

The boundaries of transnational democracy: Alternatives to the all-affected principle of democratic inclusion

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ABSTRACT: The so-called all-affected principle, claiming that people have a right to participate in political decisions that affect them, has recently received widespread discussion in political theory. While the all-affected principle has often been invoked to justify forms of transnational democracy, critics argue that the principle is neither logically valid nor practically feasible as a way of determining the boundaries of democratic communities. In this paper, I argue that we need to move beyond the all-affected principle and I present an alternative principle by which being subject to the law is the criterion for legitimate inclusion. First, criticising the all-affected principle, I argue that specifying what it means to be affected is itself a highly political issue, since it must rest on some disputable theory of interests; and that the principle does not solve the problem of how to legitimately constitute the democratic community, since such acts, too, are decisions which affect people. Furthermore, I argue that applying the principle comes at too high a cost: either political boundaries must be redrawn for each issue at stake or we must ensure that democratic politics only has consequences within an enclosed community and that it affects its members equally. Secondly, I discuss three possible replacements for the all-affected principle: (a) applying the all-affected principle to second-order rules, not to decisions; (b) drawing boundaries so as to maximise everyone's autonomy; (c) including everyone who is subject to the law. Arguing that the latter principle is the most reasonable candidate, I conclude by reflecting upon how this alternative principle could serve to support claims for transnational democracy in the light of recent claims that a global legal order might be emerging.

The so-called all-affected principle, claiming that people have a right to participate in political decisions that affect them, has recently received widespread discussion in political theory.¹ The all-affected principle is supposed to give a democratic solution to the boundary problem in democratic theory: How can we decide the proper bounds of a democratic community? According to the principle, “Everyone who is affected by a decision of a government has a right to participate in that government”.² Political theorists favouring some form of transnational democracy often invoke this principle to explain why the current, nation-state-based boundaries of democratic governance are not normatively satisfying and why we need to democratise transnational institutions or, if you like, transnationalise democracy.

David Held, for instance, criticises mainstream political theorists for merely assuming that there is symmetry or congruence between citizens and the decision makers they may hold to account, on the one hand, and between decision makers and the people affected by their decisions on the other.³ Globalisation has displaced this congruence, Held argues, and the project of cosmopolitan democracy takes on the task of restoring congruence to political power. Held regards congruence and symmetry between input and output, that is, between the causes and the effects of politics, as fundamental to democracy.

Equally concerned with the migration of problems and solutions outside the control of the (democratic) nation-state, some deliberative democrats, too, rely on the all-affected principle as the main reason for why democracy must be made transnational. Indeed, some deliberative democrats suggest that they take the all-affected principle more seriously, because unlike cosmopolitan democrats, deliberative democrats do not envisage government-like, super-statist institutions or a global liberal democracy as the necessary end-products. Rather, since the stakeholders change with each issue area, political institutions must have equally changeable boundaries. Deliberative democracy would engage current transnational governance in discursive procedures, its proponents argue, and thus deliberative democracy would be more feasible than cosmopolitan democracy.⁴

In fact, it may seem hard to imagine calls for transnational democracy which are not animated by some version of the all-affected principle, at least in part, because it forges the necessary normative link between, on the one hand, the worries over what globalisation does to democratic sovereignty and how increasingly autonomous and democratically unaccountable international institutions impact people’s life chances around the globe and, on the other hand, the conclusion that we must build democratic institutions of some sort on the transnational level.⁵ Political causes and effects no longer operate within the safe confines of nation-states, this argument runs, and transnational democracy seeks to suture the widening gap between those who make decisions and those who are affected by them.

However, while the all-affected principle may appear common-sensibly sound and simple, it raises serious problems as soon as we try to use it to set political boundaries. In the following, I discuss some of these problems. In the first part of this paper, I argue, among other things, that the all-affected principle does not actually give any guidance for delineating a political community but that it does give some absurd recommendations if we were to try to approximate it in political decision making. In the second part, I consider three re-

¹ For example, see Abizadeh 2008; Agné 2006; Christiano 2006; Goodin 2007; Gould 2004; 2006; López-Guerra 2005; Moore 2006a; 2006b; Näsström 2003

² Dahl 1970

³ Held 2000: 18

⁴ Verweij & Josling 2003; Dryzek 1999; cf. McGrew 2002

⁵ However, as we shall see, there are alternatives to justify transnational democracy by means of the all-affected principle. See for example Brunkhorst 2005; Tännjö 2006.

placements for the all-affected principle and whether they could amend transnational democratic theory. But first, let us consider some of the more elaborate attractions of the all-affected principle.

Democratic theory and those affected

“Let us imagine a society and then consider what form of government would be just for it”, Craig Calhoun writes to caricature how political theory traditionally has avoided addressing the problems of political belonging.⁶ This criticism suggests that theorists simply assume nation-states to be the pre-political basis of politics.⁷ As Frederick Whelan argues, democracy means rule by the people, and political theorists have largely quarrelled over what this “rule” thing should mean, while neglecting the other half of the definition.⁸ But “any democratic theory must face the logically prior and in some ways more fundamental question of the appropriate constitution of the *people* or unit within which democratic governance is to be practiced.”⁹ This is the so-called boundary problem in democratic theory: how to legitimately delimit the political community relevant for democracy.¹⁰ The boundary problem is not tied to any particular theory of democracy, since all theories of democracy must provide some idea about how a democratic community may be legitimately constituted. Enter the all-affected principle, stating that anyone who is affected by a decision, has a right to participate in making that decision.

There are several reasons why the all-affected principle seems morally appealing and plausible. Firstly, the all-affected principle seems to expound some classical democratic notions about autonomy and consent. Aristotle, for example, distinguished the self-governing citizenry, “ruling and being ruled in turn”, as an element of liberty characteristic of good political rule among equals. Another oft-cited precursor to the all-affected principle is the maxim of ancient Roman law: “*quod omnibus tangit, ab omnibus tractari et approbari debet*” – what concerns all, all must discuss and approve. Both the Aristotelian notion of the self-governing citizenry and the Roman dictum imply that liberty means living according to laws that you have given yourself. We find a similar concern in the early modern theories of the social contract. John Locke suggests that since men are natural equals, “no one can be [...] subjected to the political power of another, without his own consent”, and nobody knows better than oneself what is in one’s own interest.¹¹ Likewise, Jean-Jacques Rousseau grappled with the problems of legitimacy, that is, finding a political form that would be consented to by its participants on rational grounds.¹² For Rousseau, government is legitimate in so far as it reflects the general will of the political organism formed through the social contract – a will that every citizen is thus justly subjected to. Admittedly, neither Ar-

⁶ Calhoun 2003

⁷ cf. Held 1996

⁸ However, while many democratic theorists traditionally may have considered the nation-state as the primary locus of democracy, it would do the tradition injustice to suggest that it has been uninterested in the problem of how to legitimately constitute the demos and draw the boundaries of democratic communities. See for example Näsström 2003.

⁹ Whelan 1983, emphasis in original

¹⁰ When Whelan discusses where the boundary problem arises, he mentions “territorial disputes involving sovereign states, or entities aspiring to statehood”, but not the context that seems the most obvious today, namely, the challenge that globalisation poses to democracy. At any rate, my argument in this paper may also be relevant to other areas of political theory where the boundaries of legitimate rule, broadly speaking, feature prominently, such as in secession theory and theories of legitimate coercion.

¹¹ Locke 2005 [1689]: VIII:§95

¹² Rousseau 1762

Aristotle's autonomy, Locke's consent of the governed, nor Rousseau's general will imply or necessarily support the all-affected principle, but the principle seems to rhyme and resonate with these ideas, to spell out in clear terms an abstract ideal common to all of these philosophical traditions.

Secondly, the all-affected principle implies a defensive view of politics, where political decisions and institutions inflict costs and burdens, if not damage, on people, as Whelan suggests. Fear of the Leviathan has been a strong argument for democracy: people have a right to participate in politics so as not to have their interests superseded by those who hold the monopoly on the use of force. The all-affected principle seems to support our hunch to be sceptical of politics; moreover, historically, it has been employed to support extending the franchise to groups previously excluded from participating in democratic politics. Transnational democrats often reason in a similar way: People affected – for instance, by global warming, trade policies, acid rain, financial deregulation and other transnational issues – form the constituency of world politics.¹³

Thirdly, we may associate the all-affected principle with relational conceptions of justice in cosmopolitan theory. The peoples of the world have grown together in a community, Kant claims, and thus “a violation of rights in one part of the world is felt everywhere.”¹⁴ Some contemporary cosmopolitans likewise argue that we owe duties of justice to distant other persons who are not our compatriots because we are bound together by relations of interdependence.¹⁵ And just as relations of mutual influence may ground moral obligations, one might argue, they can also serve to justify the boundaries of democratic community: Persons who are affected by decisions of governments and of other powerful actors have legitimate claims to be included in democratic decision-making, regardless of their nationality or citizenship.

Thus, there is a diverse pantry of democratic and moral traditions of thought that might lend support to the all-affected principle. And yet it turns out to be very difficult both to specify and to apply, as I shall argue in the next section.

Problems with the all-affected principle

In the following section, I shall present four critical arguments against the all-affected principle. First, I shall argue that the all-affected principle is problematic as a criterion for delimiting political community, since it must rest on some theory of interests, a controversial issue in its own right. I shall also discuss Whelan's claim that the all-affected principle leads to an infinite regress of constitutive decisions, which complicates the matter further. Thereafter, I shall consider two ways of approximating the principle, either by drawing political boundaries around the affected or by keeping consequences within existing boundaries. These arguments, taken together, provide strong reasons to reject the all-affected principle, its intuitive appeal notwithstanding.

How do we recognise affectedness when we see it?

If we wish to apply the all-affected principle, we must first clarify what it means to be affected in the relevant sense by a political decision. Obviously, the all-affected principle by

¹³ Saward 2000; cf. Zürn 2004

¹⁴ Kant 1984 [1795]: 24

¹⁵ Note that the distinction between relational and non-relational conceptions of justice concerns the scope of moral obligation; the content of those obligations is a separate matter and relational conceptions of (global) justice may be launched from different theories of justice. For a critique, see Sangiovanni 2007; Eckersley 2007.

itself does not explain what being affected means, so we have to complement the principle with some theory about affectedness. An objective approach to affectedness would require that we be able to specify, measure and assess the burdens and benefits inflicted upon individuals by political institutions, policies and decisions. Alternatively, one might hold that affectedness is a subjective quality. Let us explore both conceptions in turn.

In the most general sense, being affected by political decisions and institutions implies that some of your basic rights or interests have been infringed upon.¹⁶ Although they not always specify what being relevantly affected means, the advocates of the all-affected principle usually employ environmental problems as the epitome of situations in which the principle applies. Global warming, toxic waste disposal, acid rain, radioactive fallout – these are the kind of contemporary cross-border problems that may affect other people than those who caused them. You are affected, then, when something bad happens to you through no fault of your own. David Held could probably express such bad things in terms of “nautonomy”, that is, as being deprived of your physical, social, economical, political, or cultural autonomy.¹⁷ But we could alternatively adopt, say, Robert Nozick’s libertarian theory of self-ownership as the relevant theory of affectedness.¹⁸

Now, depending on which theory of affectedness we choose, we will arrive at different or even diametrically opposed judgements. Nozick would say that forced redistribution of incomes violates people’s basic rights and interests, whereas safeguarding the sort of social autonomy Held has in mind would require an extensive welfare state financed through taxation. And different people will count as affected by the same decision depending on which theory of affectedness we choose. Someone is unrightfully affected on the Nozickian account if he or she is forced to pay taxes for redistribution, but on the Heldian account if he or she is not guaranteed a basic level of subsistence. So which theory of affectedness should we pick? These are the kinds of clashes of interests and values that democratic politics is supposed to be able to sort out in a peaceful manner. People will disagree about what it means to be relevantly affected, just as they disagree on other fundamental matters of principle.¹⁹ That’s what people do.

The all-affected principle is usually understood to concern burdens, but not benefits. And, at first glance, to take benefits into account does seem to be problematic. Would a decision be undemocratic if you prosper from it without having had an opportunity to participate in making it? To take an environmental example of the kind that transnational democrats like to invoke, it would seem peculiar to argue that an upstream community which has unilaterally cleaned up a polluted river has made an illegitimate decision solely because the decision making process excluded beneficiaries downstream. We could then qualify the all-affected principle by stating that only negative externalities, so to speak, may be illegitimate, not the positive ones.²⁰

¹⁶ cf. Arrhenius 2005

¹⁷ Held 1995: 171f

¹⁸ Nozick 1974

¹⁹ Cf. Waldron 2001; Barry 2001.

²⁰ But this oversimplifies matters: Consider, for example, people who benefit from welfare services without contributing to their production. Those people might still have legitimate claims to participate in making such policies. Furthermore, one might argue that benefiting from political decisions indirectly creates a right to participate in making them. The fairness theory of political obligation suggests that people who receive public goods by the cooperative efforts of others have an obligation to do their fair share by obeying the law. Thus, by this theory in its crude form, the downstream beneficiaries would have an obligation to obey the laws of the upstream community providing the public good of clean water. And in virtue of being obliged to obey the laws of the upstream community, the citizens of the downstream community would

But real-life political issues are usually complex. Political decisions produce both burdens and benefits and distribute them unequally.²¹ Furthermore, once we start conceiving of political consequences in economic, utilitarian terms, it seems logical to think of benefits and burdens as commensurable: A burden translates into a negative benefit and vice versa – that is, being deprived of a benefit is a burden and alleviating a burden equals a benefit. Whereas it would be difficult to keep separate balance sheets for benefits and burdens respectively, if we do take them both into account the all-affected principle, in turn, becomes difficult to apply.

Finally, how should we aggregate and weight burdens and benefits? Torbjörn Tännsjö argues that if we regard democracy as a method of aggregating interests, it would be more reasonable to interpret the all-affected principle as a claim that everyone should have an influence proportional to the stakes he or she holds.²² A graded right to participate seems to fit the rationale behind the all-affected principle, since only then would an intensely affected minority be able to trump a slightly affected majority. On the other hand, grading people's right to participate in decision making according to the extent to which they are apparently affected would seem to be at odds with the basic democratic principle of one person, one vote.²³ In effect, it grants a veto to minorities with strong preferences. I think few proponents of the all-affected principle would depart happily from the basic democratic principle of equality.²⁴

Thus, the all-affected principle appears to be difficult to specify, because what it means to be affected by politics is itself a highly political question. I believe the search for objective criteria for specifying the all-affected principle is a mistaken approach, because the principle must be founded on some particular notion of what it means to be affected and such notions are frequently matters of fundamental disagreement.²⁵

also have a legitimate claim in its decision making. As David Mapel has argued, situations where public benefits cross borders demonstrate why this fairness account of obligation is insufficient (Mapel 2005).

²¹ We could adjust the principle to state that only net negative externalities qualify those who bear them for political participation. That is, if the burdens outweigh the benefits that you receive from a political institution, then you have legitimate claims to be included in its decision making.

²² Tännsjö 2007

²³ And besides, we may again ask, by what standard or conception of affectedness should people's right to participate be graded? By Held's or by Nozick's?

²⁴ But indeed, the all-affected principle does seem difficult to reconcile with majority rule and representative democracy (cf. Persson 2008). Ian Shapiro similarly recognises the democratic problem in including people with greatly different stakes in a decision:

"Allowing an equal say in a decision to people with greatly differing stakes in the outcome generates pathologies similar to those involving large difference in capacities for exit. This is one reason why the idea of basic interests is an important criterion for delimiting the appropriate decision-making unit in many circumstances. Those whose basic interests are at stake in a particular decision have a stronger claim to inclusion in the demos than those for whom this is not so." (Shapiro 1999: 234)

Thus, Shapiro's solution to the 'equal say-differing stakes' problem is to raise the hurdle for inclusion; those whose basic interests are affected have a stronger claim to be included, but inclusion is still conceived as a dichotomous quality: Either you are included or you are not.

²⁵ Some theorists have suggested that basic human rights provide the baseline criterion for inclusion: Political institutions and decisions affect you in the sense relevant for democratic inclusion if they have an impact on your basic human rights (Held 2004; Gould 2004: 178; 2006; Caney 2005: 158). However, human rights do not provide a clear-cut, uncontroversial standard of affectedness, and it seems implausible that democratic inclusion would ever be a sufficient redress for violations of basic human rights. See Karlsson 2008: 64ff.

So perhaps we should instead look for a subjective conception for affectedness, whereby people who consider themselves to be affected by political decisions have a rightful claim to inclusion. Michael Saward, for instance, endorses the all-affected principle and advocates a “‘subjective’ way of locating issue-based subject populations”.²⁶ He suggests cross-border initiatives, by which a significant number of citizens can raise border-transgressing issues for referenda, and argues that innovations like these would actually better match the rationale behind the all-affected principle than Held’s scheme for cosmopolitan reform would.

A subjective understanding of affectedness could, I believe, draw support from a different tradition in democratic theory. In Noortje Marres constructive reading of the debate between Walter Lippmann and John Dewey, the affected come to play a role different from the one which they have according to conventional transnational democratic theory.²⁷ Despite their differences, Lippmann and Dewey both addressed not the subjects of politics, but its objects.²⁸ Whereas democratic theory traditionally focuses on the persons whom democracy enables to master their own fate, Lippmann and Dewey were more concerned with the issues of politics. In the complex, technological societies in which we live, the intricate objects of politics seem to constitute an obstacle to democracy, for how are citizens supposed to govern themselves, when the issues that they have to deal with are so complex and strange?

It would seem to be a simple matter to solve the problem that complex objects pose to democracy by either providing citizens with better and more up-to-date information or by simplifying difficult issues so that citizens can grasp them. Dewey, however, contended that “foreign entanglements” and complex issues, far from constituting an obstacle to democratic politics, actually play a central role in getting people involved in politics. Strange, unfamiliar and complex issues are an enabling condition for democracy, and precisely because issues are difficult to resolve, we need to bring them out in public view.

Publics get involved in politics precisely where existing institutions fail to deliver. Dewey suggests that the public does not just spring up from nowhere. It consists of people who are affected by human actions on which they have no direct influence. People who believe that they have been affected by some such issue must organise themselves into a visible community: a public. On this Deweyan account, then, affectedness is subjective, and more an enabling condition for democratic politics and participation than a rigid, objective criterion for drawing boundaries. Furthermore, as soon as a group of affected persons form a public and thus becomes involved in politics, that group also begins to affect others.²⁹

On Roland Axtmann’s equally interesting reading of Hannah Arendt as a theorist of democracy in a globalised world, Arendt similarly embraces the idea that politics is a matter of the concerned. Her starting point for theorising on democracy is an interdependent, interrelated world – globalisation, we would say today – rather than the assumption of an isolated, already defined community. In Arendt’s ideal republic, the elite is not chosen but constitutes itself, like the publics sparked into being by issues. However, one could object, such a republic would be an aristocratic form of government, “where only those who have a demonstrated concern about the state of the world would have a right to be heard in the

²⁶ Saward 2000

²⁷ Marres 2005.

²⁸ Dewey 1988 [1927]; Lippmann 1993 [1927]; 2004 [1921]

²⁹ Similarly, Nadia Urbinati argues that the actors of global governance “are united as a result of the problem(s) they are affected by and that they aim at solving. Interest groups, not the ‘citizens of the world’, are their multiple agencies” (Urbinati 2003). In other words, subjective, interest-based affectedness calls upon actors to engage in politics.

conduct of the business of the republic”.³⁰ On the other hand, just as we may choose to be concerned, we may choose not to be, which actually is a good thing: Such “self-exclusion, far from being arbitrary discrimination, would in fact give substance and reality to one of the most important negative liberties [...] freedom from politics”.³¹

There is something appealing about these subjective conceptions of affectedness, because they seem to recognise the reasons why people take political action in democratic politics, whereas the attempts to find objective standards of affectedness imply a more legal-technical view of politics. But if we opt for this subjective notion of affectedness, then we cannot use the all-affected principle to solve the boundary problem, because there is nothing inherently justified in anyone’s claim to be affected and therefore included.³² Indeed, the subjective approach seems kindred to Joseph Schumpeter’s claim that we must “leave it to each *populus* to define himself”.³³

A vicious regress of constituting decisions

A serious objection to the all-affected principle is that it actually does not solve the boundary problem, because the principle creates an unsolvable hen-and-egg paradox. Since every political decision presupposes a prior decision on whom to include – a decision that affects some people – the principle leads to a logical as well as procedural impossibility, as Frederick Whelan demonstrates:

“Before a democratic decision could be made on a particular issue (by those affected) a prior decision would have to be made, in each case, as to *who* is affected and therefore entitled to vote on the subject – a decision, that is, on the proper bounds of the relevant constituency. And how is this decision, which will be determinative for the ensuing substantive decision, to be made? It too should presumably be made democratically – that is, by those affected.”³⁴

Thus, when we try to delineate the political community by means of the all-affected principle, we enter a logical loop, an infinite regress of constitutive decisions from which the all-affected principle offers no escape. Delimiting the political community is a political decision which affects people, too, probably even more than any decision that might follow once the community has formed itself.

Moreover, once we apply the all-affected principle to substantive policy, we clearly see why it is indeterminate. In most cases, who is affected depends on what substantive decision the political community makes; and the problem is not just theoretical.³⁵ For example,

³⁰ Axtmann 2006: 111

³¹ Arendt 1973: 280. As Axtmann notes, Arendt does not seem to think that those who do take care of the business of the republic must also take into account the view of those who are “self-excluded”, and she does not specify the relationship between them.

³² cf. Freeman 2000: 375

³³ Schumpeter 1975: 245. Robert Dahl suggests that Schumpeter fails to distinguish between what are two separate issues: (a) Whether a system is democratic in relation to its own demos and (b) whether it is democratic in relation to everyone who is subject to its rule. Thus, Dahl argues that Schumpeter’s claim is absurd, because it does not allow us to differentiate democracy from despotism or oligarchy (Dahl 1999: 191).

³⁴ Whelan 1983: 19

³⁵ Furthermore, it might often be difficult to find consensus of what the issue is, since constructing the policy problem in a certain way rather than another is a political issue in its own right. As an example, Brian Barry disputes Iris Marion Young’s claim that women exclusively should control ‘reproductive rights policy’, noting that already this terminology takes for granted what is at stake, namely whether abortion is entirely a question about a woman’s right to control her

a protectionist trade policy benefits and harms different people than does a free trade regime. So whom should we include in deciding which trade policy to adopt? Likewise, progressive taxation will affect different people differently than a flat tax, so who ought to be included in deciding taxation policy? Depending on whom we include in the decision-making process, we will reach different policies, and depending on what substantive policies we choose, we will affect different people who would have to be included in the first place.³⁶

Whelan's regress argument demonstrates why the all-affected principle actually gives no guidance either in matters of how to delineate the community or of what policies to pursue. Proponents of the principle seem to recognise these problems. Torbjörn Tännsjö suggests that we could get out of the logical loop by selecting a constitutional assembly of "founding mothers and fathers" to solve the boundary problem.³⁷ But this solution not only disregards the fact that the boundary problem recurs on every issue, if we take the all-affected principle seriously; the solution also effectively excludes most of the people who are affected by the constituting decision from the act of constituting it. Similarly aiming to set up an institution to handle boundary problems, David Held suggests that "issue-boundary forums or courts will have to be created to hear cases concerning where and how 'significant interest' in a public question should be explored and resolved".³⁸ That is, these new institutions would be given the authority to decide when, where and how the all-affected principle applies, including picking a theory of affectedness. As Michael Saward notes, Held's proposal would vest enormous powers "in unelected authorities requiring inhuman levels of knowledge and wisdom".³⁹

Furthermore, both Tännsjö's and Held's solution presuppose that there is a correct and objective answer to be reached – that these institutions, with which we entrust the power to solve boundary problems, can decide in a neutral way who has been affected and thus has a legitimate claim to be included. As the examples indicated above demonstrate, who is affected cannot be settled independently of the substantive decision. By giving independent institutions the power to decide who is affected, we also grant them the power to decide on substantive matters as well. Depending on how these institutions draw the boundaries, dif-

fertility: "Whether or not some issue affects only the member of a certain group is itself normally a matter of controversy, and that controversy is itself one on which everyone can properly take a position." (Barry 2001: 303)

³⁶ Cf. Goodin 2007: 52f. The all-affected principle is also indeterminate in another way, because it seems to assume that causation and responsibility can easily be determined too, and that such causal responsibility grounds moral obligation. But there are many issues and problems that escape nation-state borders and which thus call for transnational governance, without being clearly caused by a particular group of decision makers. For instance, David Held cites the HIV/AIDS epidemic as a paradigm case of an issue that suggests a border-transgressing political community of stakeholders. But who are the decision-makers responsible for the AIDS epidemic that those affected should hold to account? Where the responsibility for either cause or solution are dispersed and diluted over many different actors, the all-affected principle seems even more difficult to apply. And, as Robyn Eckersley (2007: 681) argues,

"in seeking to establish culpability via a direct or indirect causal connection between perpetrators and victims, this [cosmopolitan] approach displaces the simple appeal to our common humanity as the motivator for institutional change. If no causal connection can be shown, or if the causal connection appears weak and tenuous, then there is no residual argument to suggest that those with the capacity to assist should still take responsibility anyway."

³⁷ Tännsjö 2007

³⁸ Held 1995: 237

³⁹ Saward 2000

ferent policies will result. The practice of gerrymandering demonstrates that this is not just a hypothetical concern. Drawing the boundaries of political communities is inescapably an exercise of power.

And not only will different boundaries produce different policies, but also different interests among the people sorted into communities. The all-affected principle relies on the idea that people have a right to be included when their fundamental interests are at stake. But what those interests are and how they are represented may depend on how boundaries are drawn. Your interest in migration policy, for instance, will be radically different depending on whether you end up on this side of the border or the other.⁴⁰ Again, the all-affected principle leads into a vicious regress.

Fickle boundaries

Whether we think of affectedness as objective or subjective, the all-affected principle may seem to imply that we ought to redraw political boundaries for each decision that is to be made or, at any rate, that each issue requires its own functional constituency. That is, boundaries would be considerably volatile if constantly redrawn so as to meet the requirements of the all-affected principle. Some suggest that this requirement represents a major problem with the principle, whereas others see the resulting volatility of boundaries as an advantage.

However, the advocates of the principle seem to disagree on how far the idea of issue-based constituencies actually leads us. The most radical interpretation holds that for every single political decision to be made, we first have to decide the relevant political community, that is, who is affected and thus ought to be included. Some theorists of deliberative democracy nod in this direction and embrace the fluid boundaries following from the all-affected principle. John Dryzek, for example, argues that deliberative democracy “can cope with fluid boundaries, and the production of outcomes across boundaries”, and this is in fact what makes deliberative democracy such a suitable theory of transnational democracy.⁴¹ David Held, by contrast, seems to think of redrawing boundaries by means of the all-affected principle as more of a one-off process whereby we shift authority to new but permanent territorial layers of government, with regional and global democratic institutions added to those already existing at national and local levels in some countries.⁴²

Some critics argue that because the all-affected principle leads to political boundaries that are unstable and issue-area specific, it provides an impractical criterion of legitimacy for political institutions.⁴³ Political boundaries could change from day to day and it would be hard to consolidate political institutions. Even if we shift the tasks that states perform to new regional, global or issue-specific institutions, such tasks nevertheless require a degree of continuity, especially if they are to be done in a way that is democratically accountable to anyone who is affected by them.⁴⁴ However, one could argue that as long as the conse-

⁴⁰ Cf. Kuper 2006: 15ff, see also Moore 2006b; Abizadeh 2008.

⁴¹ Dryzek 1996

⁴² Although Held sometimes talks about cosmopolitan democratic reform as a project of building new political institutions around his “seven sites of power”, the concrete proposals for international reform that he puts forward seem more based in a layered territorial state logic (cf. Seward 2000; Dryzek 1999; Coleman & Porter 2000).

⁴³ Whelan 1983: 19; Dahl 1970: 64

⁴⁴ William Scheuerman makes the related point that Held’s and Archibugi’s model of cosmopolitan democracy cannot provide the stability and predictability necessary for the rule of law, and that they thus ultimately misunderstand this concept so central to their own model (Scheuerman 2002). John Parkinson likewise argues that there is a “stability requirement” for democratic legitimacy, because “if rules change all the time, only those who can bear the cost of

quences of political decisions are fairly permanent and uniform, the boundaries drawn by the all-affected principle would be accordingly stable. Moreover, there is a solid body of scholarship on international institutions, which argues that international problem-solving is already organised into specific issue areas that are all but ephemeral.⁴⁵ In fact, a plausible fall-back position for transnational democrats would be to argue that, albeit far from perfect, the nation-state still used to be a practical shortcut to realise the all-affected principle; while in our globalised world, international institutions could offer an imperfect but decent approximation, where improved democratic participation could allow for a better overlap between those who make decisions and those who bear their consequences.

Thus, while these practical problems in applying the all-affected principle may be overstated, we should worry more about what happens to the conditions for democratic participation once we redraw political boundaries according to the all-affected principle. Issue-specific political boundaries may be feasible, but are they also desirable? Whether we understand the resulting political institutions to be overlapping, issue-specific institutions or layered territorial entities with broader responsibilities, the communities corresponding to them are supposed to replace the once so self-evident categories that nation-states sorted people into. Just as the territorial nation-state would be replaced by an array of institutions claiming authority, so the sole citizenship of the individual would be replaced with a variety of affiliations with different communities of fate and choice.⁴⁶ But what happens then to the rights, duties and belongings that territorial states, for better or for worse, have granted their citizens? Michael Saward argues that the protection of democratic rights depends upon secure and equal membership in a given unit. Applying the all-affected principle thus risks taking away the very foundation of democratic rights without replacing it with something better:

“if the constituency can and must change for each decision, then the rights of ‘members’ are not fixed, or immutable, from one decision to the next [...] Membership is only secure, because the grounds of citizenship and rightful political participation can only be clear, in a territorial entity.”⁴⁷

Nor would the rights of community members be equal, if people only had a right to participate in political decision making corresponding to the stakes they hold. Thus, even if the overlapping, multilevel institutions and constituencies were to be stable and fixed rather than ephemeral, the rights of participation accorded to citizens would be tenuous.⁴⁸

re-learning the rules will be enfranchised” (Parkinson 2003). Thus, unstable political boundaries will not likely be to the advantage of the unprivileged. Finally, as a defence for states as important units in a federal European order, Andreas Føllesdal suggests that individuals have an important interest in being able to foresee correctly their own future, and that thus, “cultural and institutional changes should not be too abrupt: Members have an interest in revising their plans as options and consequences change” (Føllesdal 1998).

⁴⁵ cf. Coleman & Porter 2000; Keohane & Nye 1977.

⁴⁶ Held 1999

⁴⁷ Saward 2000: 38

⁴⁸ cf. Chandler 2003. Margaret Moore argues that territorial self-governing democratic entities cannot harmoniously coexist with issue-specific democratic bodies with different bases of inclusion, because “Non-territorial inclusion threatens the very decision-making capacity of the kind of political community that most people care about” (Moore 2006b). Moore, however, seems to take the argument a bit too far. Obviously, issue-specific bodies can and do coexist quite successfully with territorial states. Arguing that states lose their decision-making capacity to issue-specific regimes also seems a rather sweeping generalisation, though it might be an argument that resonates with theorists of transnational democracy, concerned as they are with the allegedly unaccountable power of increasingly autonomous international institutions.

But must the all-affected principle really lead to fluid, issue-specific political boundaries? A different way to abide by the all-affected principle would be to ensure that a given territorial political community, national or transnational, produces outcomes that are in accordance with it. Instead of reshaping the boundaries of political institutions to fit with their consequences, we could try to reshape the political consequences to fit with existing boundaries. We would then try to assure that only those persons are affected who are already included in political decision making. Both approaches seem to meet the all-affected principle's requirements. Therefore, if such territorial communities still wish to abide by the all-affected principle, what policies would they have to pursue? I shall now address this latter solution to fulfilling the all-affected principle.

Unpalatable policy recommendations

Thus far I have argued that the all-affected principle does not offer any clear guidance on whom to include in a democratic political community, nor does it help us decide on substantive policies. But as vague as the principle may appear, there may be other recommendations that can be derived from it. I shall discuss those further implications of the principle, and I shall argue that they suggest further reasons not to make democratic theory dependent on the all-affected principle.

Hans Agné presents an interesting argument against the all-affected principle by trying to explicate the conditions for fulfilling it in a world of states.⁴⁹ The all-affected principle has two components: to participate in making a decision and to be affected by that decision. For the sake of simplicity, if we interpret the components as dichotomous (as do most of the all-affected principle's supporters), there are two ways in which the all-affected principle could be violated: If someone who is affected by a decision is excluded from taking part in it or, conversely, if someone who is not affected participates in making a decision. Such illegitimate exclusion and illegitimate inclusion are both ruled out by the all-affected principle.⁵⁰ Obviously, the all-affected principle is equally satisfied if you participate in making a decision that affects you or if you do not participate in making a decision that does not affect you.

Interpreted in the dichotomous way, the all-affected principle puts seemingly drastic requirements on democratic decision making. Even if we assume the state to be isolated from its surroundings, it seems difficult to rule out completely the possibility that someone participates in making decisions without being affected by them or vice versa. Once we add the complicating assumption of a world of states, it becomes virtually impossible to avoid illegitimate exclusion and thus to avoid violating the all-affected principle. Even if a state interacts minimally with the surrounding world, some decisions that the state makes will affect some persons outside its borders who are not included in making those decisions.

In effect, globalisation may also lead to illegitimate inclusion. Agné's argument runs roughly like this: A community may avoid illegitimate inclusion when collective decisions concern properties that all its members share. For example, if everyone is at least a potential tax payer and a potential benefactor of public expenditures, then we may safely include everyone in deciding on tax policy.⁵¹ The more characteristics people share, the more evenly will they be affected by the decisions that they make. Thus, to avoid illegitimate inclusion, a democratic community must seek to make its members more uniform – economically, socially, culturally and by any other relevant dimension – so that nobody who partici-

⁴⁹ Agné 2006; cf. Agné 2004

⁵⁰ Cf. Goodin 2007

⁵¹ In fact, this might follow from a contributivist view of affectedness: You are affected if you have a stake of some kind, for example by contributing taxes (cf. Beckman 2006)

pates in collective decision making can shield him- or herself from the consequences. In order to make the population more homogenous and less fragmented and stratified, it may be reasonable to try to isolate the community from influx from outside. Thus, globalisation may lead to illegitimate inclusion, because globalisation brings heterogeneity into a previously well-integrated collective. It will be difficult to fulfil the all-affected principle if people are not considerably similar and equal, Agné concludes. Because the all-affected principle suggests that democracy can only be achieved in an isolated and homogenous political community, Agné rules the principle out as an element of nationalist ideology: “[O]nly a nation-state, firmly founded on a mythology of unity and autonomy, can wield the social powers required by the [all-affected principle].”⁵²

Thus, a community that takes the all-affected principle seriously would have to pursue a policy of isolation from its surrounding world and internal homogenisation. This conclusion may seem stretched. Would the proponents of the all-affected principle really agree that it implies a nationalist, isolationist policy? Probably not. After all, most of them use the all-affected principle to support claims for transnational democracy – not for nationalist and isolationist policies. When we assume that the political community attempting to approximate the all-affected principle is a state, we rely on the very assumption challenged by transnational democrats.

Nevertheless, these implications of the all-affected principle are not significantly different from the standard narrative framing transnational democracy. Since globalisation has displaced and disturbed the once so neat match between political authority and cultural, economic and social borders, theorists of transnational democracy claim, we need to build new democratic institutions beyond or above the state as well. In so doing, we may regain lost symmetry or congruence between the rulers and the ruled – a congruence which before it was lost always required a high degree of homogenisation, unity and cohesion. If we were to fulfil the all-affected principle at the transnational political level, it might well have similar policy implications to those which emerged at the state level.⁵³ For example, identity politics in the European Union seem to reproduce nationalist ideology at the European level, albeit under a flag of post-nationalism.⁵⁴

In that sense, by means of the all-affected principle, transnational democrats seem to bring on board more of the notion of the nation-state as the locus of politics than they would like to think themselves. They premise democracy on a conception of symmetry or congruence between political and social boundaries which we have now lost. As it were, the all-affected principle renders transnational democrats just as rooted as other political theorists in a tradition regarding the political entity to which democracy applies as a closed circuit, a conception so appositely described by Walter Lippmann:

“The democratic tradition is [...] always trying to see a world where people are exclusively concerned with affairs of which the causes and effects all operate within the region they inhabit. Never has democratic theory been able to conceive itself in the context of a wide and unpredictable environment. [...] And although democrats recognise that they are in contact with external affairs, they see quite surely that every contact outside the self-contained group is a threat to democracy as originally conceived.”⁵⁵

⁵² Agné 2004: 59

⁵³ Cf. Näsström 2003

⁵⁴ Hellström 2006

⁵⁵ Lippmann 2004 [1921]: ch. XVII:4

Three alternative criteria

The all-affected principle, I have argued, is not a useful tool for setting the boundaries of democratic community. Let us now consider three modifications of or replacements for the all-affected principle and discuss whether the proposed replacements would advance transnational democratic theory. The first modification involves restricting the scope of the all-affected principle so as to avoid some of its peculiar consequences, whereas the latter two modifications opt for replacing the all-affected principle with different principles that would allow us to determine the proper bounds of a political community.

Procedures, not decisions

So far I have argued that the all-affected principle is indeterminable, virtually impossible to apply, and leads to some rather peculiar guidelines for decision-makers who take it seriously. But should we actually take it that seriously – in the sense of reading it as a literal rule by which democratic politics must abide? After all, most normative principles are vague and ambiguous, and may lead to absurd conclusions if we try to follow them too rigidly and categorically. So perhaps we should not let the absurd implications that may arise in concrete situations lead us to abandon a principle that may be sound in a more abstract sense.

Gustaf Arrhenius defends the all-affected principle against such easy confutation.⁵⁶ Although the all-affected principle may be both impractical and unfeasible as a method of democratic decision making in real situations, it may still well be part of the normative ideal of democracy, Arrhenius suggests. We may cherish the principle as an end, although not as a means to that end. That's how rule utilitarians reason when they admit that attempting to maximise utility in each and every action we take may lead to absurd consequences, but nevertheless argue that we should seek personal rules of thumb and political institutions that lead to the greatest possible utility.⁵⁷ In a similar sense, the all-affected principle may sometimes lead to absurdities if applied in particular circumstances, but nevertheless provide a standard by which we may measure the democratic inclusiveness of practically feasible methods of decision making. And even though none of these methods will ever fulfil the principle's demands, Arrhenius concludes, the all-affected principle may nonetheless help us discriminate among better and worse decision making procedures.⁵⁸

Given that the all-affected principle is difficult to apply to concrete situations, it seems reasonable to consider the principle not as a razor-sharp rule, but rather as a desirable yet not fully attainable and somewhat nebulous ideal of democratic theory. However, this is not how the advocates of the all-affected principle in transnational democratic theory really view it at all. They, and indeed Arrhenius himself, applies it to rather concrete situations of drawing political boundaries – for instance, whether it is permissible to build nuclear power plants or perform atmospheric nuclear weapon tests near the border of another state – and not just to questions of institutional design. It is difficult to determine what the all-affected principle implies as an abstract ideal rather than as a concrete rule.

⁵⁶ Arrhenius 2005

⁵⁷ cf. Kymlicka 1995: 38

⁵⁸ Put differently, this argument accepts that the all-affected principle cannot guide what Pogge calls first-order political decision-making, that is, substantive, everyday policy decisions; but claims that the all-affected principle may still help us make second-order political decisions, which “are about first-order political decision-making, i.e. about where, how, when and by whom everyday political decisions are to be made.” (Pogge 1998).

However, if we could distinguish decisions from ideals, this latter way of looking at the all-affected principle would allow us to escape Whelan’s logical loop, Arrhenius suggests. Instead of entering the infinite regress of constitutive decisions, we should simply concoct a theory of interests and analyse how different institutions would affect people’s interests – and then decide who ought to be included in those institutions.⁵⁹ (After that, presumably, the community can go back to democratic business as usual.) But who is this “we” supposed to decide on these important matters? Who should decide what affectedness means and analyse the consequences of different political choices? These too are political decisions, and taking the all-affected principle seriously, if not literally, they should reasonably be made by anyone who is affected by them. Hence, we are drawn back to the infinite regress, which Arrhenius fails to bring to a convincing end.

Autonomy, not affectedness

Robert Dahl has argued that given that a democratic process is desirable for a group of people, the values of the democratic process – where personal political autonomy is paramount – can sometimes better be obtained by changing the boundaries of their political unit, *ceteris paribus*.⁶⁰ Susan Hurley similarly endorses what she terms an endogenous approach to the boundary problem, according to which boundaries may indeed be assessed in terms of “distinctively democratic values, such as values of self-determination, autonomy, respect for rights, equality and contestability”. On this view, “some choices of boundaries and units and assignments of jurisdiction might tend to repress and others to foster the autonomy of individuals, respect for their rights, and their deliberative and rational capacities.”⁶¹ Thus, political boundaries could and should be evaluated in terms of their effects – not their effects on people’s interests, but on the core values integral to democracy itself.

The idea that boundaries should be drawn so as to maximise the values of democracy may suggest an alternative to the all-affected principle. This alternative advances on Arrhenius’ solution by replacing the indeterminable notion of affectedness with autonomy as the criterion for deciding the boundaries of a democratic community. This principle, which we could call the maximal-autonomy principle, requires:

“that people be included in political procedures to the extent that their inclusion yields the greatest amount of autonomy to the greatest number of people, while accounting for both those who are included and those who are excluded, and accounting for actions performed both individually and collectively.”⁶²

Advancing this principle, Hans Agné argues that it would solve some of the problems he deduces from the all-affected principle. The maximal-autonomy principle better matches other core democratic concepts and intuitions, and it focuses on a quality more central and well-defined than affectedness, namely autonomy understood as action capacity.⁶³ Thus, it

⁵⁹ This is the task that Held and Tännsjö wish to delegate to non-majoritarian institutions, and Arrhenius seems to nod in the same direction, and likewise supposes that we could find objective criteria for affectedness.

⁶⁰ Dahl 1989: 148

⁶¹ Hurley 1999: 127

⁶² Agné 2006

⁶³ The concept of autonomy employed here defines autonomy as “the possibilities of an actor – individual or collective – to take action in regard to itself while free from domination by other actors.” (Agné 2006) That is, the more and the more different actions an actor can perform, the more autonomous it is. Similarly, Arash Abizadeh invokes a Razian notion of autonomy, by which a person is autonomous in virtue of having not only a range of valuable options, but also

also suggests that whether globalisation challenges democracy is a matter of empirical research, not something we can establish merely by definition.

Importantly, the maximal-autonomy principle factors in both those who are included and those who are excluded by boundaries. Thus, the persons whose interests must be taken into account are to be found on both sides of the boundary once it has been drawn. This aspect of the maximal-autonomy principle solves the problem that boundaries by their very nature affect both those who are included and those who are excluded, a conceptual feature of boundaries that the all-affected principle cannot escape.⁶⁴ Furthermore, factoring in both insiders and outsiders renders the demos in principle unbounded and global. In practice, the legitimate self-determination of each democratic polity is derivative of this global demos as a whole, as Arash Abizadeh points out:

“The unbounded demos thesis does *not*, of course, rule out the potential legitimacy of political borders and differentiated jurisdictions. It simply confirms that the existence of political borders and their regimes of control require justification.”⁶⁵

Hence, by giving equal standing to insiders and outsiders, the unbounded demos thesis could be justified on cosmopolitan grounds. Andrew Kuper argues that a cosmopolitan theory could very well hold that the world should be divided into a system of sovereign states – with the crucial point added that the existence of states must be justified, not merely assumed.⁶⁶ The values of democracy could take place among the kinds of cosmopolitan values in terms of which borders must be justified on this account.

While it might be difficult to imagine what it means to justify boundaries to an unbounded, global demos, and how such justification could be achieved in practice, the maximal-autonomy principle undeniably resolves some important issues following from the all-affected principle. The fickle-boundaries objection need not apply: For individuals to exercise their democratic autonomy, political institutions would presumably need to be stable and comprehensive, something which the maximal-autonomy principle allows for.

But the maximal-autonomy principle comes with some peculiar problems of its own.⁶⁷ Based on a consequentialist logic, the maximal-autonomy principle seems to open for some staple criticism of classical utilitarianism’s intuitively abominable consequences. Classical utilitarianism suggests that it is morally right to throw a handful of Christians to the lions, if their pain does not outweigh the happiness of the cheering spectators in the Colosseum. Now, substituting autonomy for happiness as the quality which is to be maximised does not allow us to avoid that problem, because the problem lies in consequentialism, not in our preferred currency of consequences. Would it be legitimate to rob some people of their autonomy to maximise aggregate autonomy for everyone? Yes, it seems. The principle of maximal autonomy would allow us to disenfranchise or expatriate some persons to increase overall autonomy (on both sides of the divide between inside and outside). Not wanting to bite this bullet, Agné instead suggests that exclusion (as well as inclusion, presumably) on

the mental capacities to formulate personal projects and pursue them and by being independent, that is, free from subjection to the will of another (Abizadeh 2008).

⁶⁴ Cf. Abizadeh 2008.

⁶⁵ Abizadeh 2008: 49

⁶⁶ Kuper 2006

⁶⁷ This problem is unrelated to the unbounded demos thesis that both insiders and outsiders should be taken into account when drawing boundaries. It follows from the ambition to maximise aggregate autonomy.

such terms is not compatible with his principle because “Political participation for the exertion of autonomy does surely not benefit from the fear created by such measures.”⁶⁸

This retreat position seems to bring back in a concern for the affected. Moreover, this consequentialist formulation of the autonomy principle also seems to remove boundary decisions from the ambit of democratic decision-making. Like the objective approaches to affectedness, the maximal-autonomy principle does not seem to require that boundary decisions should be actually justified to those who are included and excluded. Instead, it suggests a criterion by which to draw and justify boundaries. In that sense, even though it elevates autonomy as the criterion by which to include and exclude people, this principle seems to be at odds precisely with the idea of democratic autonomy. For who is to judge whether a certain boundary maximises autonomy? We can’t vote about it. Just like the all-affected principle, the maximal-autonomy principle would have to rely on some boundary court, constitutional assembly or law-giver to determine the boundaries.

Against democratic consequentialisms of this kind, Jeremy Waldron argues that “any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people disagree about the goodness of outcomes that they need to set up and recognize an authority.”⁶⁹ That problem is not solved by the maximal-autonomy principle either.

Subject to the law, not affected

As I suggested earlier, the all-affected principle may seem intuitively appealing because it builds upon core values in the democratic tradition. Democratic autonomy implies living by laws that you have given yourself and having means by which to protect your interests against the government. A different way to express the congruence between governing and being governed is a principle declaring that “The citizen body in a democratically governed state must include all persons subject to the laws of that state”.⁷⁰ This subject-to-the-law principle, as I shall call it, solves some, if not all, of the problems that follow from the all-affected principle.

Just like the all-affected principle, the subject-to-the-law principle can be justified in terms of the general ideals of democratic autonomy as self-government or as government requiring the consent of the governed. In that way, it can be formulated to be compatible with either a republican or a liberal normative model of democracy, and their respective concepts of law and participation.⁷¹ The republican version stresses that the citizens of a state should themselves be the authors of the laws that constitute their polity, which requires that they participate actively, whereas the liberal version regards the right to participate in making the laws as instrumental to protect individual liberties and personal in-

⁶⁸ Similarly, Richard Arneson, a staunch defender of a strict consequentialist justificatory theory of democracy, argues that exclusion from the demos (for example, in the form of weighted voting) is impermissible even if doing so would lead to better outcomes in terms of liberal rights (his preferred measure of good consequences), because it would damage people’s psychological health (Arneson 2004). I believe many people would be no less worried having their rights to participate depend upon so contingent a psychological fact and in most real societies, some people have more reason than others to fear exclusion and expatriation.

⁶⁹ Cited in cited in Arneson 2004

⁷⁰ Dahl 1989: 122. Dahl calls this the “principle of full inclusion”, and it comes with some qualifications, such as excluding “transients and persons proved to be incapable of caring for themselves” from the right to participate, and specifying what a reasonable level of participation requires.

⁷¹ Habermas 1998a: Ch. 9; López-Guerra 2005: 220

terests, a right that citizens may practice by electing representatives.⁷² Indeed, the subject-to-the-law principle seems to make better sense of these fundamental democratic ideals than the all-affected principle does, since it does not take the detour over the troubling concept of affectedness.⁷³

How does being subject to the law differ from being affected by decisions?⁷⁴ The two principles do not necessarily overlap: You may be subject to laws that do not affect your interests in any tangible sense, and vice versa.⁷⁵ Unlike the consequences implied in the all-affected principle, however, being subject to the law cannot always be expressed as a calculus of costs and benefits. Furthermore, laws normally specify to whom they apply: usually people living within a territorial state.⁷⁶ For that reason, the subject-to-the-law principle offers no internal solution to the boundary problem, since it merely presumes that the relevant community is already determined and that there is already a state in place to maintain the laws and do the subjecting.⁷⁷ The principle only states that where there is law, those subject to it have a legitimate claim for inclusion in its making.

The point is, however, that the subject-to-the-law principle sets clearer (if not self-evident) criteria for illegitimate inclusion/exclusion than does the all-affected principle. We can easily think of cases when people are subject to laws that they have not even indirectly or passively participated in making, or cases when people participate in making laws to

⁷² Dahl 1999: 145

⁷³ Someone might object that the subject-to-the-law principle is only an explication of the all-affected principle which relies on a special conception of affectedness purporting that individuals have an interest of some sort not to be subject to laws that they have not given themselves, and that such a theory is just as disputable as other theories of what's in a person's interests. On the other hand, the basic assumption underlying the subject-to-the-law principle could be hinged on many different ideals; but I think no normative democratic theory could do without a baseline assumption about a human propensity for autonomy – about human beings being capable of creating laws for themselves.

⁷⁴ The subject-to-the-law principle seems compatible with different conceptions of law. We may either think of it as the general body of law governing a community, or a constitution, or as particular laws. Depending on which conception we use, different conclusions might follow and the ambiguity of the concept of law opens for interesting applications of the principle.

⁷⁵ Claudio López-Guerra suggests expatriates as an illustration of this difference: They are generally not subject to the laws of their countries of origin, but may sometimes be affected by their decisions (López-Guerra 2005)

⁷⁶ Cf. Beckman 2006. However, the state's authority and jurisdiction does not always halt at the borders of its territory. From the mid-nineteenth century to the Second World War, Western states claimed exclusive jurisdiction over their citizens in non-Western, non-colonized countries. For example, when a US adventurer in China killed a Tibetan Buddhist lama in 1907, he was tried (and acquitted) by the US District Court for China. In the 1920s, a total of 121 consular courts of Japan, Great Britain, the United States and France operated in China. Extraterritoriality was abolished as Western states came to recognise non-Western states' claims of sovereignty and exclusive territorial jurisdiction (Kayaoglu 2007). Like the all-affected principle, the subject-to-the-law principle might seem to justify more fluid constituencies if extraterritoriality frays the integrity of legal sovereignty.

⁷⁷ Habermas similarly suggests that in modern, complex societies, we must regard the medium of law as a matter of fact, and suggest that this helps us avoid the problem of having to justify the prior creation of a community of legal persons:

“we can take the medium of enacted, coercible law more or less at face value as effective and unproblematic. Unlike classical contract theory, the proposed model does not treat the creation of an association of legal persons, defined as bearers of rights, as a decision in need of normative justification. A functional account suffices as justification because complex societies [...] seem to have no functional equivalent for the integrative achievements of law.” (Habermas 1998b)

which they are not even potentially subject themselves. Such cases constitute illegitimate exclusion or inclusion, respectively.⁷⁸ Moreover, given that it is easier to determine who is and who is not subject to law than who is affected by a particular decision, illegitimate inclusion and exclusion seem to be more readily identifiable by the subject-to-the-law principle than by the all-affected principle.⁷⁹ Hence, the subject-to-the-law principle is more specific as to what should be democratically controlled, namely, the power to make law, but not necessarily all and any power to make decisions or take action, individually or collectively, which may affect someone else. Furthermore, we need not fear the absurd policy recommendations that seem to follow from the all-affected principle, because law (ideally at least) applies to all its subjects regardless of their individual properties, even though law may affect them differently.⁸⁰

Thus, the subject-to-the-law principle seems to be less ambiguous and more applicable, while spelling out in clear terms the same abstract democratic ideals that seemed to resonate with the all-affected principle. If the subject-to-the-law principle is indeed sounder and simpler, does it lend support to claims for transnational democracy? Notably, the principle shifts the grounds for justifying transnational democracy. The crucial question in justifying transnational democracy now is not whether people are affected by transnational decisions or institutions, but whether they are subject to transnational systems of law. This turns out to be a contested empirical issue, with a diverse group of scholars arguing that we are today increasingly witnessing an emerging global system of hegemonic law or a world constitution.⁸¹ I shall consider two sorts of empirical claims about transnational law, which in conjunction with the subject-to-the-law principle may seem to justify calls for transnational democracy. Considering them in detail serves to outline the content and limits of the subject-to-the-law principle.

Hauke Brunkhorst suggests that we are today already subject to a system of “world law” or “global hegemonic law”, which “extends from the *Lex Mercatoria* to the comparatively fixed domestic as well as supranational positive system of human rights”.⁸² Because the de-

⁷⁸ A colonial power imposing a legal system on a colony springs to mind as an illustration of such illegitimate exclusion (of the colonials subject to the law) and inclusion (of colonial power legislators not themselves subject to colonial law).

⁷⁹ Susan Marks blurs the distinction between these two principles when she ponders about how the all-affected principle may solve problems of jurisdiction over foreign businesses:

“[Congruence between decision-making and its outcomes] is lacking when those in one country are made subject to the jurisdiction of another. But, from the perspective of the latter, congruence is also lacking when those in one undertake activities which constrain the options available to another country, yet escape its control.” (Marks 2000: 114)

Marks actually alludes to two different kinds of illegitimate exclusion: Her first sentence concerns the subject-to-the-law principle, whereas the second sentence concerns the all-affected principle. This demonstrates why the two principles do not overlap, and why they may even conflict.

⁸⁰ On the other hand, just like that version of the all-affected principle requires citizens to be equal and uniform, so that they cannot shield themselves from being affected by political decisions, equality before the law may require that citizens are fairly equal in socio-economic terms: “in a society characterised by great inequality, the rich and poor do not enjoy genuine equality before the law. Laws will often impact differently on people, depending on their wealth and income” (Bertram 2005: 83). Furthermore, even legislation approximating Rousseau’s requirement that all laws be “general in form” (Rousseau 1762: Book I, Ch. 6; Book II, Ch.) may serve narrow interests (Goodin 1996).

⁸¹ See for example Brunkhorst 2005; Habermas 2004; Weller 2002; Tännsjö 2006.

⁸² Brunkhorst 2002. David Held & Anthony McGrew similarly argue that “Increasingly aspects of international law are acquiring a cosmopolitan form. By cosmopolitan law, or global law, or

mocratic ideal of autonomy requires that those subject to the law are also its authors and because people are subject to law that is issued by global or supranational agencies, democracy must also become global in scope, Brunkhorst argues. He lists a number of sources of global hegemonic law: binding decisions made by the United Nations General Assembly and Security Council; agreements made by the World Trade Organization; the statutes of the Organization for Security and Cooperation in Europe and the Council of Europe; international and transnational organizations such as the World Bank and the International Monetary Fund; private organisations such as the International Olympic Committee; and inter-governmental institutions like the G8 summits and the Organisation for Economic Cooperation and Development, which “have far-reaching authority for regulating the entire global economy”.⁸³ Brunkhorst argues that:

“As a whole, the ‘network of agreements’ [...] has led to a new form of international and supranational comprehensive jurisdiction [*Allzuständigkeit*], which is no longer the distinctive property of the sovereign state, but rather is claimed by a multitude of post-national organizations, partly in direct competition with the states that are linked with them.”⁸⁴

Now, let me point to a few problems in justifying transnational democracy on the basis of this empirical claim. First, under the rubric of global hegemonic law, Brunkhorst includes international agreements, statutes of international organisations, international organisations themselves, standards set by private, non-governmental organisations, and mere decisions and resolutions taken at international summits or by the United Nations. By pointing to this vast, multifarious and pervasive body of world law, Brunkhorst can boost his argument for extending democracy to the transnational level. At the same time, however, he also undermines the argument. For what is it about law that makes it so important for those subject to it to be its authors? Its character of being coercive, binding and enforceable on individual citizens, a characteristic not shared by any of the instances on his list. Moreover, stretching the concept of law to include these international institutions also renders the democratic requirements of the subject-to-the-law principle unclear: we are back at being affected by decisions, rather than being subject to the law.

Second, international law proper has certainly gained in content, scope and importance over the past century. But international law is not law in the same sense as positive law within a state. Its sources, its enforcement, its subjects, even its normative and ontological status is different. International law is predicated on the recognition of state sovereignty. Thus, its authority depends on states to voluntarily formulate, observe and enforce it. There is neither an established compulsory judicial system to settle disputes nor a coercive penal system. And while there is, arguably, a tendency in international law increasingly to implicate non-state actors, such as corporations and individuals, its subjects and parties are still predominantly states. Even when international law concerns individuals (refugees, minority groups or war criminals, for instance) it addresses states, not non-state actors, to respect international human rights. And it is still exceptional that international organisations are recognised as parties to international law. Thus, international law turns out to be law of a different kind than that addressed by the subject-to-the-law principle. It is a law of states, not of self-governing citizens.

global humanitarian law, is meant here a domain of law different in kind from the law of states and the law made between one state and another for the mutual enhancement of their geopolitical interests.” (Held & McGrew 1998; cf. Held 2002)

⁸³ Brunkhorst 2005: 129

⁸⁴ Brunkhorst 2005: 130

Third, while undoubtedly international institutions have gained in importance too, they are not examples of global hegemony. They result from agreements between states. To the extent that they get implemented, revised, monitored and enforced, sovereign states perform these tasks. Like international law, international organisations do not imply the end of sovereignty – they are implicated on sovereignty. Moreover, the tendency toward increasing juridification or legalization of transnational institutions, that is, to express international agreements in a law-like form, does not necessarily imply actual law-making and law-enforcing capabilities.⁸⁵

The European Union, however, might be a special case. Indeed, in international law the EU stands out because community law has precedence over the national law of member states. Moreover, the European Court of Justice has successively widened its jurisdictional mandate and by the doctrine of direct effect, community law imposes obligations and confers rights upon individual legal subjects in the member states.⁸⁶ Thus, by the subject-to-the-law principle, European Union citizens would have a strong and legitimate claim to be the authors, if only indirectly, of its laws. On the other hand, the EU still relies on national judiciaries and other governmental agencies of the member states for implementing and, more importantly, enforcing its legislation.⁸⁷

Finally, coupling the subject-to-the-law principle with the thesis of global hegemonic law in order to revivify claims for transnational democracy creates a problem similar to the one we identified with the all-affected principle. The subject-to-the-law principle depends on sovereignty: It needs a sovereign law-giver, the subjects of which have a legitimate claim in democratic participation. But the thesis of the global hegemonic law disperses the authorship of the law to a multitude of post-national organizations, overlapping and competing with each other's jurisdictions, as well as with states. Along these lines, some legal theorists similarly dispense with the sovereign law-giver altogether. Drawing on Luhmannian systems theory and in opposition to traditional legal doctrine, these scholars suggest that a legal system should not simply be understood as the implementation of a sovereign will, but rather as an autonomous system in charge of codifying the code legal/illegal. This holds especially well, they argue, since globalisation has undermined the traditional doctrine that legislation ultimately depends on a constituent power (the sovereign). The upshot of this systems theory version of the global law claim is that there already exists a closed, decentered or polycentric, autopoietic global legal system, producing valid legal norms:

“The global political constitution is not produced by legislation but through decentered legal self-reflection and through a global community of courts, which ascertain legal validity and legal violations.”⁸⁸

Thus, this approach decouples the concept of legal validity from the concept of sovereignty. Breaking the link from the global legal subsystem to sovereignty, this account of global law seems difficult to adjoin with the subject-to-the-law principle to support a claim for transnational democracy. If laws are not made by an identifiable, sovereign law-giver, the subject-to-the-law principle lacks a clear target for its claims about democratic autonomy. The

⁸⁵ Cf. Zürn 2005

⁸⁶ Cramér 1994

⁸⁷ Thompson 2006. Notably, scholars all but agree what sort of political institution the EU is (Pollack 2005).

⁸⁸ Cohen 2004: 10

subject-to-the-law principle requires a sovereign, a law-giver, something which the systems theoretical account of global law denies.⁸⁹

Of course, like the all-affected principle the subject-to-the-law principle lacks a preference for levels. Even if hegemonic global law exists in the extent that Brunkhorst and others suggest, we could conclude that the power to legislate should be brought back to national legislatures, rather than that transnational legislation should be brought under transnational democratic control. On this point, the two principles are equally indeterminate and would have to be complemented by some claims about why re-nationalisation is either unfeasible or undesirable, or both. But re-nationalisation might be the more compelling alternative, since, as Dominique Leydet argues, we cannot expect that the “totality of addressees” of global norms will ever be able to exercise its sovereignty rights.⁹⁰

Thus, while the subject-to-the-law principle could lend some support to transnational democratisation, its consequences are more restricted and specific than those following from the all-affected principle. It does not, I have argued, justify sweeping claims for global democracy, but it might suggest that specific institutions like the European Union and other international legislative bodies should be democratically accountable to those who are subject to the laws that they issue. However, whether such institutions do in fact enact law turns out to be a contested empirical, or even ontological, matter.

Conclusion

Now, our conclusion may be somewhat awkward. I have argued in this paper that the all-affected principle should be rejected, because it does not help us draw the proper boundaries of political community and because it may have some rather unpleasant consequences if we were to try to approximate it anyway. For transnational democrats, the question now is what remains of their calls for transnational democracy if they simply discard the all-affected principle, which has been so central in tying their diagnosis of a globalising world with a call for transnational democratisation. While solving some of the problems with the all-affected principle, the three alternatives I have considered here do not solve the fundamental boundary problem, and thus cannot fully amend transnational democracy. The subject-to-the-law principle seems to be least problematic, because it substantiates the more well-defined claim that any already existing lawgiver should be democratically governed. But even so, it does not give an internal solution to the boundary problem.

I believe these attempts to solve the boundary problem in democratic theory demonstrate what many political theorists have known for a long time: That the problem is unsolvable in principle, which means that a democratic community cannot lift itself by the hair and provide its own justification in democratic terms. Of course, that does not mean that we can never solve boundary problems in both theory and practice, only that we cannot in advance justify our solutions in terms of democracy. Chris Brown argues that the quest for a democratic legitimacy of borders is symptomatic of a wider problem, by which political theory is reduced to moral theory and all social arrangements are regarded as in need of rational justification. But, as Brown suggests, we have no reason to believe that such justification is always going to be available:

⁸⁹ Cohen 2004: 7. Hereby, I only indicate a possible inconsistency between the subject-to-the-law principle and certain claims about a dispersed, autopoietic system of global law; I do not, of course, suggest that such claims should be rejected because of this inconsistency.

⁹⁰ Leydet 2006

“Politics is about practical action in a realm where no answer can be other than provisional, not about the application of formulae concerning matters such as social justice – and it ought not to be surprising that when formulaic approaches are made to subjects such as the legitimacy of borders the argument quite soon breaks down.”⁹¹

Even (or especially, some would say) in an allegedly globalising world, boundaries and borders are ubiquitous. Drawing, defending, transgressing and challenging the boundaries between inside and outside are among the most political of issues, and as I hope to have demonstrated in this paper, it is at best naïve to think that we could find some formula by which to bridge the gap between the people and its constitution and, once and for all, make the drawing of boundaries uncontroversial and, effectively, apolitical.⁹²

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⁹¹ Brown 2000

⁹² Cf. Näsström 2003

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