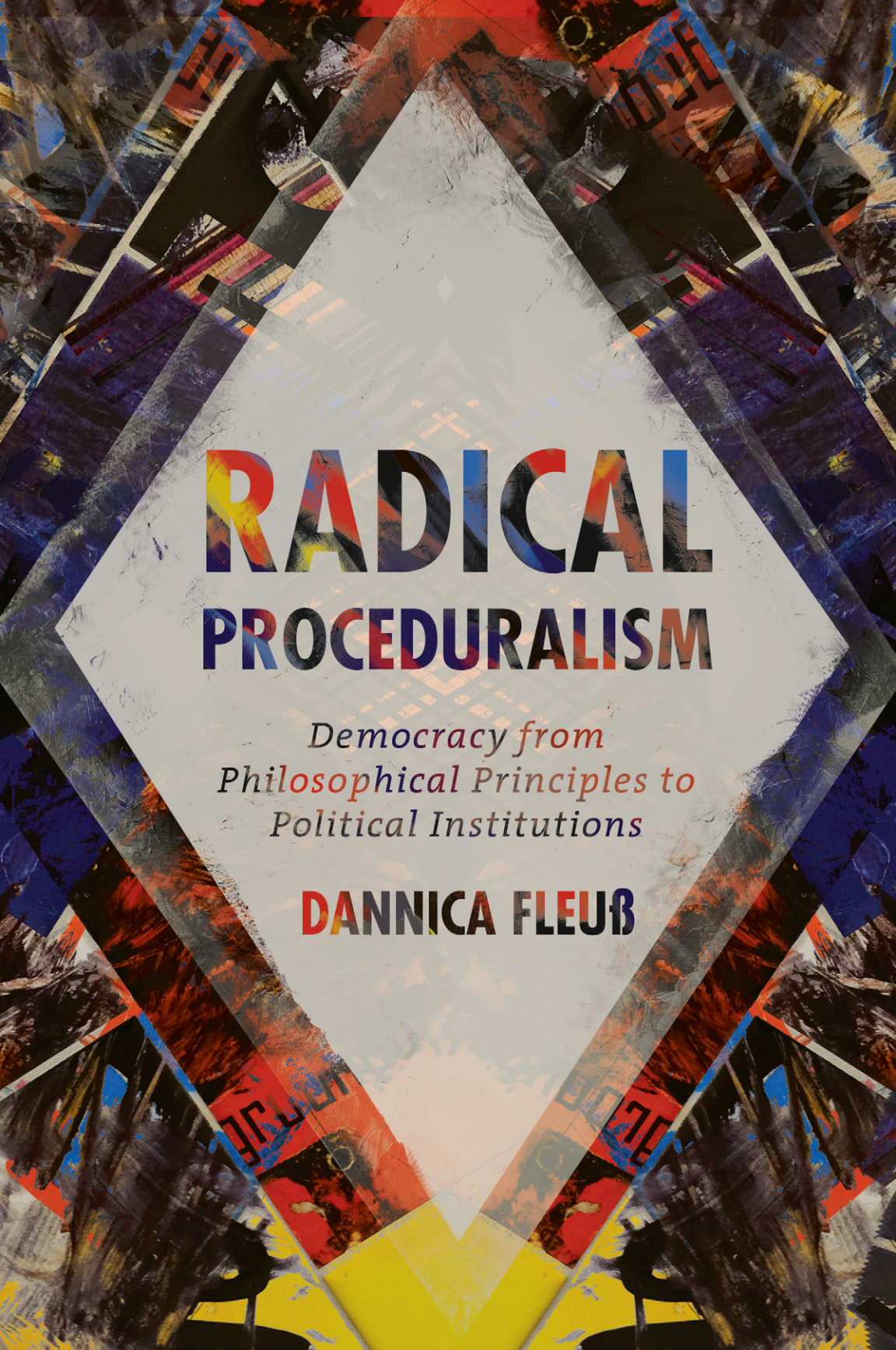
RADICAL
PROCEDURALISM
Democracy from Philosophical Principles to Political Institutions
DANNICA FLEUß

Radical Proceduralism

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Radical Proceduralism: Democracy from Philosophical Principles to Political Institutions

DANNICA FLEUß

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INVESTOR IN PEOPLE

To
Elli, Micha & Thomas – You know why
(And for teaching me, very practically, that people matter more than principles.)

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List of Acronyms

BFN	Habermas, J. (1996). *Between fact and norms. Contributions to a discourse theory of law and democracy.* Polity.
IPR	Rawls, J. (1997). The idea of public reason revisited. *The University of Chicago Law Review*, *64*(3), 765–807.
JA	Habermas, J. (1993). *Justification and application: Remarks on discourse ethics.* Polity.
JaF	Rawls, J. (2001). *Justice as fairness: A restatement*. Harvard University Press.
KC	Rawls, J. (1980). Kantian constructivism in moral theory. The Journal of Philosophy, 77(9), 515–572.
MCCA	Habermas, J. (1990). *Moral consciousness and communicative action*. MIT press.
OED 1996	Hornblower, S., & Spawforth, A. (Eds.). (1996). *The oxford classical dictionary* (3rd ed.). Oxford University Press.
PL	Rawls, J. (2005). *Political liberalism*. Columbia University Press.
RH	Rawls, J. ([1995] 2005). Political liberalism: Reply to Habermas. In *Political liberalism* (pp. 372–434). Columbia University Press.
TCA 1	Habermas, J. (1984). *The theory of communicative action*: *Volume 1: Reason and the Rationalization of Society*. Polity.
TCA 2	Habermas, J. (1985). *The theory of communicative action. Volume 2: Lifeworld and system: A critique of functionalist reason*. Cambridge: Polity.
ToJ	Rawls, J. (1999). *A theory of justice* (rev. ed.). Harvard University Press.

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About the Author

Dannica Fleuß is a Research Fellow at Helmut-Schmidt-University Hamburg and a Research Associate at the Center for Deliberative Democracy and Global Governance. She completed her PhD in 2016 at Heidelberg University and held visiting fellowships at the University of Canberra, Australia and at Westminster University, London, UK. She is currently one of the convenors of the British Political Studies Associations' Specialist Group for Participatory and Deliberative Democracy.

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Introduction: Democratic Legitimacy, Democratic Crises, Everyday (Political) Practice

Democratic Legitimacy: Large-scale Crises and the "Little Things"

Scholarly and political books about democracy that have been published in the course of the past years tend to start out with the claim that contemporary liberal-representative democracies are "challenged," "under threat," or in "in deep crisis." The election of Donald Trump, the Brexit referendum, or the rise of populism in many established Western democracies and beyond are seen as symptoms of the current democratic malaise (e.g., Brennan, 2017; Bridle, 2018; Klein, 2017; Lafont, 2020; Landemore, 2020; Levitsky & Ziblatt, 2018).

Let's put these debates aside for a moment. Let's assume that the mainstream of social science and political commentaries is generally right and that democracy as we know it is in great peril. As both the precise diagnosis and the cure of the problem crucially depend on the presupposed normative ideal of democracy, this observation in itself has limited analytical and practical value (see Della Porta, 2013; Ercan & Gagnon, 2014; Merkel, 2014; Merkel & Kneip, 2018). Rather, it points toward some of the most intricate and longest-standing disputes in political philosophy and political theory: What are the sources and standards of democratic legitimacy and how are we supposed to detect deviations from this ideal? What are "legitimate" political institutions in the context of contemporary pluralistic societies and perennial (philosophical and political) disagreements about values and visions of the good life?

In this book, I shall pick up on such foundational debates to propose what I shall term a "radical proceduralist" conception of democratic legitimacy, that is an understanding that bases the legitimacy of political results *solely* on the fact that they have been brought about by a fair and inclusive procedure. I will analyze and defend this ideal at a conceptual level and outline how it can be put into practice within the context of contemporary democratic societies. I shall also indicate that radical proceduralism can provide a cure for (at least some of) contemporary democratic crisis phenomena. However, I firmly believe that democracy and democratic theory are about both the everyday, "small-scale" matters and about "big" societal developments and crises. At the very least,

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though, everyday moral intuitions can help shed light on some basic features and problems that we are confronted with at large scale.

Before I address big and bold claims, I therefore wish to pump your intuitions about democratic legitimacy: let's start with the "little things" and consider how we make collective decisions in our everyday lives. The rationales and arguments that are relevant to everyday life and everyday collective decisions already pose highly complex challenges, prone to moral dilemmas and conflicts. Before the world was hit by a pandemic, I met a group of eight people to go to the movies. We hadn't agreed on a specific movie in advance, but had casually articulated our preferences for seeing one of the science fiction movies that had just come out. Now it happens to be the case that I am *very* well-informed about science fiction movies and TV series, at least as long as they involve either space or time travel. I have studied all StarTrek episodes that deal with temporal logic, conducted in-depth comparative analyses of the technological devices for time travel in a representative sample of science-fiction stories, and analyzed the – often deadly! – logical and ontological paradoxes time travelers must deal with on their journeys. In short: I fancy myself as somewhat of an expert in these matters.

However, the problem was this: There were two science-fiction films on the movie program, one from an excellent film series with a beautiful story line and nuanced characters, located in a complex cosmos of interstellar political relations, one from a series that builds on noisy effects rather than the intricacies of time travel. And although our little group had envisaged watching a Sci-Fi movie that night, there was no agreement at all concerning which one to watch. Members of our group held different interests and preferences and displayed remarkably different attitudes toward features that matter in selecting a Sci-Fi movie in the first place.

I not only consider myself an expert in Sci-Fi, I also conceive of myself as a democrat who does not impose her interests or preferences on others. This presented me with a serious dilemma: On the one hand, I reject any form of paternalistic or authoritarian decision-making. On the other hand, I was *really* not willing to let people who cannot tell a *Tardis* from a *Tricorder* decide what movie to watch. I felt that there was a *right* answer to the question "what movie should we see tonight?" What is more: I felt that I would be perfectly able to choose the best (most aesthetically pleasing, politically inspiring, entertaining) movie. All people involved were social scientists or philosophers who conceived of themselves as democrats in every fiber of their being. In consequence, we had a long discussion about the right course of action, the standards that should be applied in selecting movies and our respective interests and visions of how to have a relaxed evening. We finally resolved the conflict by watching neither of the Sci-Fi movies, but a romantic comedy. In a nutshell: At least from my viewpoint, inclusive democratic deliberation led to the worst conceivable result.

So, I was definitely not happy about this outcome. I felt that it was, all valid quality-standards for movies or evening plans considered, a very bad result. But did I consider the collective decision in favor of watching the romantic comedy to be "illegitimate?" At this point, I must admit that I was (and still am) torn: I firmly believe that my expertise undoubtedly would have enabled me to choose the *best* – or, at the very least, a *better* – movie. But, of course, my friends would

most likely disagree with this judgment: they may have had different ideas about what a pleasant evening looks like, they may like Hollywood effects, and they may even genuinely enjoy watching romantic comedies. They may doubt my self-attributed expertise in evaluating the quality of movies and they may have good reasons to do so. They may also question that there is any such thing as "objective knowledge" about the quality of Sci-Fi or any other movies after all.

Arguably, some variables other than my (disputable) expert status in these matters were relevant to the depicted situation: We wanted to make a decision and jointly watch a movie at some point. We also wanted to remain friends and therefore excluded blackmailing and other uses of physical and non-physical violence from our action portfolio. We had different preferences and competing interests. There was no quick and easy solution, no straightforward "right" method to resolve our disagreement. Was there any such thing as the "right" or "just" way to proceed with our evening planning? Nobody seemed to be willing to just toss a coin and leave the matter to chance. Rather, everyone wanted to put forward his or her considerations, be heard and feel that his or her perspective is taken seriously and respectfully considered by everybody else. We discussed the matter for a while and then took a vote, with the depicted outcome.

Our "evening planning dispute" was, in short, characterized by what Jeremy Waldron (1999) termed the "circumstances of politics:" It was a situation of deep and perennial disagreements in which the actors involved nevertheless wanted and needed to act in concert. Aesthetic judgments, cinematographic choices and evening plans can be complex, but political issues that affect large-scale communities in modern mass democracies are certainly significantly more complicated. They not only affect significantly more people and must respect their needs and preferences – they also frequently concern high-stake issues and, on top of that, can be enforced by the state's power monopoly. Nevertheless, the circumstances under which we make democratic decisions in complex and pluralistic societies display similar basic features: Siding with Waldron, I shall argue in this book that political issues such as the choice of the presidential candidates, abortion legislation, the regulation of free speech, the justice of welfare provisions in our country, or measures to organize public transport in our district are issues that we can expect *reasonable*, reasonably *well-informed* people to *perennially disagree* upon – and to do so *in good faith* (see Waldron, 1999, p. 112).

The ways in which we talk about politics and engage in everyday political practice often presuppose that there are ("objectively") *better* and *worse* political decisions – and that we *know* what is "right" or "wrong:" "[w]e are supposing that some things are unjust, some right, some things vicious, and so on" (Estlund, 2008, p. 5). We will oppose calling a political decision "legitimate" that we feel violates basic human rights or discriminates against minorities. We may disagree about what precisely constitutes such violations of normative standards and we may change our position over time. What does not fit well with everyday political practice, though, is an attitude of "epistemic abstinence" (Landemore, 2017a; Raz, 1990).

What becomes clear in pumping our intuitions about the sources and standards of political decisions' legitimacy is that various convictions and preconceptions about these issues may, depending on the precise decision at stake, point into strikingly different directions: Are fair and inclusive *procedures* that respect the viewpoints of all affected individuals what truly matters or must we take into account the *quality of the outcome* as well? When the chips are down: do such outcome-related considerations outweigh procedural considerations?

Longstanding philosophical debates about the sources and standards of democratic legitimacy deal with precisely these issues: Must a "good" or "legitimate" democracy generate "high-quality" political results and warrant, for instance, a just distribution of resources, economic prosperity and people's wellbeing? Must political processes primarily realize all people's equal autonomy and enable them participate in deciding upon the collective course of action? Should both dimensions play a role – and if so, how should they be weighted and what should be done when they come into conflict? Such questions are not political philosophers' mind gimmicks, but bear implications for the real-world problems that everyday democratic politics must face – and for how we diagnose, explain, and attempt to address or cure "democratic crises."

Democratic Crises and Responses: Do We Need More or Less Democracy?

Despite the appearance of their omnipresence, diagnoses of democratic crises have "gone through periodic cycles of hope and fear" (Norris, 1999, p. 3): while scholarly and public debates in the 1960s and 1970s were prone to claim that democratic systems are "in crisis" (e.g., Crozier et al., 1975; Habermas, 1975; Huntington, 1981), "'crisis' theories tended to fall out of intellectual fashion during the 1980s, as they appeared to have underestimated the adaptive capacities of the modern state" (Norris, 1999, p. 9). In the 1990s, the prevailing perception among public and scientific commentators referred to democratic citizens' disengagement and disinterest in politics which has been captured in the telling – and untranslatable – German technical term *Politikverdrossenheit* (see Arzheimer, 2013). Referring to the political atmosphere in the US, Norris captures this mood in the following way:

> Democracy seemed to have triumphed and yet to become absorbed by self-doubt. Popular accounts stressed widespread signs of democratic malaise, claiming that the electorate in many industrialized societies [...] had become deeply disengaged. [...] Yet the popular *Zeitgeist* in America seemed to be more anxious than angry, immobilized on the couch by ennui than energized by radical energy. (Norris, 1999, pp. 5–6)

Norris argues on the basis of longitudinal comparative analyses of citizen attitudes that many democratic citizens are "critical citizens" and overwhelmingly

support general principles of democratic rule while their support for and trust in current institutions and authorities of representative democracies is eroding: "[t]here is a growing tension between ideals and reality" (Norris, 1999, pp. 26–27). Norris indicates here that this tension may lead to frustration, disenchantment, but that it may also fulfill a productive function for democracy, mobilize citizens to get engaged, to improve and reform democratic institutions: "The consequences of declining support for government institutions [...] remains open to debate." (Norris, 1999, p. 27)

In public and scholarly discourses, this cautious optimism of the late 1990s has by now widely been replaced by the diagnosis that contemporary Western democracy is not just "challenged," but in deep crisis. Foa and Mounk (2017, 2019) argue that recent public opinion studies suggest a deeper malaise than the "critical citizens-diagnosis" of the late 1990s: "developed democracies have experienced a form of deconsolidation" that is rooted in citizens' "negative view of democratic governance" *as such* (Armingeon & Gutmann, 2014; Foa & Mounk, 2017; 2019, p. 10; Willke & Fetterolf, 2018).

Democratic politics crucially depends on citizens' participation, trust and support. Against this background, recent years' rise of populism, the support for anti-system parties and post-truth politics (De Cleen, 2017; Speed & Mannion, 2017) and the rise of authoritarian leadership-styles (Norris & Inglehart, 2019) have frequently been interpreted as results of citizens' "disaffection, disenchantment, disappointment, [feeling of] being disempowered by the elites" (Offe, 2011, p. 447). Both the Brexit campaign and Donald Trump's communication and leadership strongly relied on anti-elite or anti-establishment appeals (see Norris & Inglehart, 2019, pp. 3, 21, 124; Rose, 2017). Naomi Klein's targeted rhetoric brilliantly captures this sense of disenchantment with current liberal-representative democratic politics:

> It's absolutely true that the system is corrupt. It's a swamp. And people know it. [...] That's why so many people have been happy to treat electoral politics as macabre entertainment. Once politics has reached such a debased state, why bother protecting it from a boor like Trump? It's cesspool anyway, so let the games begin. (Klein, 2017, pp. 41–42)

In spite of such pervasive narratives, "[d]emocracy is claimed to be in crisis as a result of various factors" (Ercan & Gagnon, 2014, p. 1). At this point, I do not aim at an exhaustive list of factors considered and arguments made in the vast and ever-expanding "democratic crisis"-literature. With regards to current political developments, particularly prominently mentioned variables refer to increasing "political complexity" (Warren, 2009, p. 6). This rise in political complexity is, in turn, associated with several factors, including "the intensification and globalization of markets, migration, security regimes, environmental issues" (Warren, 2009) and technological developments such as digitalization (e.g., see Fleuß et al., 2019; Sunstein, 2018). In consequence, democracies are

frequently considered "structurally inadequate for the government of advanced modern societies" (Blühdorn, 2020, p. 389; see Willke, 2014; Zolo, 1992):

> Societal differentiation, technological development, the dynamics of globalization and so forth steadily increase the complexity of modern societies, render their problems and crises ever more unpredictable, and persistently reduce the steering capacity of government institutions. (Blühdorn, 2020, p. 389; see Willke, 2014; 2016a; 2016b)

Against this backdrop, not only democratic institutions but also "ordinary citizens" are frequently believed to be "overwhelmed" by political complexity and held to be incapable and unwilling to engage with of democratic policymaking: "Democracy presupposes that citizens who are eligible to vote can assess and understand what they are voting on. Both constitutive conditions for democracy are increasingly proving to be fiction." (Willke, 2014, p. 9)[1]

Subsequently to the 2016 US-presidential election and the Brexit vote, many public and scholarly commentators shared a deep sense of wariness vis-à-vis democratic citizens[2] and popular engagement: citizens who voted for Brexit, for Donald Trump, or populist parties appeared unable to make intelligent and informed decisions – they appeared overwhelmed by political complexity and fooled by political campaigns that to an unprecedented extent made use of "fake news," "alternative facts," and spectacular social media strategies. Against this backdrop, the electoral results and outcomes of recent referendums led scholars to reconsider democratic citizens' cognitive capacities, informational environment, and their motivation to engage in "meaningful" and "responsible" or "common good-oriented" political participation.

Scholarly assessments differ widely both in terms of the answers given to these questions about citizen capacities and virtues and in terms of the conclusions they drew for democratic crises, renewal, and reform proposals. Jason Brennan pointedly features three "ideal types" of democratic citizens – Vulcans, hooligans, and hobbits – and argues that the majority of citizens are either "hobbits" who are neither able nor willing to participate constructively in democratic processes or "hooligans" who have "strong and largely fixed worldviews" and "consume political information [...] in a biased way." He argues that the "Vulcan" citizen that "think[s] rationally about politics," displays high levels of reflectiveness and is able to take others' point of view – in short: the citizen that many democrats and democratic theorists may envision and wish for – is extremely rare (see Brennan, 2017, pp. 24–53). In the light of this picture of democratic citizens and vis-à-vis rising political complexity, it

[1] *"[...] Demokratie setzt voraus, dass wahlberechtigte Bürger und Bürgerinnen einschätzen und verstehen können, worüber sie abstimmen. Beide konstitutiven Bedingungen für Demokratie erweisen sich zunehmend als Fiktion."* – Translation by the author.

[2] I will use "citizens" troughout this book to refer in a rather generalist way to all people on a particular territory that are affected by collectively binding decisions.

seems that mass democracies can only make high-quality political decisions and secure citizens' consent and satisfaction if they implement institutional reforms.

Brennan provocatively entitles his assessment "Against Democracy" and argues for "the rule of the knowers," suggesting to tie the right to vote to knowledge tests and to introduce expertocratic councils (Brennan, 2017, pp. 204–230). However, for instance, Helmut Willke's recent system-theoretically inspired account displays a similar thrust:

> I propose a model of "complex democracy," in which the parliament as sovereign delegates [...] problem contexts to specialized and competent technical institutions, following the model of central banks and constitutional courts. (Willke, 2016a, p. 12)[3]

In short: the current democratic malaise and manifestations of citizens' disenchantment and distrust in political elites should be answered with *less democracy*, with reducing the amount and the impact of citizen participation. The fear of "the people" and their assumed political incompetence, their emotional volatility, and their aptness for being manipulated and "seduced" by elites led to a burst of such expertocratic reform proposals that are frequently associated with the intent to safe-guard existing liberal-democratic institutions against "ordinary people" (Brennan, 2017; Jones, 2020; Willke, 2014; 2016a).

Whatever their merits in terms of technical and functional problem-solving for complex societies may be – models of governance that involve a group of individuals who claim to "know[…] better what is in the best interest of another or others and attempt to impose […their] view on others" (see Dworkin, 1988; Rostboll, 2008, p. 95) unequivocally conflict with what is conceived of as core democratic intuitions (at least) since the early days of Modern political philosophy and Western Enlightenment: the aim to realize everybody's equal autonomy in collective decision-making.

Competing Theoretical Goggles – and the Quest for a Radical Proceduralist Alternative

Expertocratic reform proposals are associated with a "paternalistic threat:" the restriction of popular self-rule and meaningful opportunities to decide upon the substance of political outcomes is legitimized with the intent to "safeguard democracy" and to protect the people from themselves. With this, they meet the classic definition of "paternalism," i.e. "the interference with a person's liberty by reasons referring [...] to the welfare, good, happiness, needs, interests or values of

[3] *"Ich schlage ein Modell 'komplexer Demokratie' vor, in welchem das Parlament als Souverän in einem engen Rahmen bestimmte Problemkontexte an spezialisierte und kompetente Fachinstitutionen – nach dem Muster von Zentralbanken und Verfassungsgerichten delegiert."* – Translation by the author.

the person being coerced" (Dworkin, 1972, p. 65). In this book, I shall argue that the solution to democratic crisis phenomena is not "*less*," but "*more*" *democracy* – and explore an alternative, radical proceduralist perspective for democratic renewal and institutional reform that avoids referring to procedure-independent standards of what is "normatively valuable," "just," or "right for the people."

To develop this proposal, I explore an exemplary argumentative path that ranges from philosophical principles to political institutions. The rationale behind this is that the nature of the crisis diagnosis and the range of available and plausible proposals for democratic reform crucially depend on the normative viewpoint from which empirical findings concerning, for example, citizens' distrust and disaffection are categorized and interpreted (also see Fleuß, 2020): What do we conceive of as "good democracy" and its core values or ideals? What relationship do we assume between democratic legitimacy and effective problem-solving, between democratic procedures and the quality of political results? And how do these normative-philosophical considerations translate in concrete institutional arrangements?

Here, different theories of democratic legitimacy suggest remarkably different points of departure. This book's – and contemporary political theory's – focus on *democratic* legitimacy by no means implies that democratic legitimacy has its *source* exclusively in democratic values or procedures. The space of possible conceptions of democratic legitimacy comprises three basic positions: a pure instrumentalism, a pure proceduralism, and a "hybrid" conception that combines instrumentalist and proceduralist criteria (also see Christiano, 2004).

Instrumentalist approaches ascribe *no intrinsic* value to democratic principles and assume that the sole criterion for democratic legitimacy is that political results conform with an extra-procedural standard that refers to their "quality," "correctness," or "rightness." Joseph Raz, for instance, argues that the exercise of power over others is justified if and only if it ensures that those who are affected by decisions will *benefit* if they follow the instructions of those who are exercising power. Particularly in cases where there are deep disagreements among those affected by the decisions, we may, however, rather be inclined to attribute value to the equal consideration of all interests in fair procedures: here, "simply put, making decisions together can be more important than getting them right" (Hershovitz, 2003, pp. 216–218). Against this backdrop, Estlund (2008) argue that legitimacy *partly* depends on democratic procedures. According to the hybrid conception he terms "Rational Proceduralism," a political decision is legitimate when it is in accordance with procedural requirements *and* with standards that concern the quality or correctness of political results.

Just as pure instrumentalism, "radical" or "purely" proceduralist conceptions of democratic legitimacy rest upon a *single* criterion: Political legitimacy is solely dependent on the fact that political agents made this decision in fair and inclusive, democratic procedures. Political theorists and philosophers who *oppose* this position are united by their appeal to a procedure-independent standard of "political truth" or "correctness." To motivate this approach, they frequently allude to the way "we" (whoever that may be) *talk* and *act* with regards to political matters. Everyday conversations at workplaces as well as