of these arguments from affected individuals in their decision to reject ACTA. In particular, the Dutch government was very quick to respond to the argument that ACTA might 'harm a free and open internet'.[111] In May of 2012, Dutch Parliamentarians voted to reject ACTA and not sign another similar agreement for fear of setting a long-term precedent. This sent a strong message to the EU Parliament that domestic and local governments would refuse to implement ACTA policy. Under conditions of systemic pluralism, different sub-orders can seek fragmentation to uphold these arguments without the legal or hierarchical pressures demanded by institutional pluralists and constitutionalists.

A similar national-level reaction occurred in many other EU states. The German Justice Minister, Sabine Leutheusser-Schnarrenberger, explained the German decision to reject ACTA as a result of how 'many people there are in all of Europe that do not want ACTA'.[112] These decisions were surprising because, for seven years, these national governments had been involved in ACTA negotiations at the EU level. While contrasting positions were evident, these differences between ACTA states tended to be technical and detailed. However, this complete rejection suggests that domestic politicians changed their preferences in response to emerging arguments from protesting publics and civil society at large. Because different sub-orders of governance compete with one another under systemic conditions, affected individuals could use this competition to strategically develop their argument to suit different venues.

Similar preference transformations are also evident in the EU Parliament. In January 2012, in a foreshadowing example, Kader Arif – the EU Parliament rapporteur for ACTA – resigned due to the fact that ACTA had 'no consultation of the civil society' and a 'lack of transparency since the beginning of negotiations'. Then in July 2012, after widespread protests, petitions, and the defeat of SOPA/PIPA, the EU Parliament recognized that ACTA had suffered from a dearth of transparency and inclusive reason-giving. This advice was clearly heeded and the EU Parliament, by a margin of 478–39 (165 abstentions), used powers granted at the Lisbon Treaty to

[110] Habermas, *The Postnational Constellation* (n 62).

[111] O Solon, 'Netherlands Rejects ACTA, and Forbids any Similar Legislation' (2012) <http://www.wired.co.uk/news/archive/2012-05/30/dutch-acta-rejection>, accessed 6 March 2014.

[112] Dür and Mateo González, 'Public Opinion and Interest Group Influence' (n 97) 20.

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block ACTA for fears of internet censorship.[113] Martin Schulz, President of the EU Parliament, noted 'the existence of European public opinion that transcends national borders' was the key explanatory factor behind the Parliament's decision not to ratify ACTA.[114] This highlights the ability for overlapping dêmoi to emerge and build a strong argument which relatively quickly altered the preferences of EU rule-makers.

And the claims made by anti-ACTA citizen groups had transnational implications in the WTO and the WIPO. For instance, in February 2012, the Avaaz petition was gaining traction and the Greens/EFA group in the EU Parliament demanded that José Manuel Barroso explain why the Commission opted to send ACTA to the ECJ for legal review without public announcement. These groups argued that ACTA stifled internet freedom and data on counterfeiting and piracy costs were unreliable.[115] India explicitly drew upon these arguments crafted by EU citizen groups and EU Parliamentarians in a WTO debate about ACTA.[116] India cited concerns over internet freedom and digital goods when noting that ACTA is 'likely to have a severe impact on the efforts towards literacy and access to knowledge and information that has been at the core of aspirations of the developing world'.[117] These arguments, as have become clear, were formulated and given legal strength by the WIPO DA.

In earlier concerns about ACTA transparency from a sub-section of the EU Parliament, Lamy – the WTO Director-General – argued that the WTO holds higher standards for transparency than ACTA had exhibited and reinforced the notion that 'the TRIPS Agreement is the chief multilateral standard on measures for the enforcement of intellectual property'.[118] Similarly, the German Federal Minister for Economic Cooperation and Development drew upon the anti-ACTA petition signed by 60,000 German citizens to warn developing countries that they should not sign or recognize

[113] M Ermert, 'Unprecedented Vote: EU Parliament Trade Committee Rejects ACTA' (2012) <http://www.ip-watch.org/2012/06/21/unprecedented-vote-eu-parliament-trade-committee-rejects-acta/>, accessed 18 October 2013.

[114] M Schulz, 'ACTA Wrong Solution to Protect Intellectual Property' (2012) <http://www.europarl.europa.eu/the-president/en/press/press_release_speeches/press_release/2012/2012-july/html/acta-wrong-solution-to-protect-intellectual-property>, accessed 6 March 2014.

[115] La Quadrature, 'ACTA' <http://www.laquadrature.net/fr/ACTA>, accessed 2 March 2014.

[116] IP-Watch, 'ACTA Debated at WTO; Petitions and Letters Fly in Brussels' (2012) <http://www.ip-watch.org/2012/02/29/acta-debated-at-wto-petitions-and-letters-fly-in-brussels/>, accessed 7 March 2012.

[117] IP-Watch, 'ACTA Debated at WTO; Petitions and Letters Fly in Brussels' (2012) <http://www.ip-watch.org/2012/02/29/acta-debated-at-wto-petitions-and-letters-fly-in-brussels/>, accessed 7 March 2012.

[118] P Lamy, 'WTO Responds to Concerns of the European Parliament on ACTA' (2010) <http://keionline.org/node/838>, accessed 8 March 2014.

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ACTA for fear of hampering access to medicine and seeds. These views filtered back to the WIPO. As noted by the WIPO Director-General Francis Gurry, the WIPO seeks to turn away from the 'detrimental' and 'exclusive' minilateralism of ACTA toward a more 'inclusive' and 'balanced' form of multilateralism.[119]

Overall, affected individuals have formed dêmoi and directed well-crafted arguments against different sub-orders of legal governance. Local-level politicians, national leaders, EU Parliamentarians, and international bureaucrats were all faced with contestatory pressure and reason-giving about the freedom of the internet, the lack of negotiating transparency, and issues facing developing states. Because each sub-order is autonomous and can claim its own authority, this opened channels for deliberation in novel ways. National Parliamentarians were presented with argument about liberal democratic rights and the freedom of the internet, and EU Parliamentarians were repeatedly told that they should be more concerned about the isolation of their institution during ACTA negotiations. The ability for individuals and collectives to direct arguments at different groups represents a type of forum shopping that, given the collapse of ACTA, highlights a strategy to obtain normative democratic values under systemic pluralism.

VI. Concluding remarks

In his book *Beyond Constitutionalism*, Krisch flagged the democratic potential of systemic pluralism as an area of further research.[120] Focusing on the global IPR system, I have identified how effective contestation and authentic deliberation emerge across two planes: the horizontal level of multilateralism and the vertical level which links affected citizens to national, regional, and global rule-makers. Because systemic pluralism calls for a fragmented and uneven institutional terrain, identifying democratic values is a challenging prospect. It is often hard to see the causal connections linking contestation in one venue to changes in other venues. Despite this, an in-depth analysis of the WTO–WIPO relationship and the collapse of ACTA has begun uncovering democratic values. This highlights that systemic pluralism generally – and the politics of institutional heterachy between sub-orders, forum shopping, and interface norms, more specifically – may provide a strategy for inducing democracy beyond the state.

[119] F Gurry, 'Historic Treaty Adopted, Boosts Access to Books for Visually Impaired Persons Worldwide' (2013) <http://www.wipo.int/pressroom/en/articles/2013/article_0017.html>, accessed 29 February 2014.

[120] Krisch, *Beyond Constitutionalism* (n 1) 280.

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The scope and potential of this normative claim needs more empirical analysis. This should occur both within the realm of global IPR, and in other systemically-pluralist structures of international law. Do the horizontal negotiations over medical patents in the WTO, WHO, and the WIPO induce democracy? Do vertical battles, such as the Treatment Action Campaign, link affected individuals with various sites of public power in democratic ways?[121] Similar questions could be asked in the fragmented architecture of climate change. Do multilateral affairs provide scope for democratization as some have suggested?[122] Do the Western Climate Initiative and Climate Action Network allow affected parties a democratic outlet?[123] I suggest that the horizontal/vertical heuristic may offer a plausible pathway for further work, but note that remaining within the same issue-space is appropriate to see connections between the levels.[124]

It has not been the object of this article to undermine completely the constitutional and institutional pluralist approach to international law. Rigid rules and an overarching framework might provide the types of checks and balances many people associate with liberal democracy and resolve battles by prescribing legal jurisdictions. But the international system is not a state, and nor is it a realm that democracy has ever been substantively exercised. As such we should not assume that liberal democratic institutions are the best (or only) way to make transnational democratization workable. The key point of this article is that democratic values can and do emerge under conditions of systemic pluralism. Institutional competition and forum shopping, upheld by interface norms and heterachy, do enable contestation and deliberation. This strategy should, at the least, provide fodder for the broader literature on the democratization of international law.

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[121] This case, happening largely within South Africa and sub-Saharan Africa, would be particularly useful to test normative theories away from the traditional Western locations.

[122] See, for instance, H Stevenson and JS Dryzek, 'The Discursive Democratisation of Global Climate Governance' (2012) 21 *Environmental Politics* 189–210.

[123] MJ Hoffman, *Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto* (Oxford University Press, Oxford, 2009).

[124] A normative assessment of either the horizontal or vertical level on its own may be plausible but, in my view, is insufficient for remedying the democratic deficit.

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