

Affected and subjected - the all-affected principle in transnational democracy theory

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DISCUSSION PAPER

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Affected and Subjected—The All-Affected Principle in Transnational Democratic Theory¹

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1 This paper represents work in progress; comments are welcome.

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Zusammenfassung

Betroffen und Beteiligt – Der Anspruch auf Partizipation aller Betroffenen in der transnationalen Demokratietheorie

Viele Vertreter einer transnationalen Demokratie stützen ihre Forderungen nach globalen demokratischen Reformen auf das so genannte *all-affected-Prinzip*, nach dem alle Personen, die von einer Entscheidung betroffen sind, auch das Recht haben, diese mitzubestimmen. Obwohl das *all-affected-Prinzip* als eines der grundlegendsten Prinzipien der demokratischen Theorie gelten kann, ist es schwierig zu interpretieren und anzuwenden. Der erste Teil des vorliegenden Papiers widmet sich der Kritik am *all-affected-Prinzip*. Dabei wird argumentiert, dass schon allein die Spezifizierung, wer betroffen ist, eine höchst politische Frage ist, da sie notwendigerweise auf anfechtbaren Interessentheorien beruhen muss. Das Prinzip löst außerdem nicht das Problem der legitimen Konstituierung einer demokratischen Gemeinschaft, weil solche Vorgänge ebenfalls Entscheidungen sind, die Menschen betreffen. Weiterhin wird argumentiert, dass die Anwendung des Prinzips hohe Kosten mit sich bringt: Entweder müssen die politischen Grenzen bei jeder anstehenden Frage neu gezogen werden, oder es muss sichergestellt werden, dass demokratische Politik ausschließlich im Rahmen einer abgeschlossenen Gemeinschaft wirkt und deren Mitglieder gleichermaßen betrifft. Im zweiten Teil werden zwei Versionen von transnationaler Demokratie, die beide auf dem *all-affected-Prinzip* beruhen – kosmopolitische Demokratie und deliberative Demokratie – darauf untersucht, wie sie auf die formulierte Kritik antworten können. Im letzten Teil wird ein alternatives Prinzip, das *subject-to-the-law-Prinzip*, als möglicher Ersatz für das *all-affected-Prinzip* diskutiert. Dem *subject-to-the-law-Prinzip* zufolge sollte jeder Person, die den Gesetzen unterliegt, das Recht zugesprochen bekommen, an deren Schaffung teilzunehmen. Dieses *subject-to-the-law-Prinzip* löst einige, aber nicht alle Probleme, die sich aus dem *all-affected-Prinzip* ergeben.

Abstract

Many transnational democrats support their claims for global democratic reform by appealing to the so-called all-affected principle, stating that everyone who is affected by a decision has a right to participate in making it. Although often identified as a core principle of democratic theory, the all-affected principle is difficult both to interpret and to apply. In the first part of this paper, I examine the critique against the all-affected principle, arguing 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. In the second part of the paper, I consider how two versions of transnational democratic theory—cosmopolitan democracy and deliberative democracy, both of which rely on the all-affected principle—may respond to this critique. In the final part of the paper, I discuss a possible replacement for the all-affected principle, an alternative principle according to which everyone who is subject to the laws should be granted the right to participate in making them. This subject-to-law principle solves some, but not all, of the problems that followed from the all-affected principle.

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1. Congruence Lost

The so-called all-affected principle is supposed to give a democratic answer 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” (Dahl 1970).¹ Political theorists favouring some form of transnational democracy, such as cosmopolitan democracy or deliberative democracy,² 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 (2000: 18) 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. Globalisation has displaced this congruence, Held argues, and his cosmopolitan democracy project 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. Cosmopolitan democracy includes, among other things, making the United Nations more effective and democratic, increasing regionalisation and strengthening international courts.

Equally concerned with the migration of problems and solutions outside the control of the (democratic) nation-state, some deliberative democrats, too,

1 Sometimes this principle (or some variant of it) is referred to as the principle of congruence, the principle of symmetry, or the principle of democratic inclusion (Marks 2000), the latter of which is somewhat of a misnomer, since the principle is just as much a criterion for excluding people from democratic rule.

2 The proponents of cosmopolitan democracy and deliberative democracy at times gladly embrace each other as fellow transnational democrats. Sometimes deliberative democrats call themselves cosmopolitan democrats (Bohman 1999), and sometimes cosmopolitans espouse deliberative democratic ideals (Gilbert 2006). Of course the scope of everything lumped together under the label of deliberative democracy is much wider and deeper than that of cosmopolitan democratic theory, and concerns more than just democracy beyond the state. But cosmopolitan democrats and deliberative democrats do make partially competing claims about how to achieve democracy beyond the nation-state and, as the debates between them demonstrate, they part company on some crucial points, for example, how human rights relates to democracy (Erman 2005) or how transnational governance is envisaged (Dryzek 1999). Thus, I think I am in good company when I treat cosmopolitan democracy and deliberative democracy as two kindred but distinct—sometimes rivalrous, sometimes unanimous—and thus comparable traditions of transnational democratic theory (Urbainati 2003; Verweij & Josling 2003; Cochran 2002; McGrew 2002).

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 than do cosmopolitan democrats, because the former 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, and thus proponents of deliberative democracy argue further that it is more feasible than cosmopolitan democracy (Verweij & Josling 2003; Dryzek 1999; cf. McGrew 2002).

In fact, it is 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, on the one hand, between worries over what globalisation does to democratic sovereignty and how increasingly autonomous and democratically unaccountable international institutions impact people's lives and opportunities around the globe and, on the other hand, the conclusion that we must build democratic institutions of some sort on the international level.

However, for as common-sensibly sound and simple the all-affected principle may appear, it immediately generates problems as soon as we try to use it to draw political boundaries. In the following, I discuss some of these problems. In the first part of the 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 may give some absurd recommendations if we were to try to approximate it in a given community. In the second part, I discuss what transnational democrats could do in light of this critique. In the concluding part, I consider a principle which could be substituted for the all-affected principle; it focuses on being subject to laws rather than being affected by decisions. Finally, I discuss how such a principle could amend transnational democratic theory. But first, let us consider some of the more elaborate attractions of the all-affected principle.

* * *

“Let us imagine a society ... and then consider what form of government would be just for it”, Craig Calhoun (2003) writes to caricature how political

theory traditionally has avoided addressing the problems of political belonging. Theorists simply assume that nation-states exist as the pre-political basis of politics (cf. Held 1996). 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. But, as Frederick Whelan (1983) argues, “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.” This is the so-called boundary problem in democratic theory: how to legitimately delimit the political community relevant for democracy.³ The boundary problem is not tied to any particular theory of democracy, since all theories of democracy must provide some idea about how a democracy may be legitimately constituted. Enter the all-affected principle, stating that anyone who is affected by a decision (and nobody else), has a right to participate in making that decision.

There are several reasons why the all-affected principle seems morally appealing and plausible. In general, the all-affected principle seems to expound some classical democratic notions about autonomy, reciprocity, 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 reciprocity as a principle of justice and, further, that liberty means living according to laws that you have given yourself. We find a similar concern for reciprocity 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” (2005 [1689]: VIII, §95), and nobody knows better than oneself what is in one’s own interest. Likewise, Jean-Jacques Rousseau (1994 [1762]) grappled with the problems of legitimacy, that is, finding a political form that would be consented to by its participants on rational grounds. For Rousseau,

3 When Frederick Whelan (1983) 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.

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 Aristotle’s “autonomy” nor Locke’s “consent of the governed” nor Rousseau’s “general will” imply the all-affected principle, but this principle does seem to rhyme and resonate with their ideas, that is, to spell out in clear terms an abstract ideal common to all of these philosophers.

Furthermore, 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 politics-sceptical 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 (Saward 2000a; cf. Zürn 2004).

Finally, the all-affected principle may also appeal to us because it resembles the usual solution to the question of scope in utilitarian theory. Most utilitarians agree that utilitarianism requires that we advance the welfare of humanity as a whole (Singer 2004). However, many utilitarians have argued that dividing the world into “separate jurisdictions, with a rule in favour of giving preference to co-nationals can be justified in terms of the greatest happiness principle” (Brown 2000: 196), but the value of states is then always merely instrumental, as the possibly most efficient way to maximise the good of all sentient beings everywhere (Ellis 1992). The all-affected principle, Whelan suggests, may even be derived as a political application of such a utilitarian stance, so perhaps the all-affected principle could tap utilitarianism for moral support.

2. Problems with the All-Affected Principle

In the following section, I shall examine four critical arguments against the all-affected principle. Mostly, the arguments concern whether the all-affected

principle is possible to apply at all, whether it gives any practical guidance for democratic institutions and, if so, whether the guidance it gives is desirable. 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 deeply political 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 discuss two ways of approximating the principle, either by drawing political boundaries around the affected or by keeping consequences within existing bounds. I think that these arguments, taken together, provide strong reasons to reject the all-affected principle, its intuitive appeal notwithstanding.

2.1 How Do We Recognise *Affectedness* When We See It?

If we wish to apply the all-affected principle, we must first clarify what we mean by "affectedness". What does it mean to be affected by a political decision? Obviously, the all-affected principle by 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.

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 (cf. Arrhenius 2005). Although they rarely specify what being "relevantly affected" means, the advocates of the all-affected principle usually employ environmental problems as the paradigm for 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 people other 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. But we could also adopt, say, Robert Nozick's (2001) libertarian theory of self-ownership as the relevant theory of affectedness.

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? I think that there is no point in trying to argue that one of these theories of affectedness is objectively true or, even if it were, that we could know this. 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 (cf. Waldron 2001).

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 and adjust the all-affected principle accordingly, to account for benefits, it would seem peculiar to argue that an upstream community which has, for instance, 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.⁴

But real-life political issues are usually more complex than cleaning up a fictitious river.⁵ Political decisions produce both burdens and benefits and

4 In a similar vein, James Bohman suggests that in the case of national governments, "we would surely say that a democracy is illegitimate if its worst-off citizens are required to obey laws and decisions over which they had no effective influence". That is, a political process is illegitimate only when it excludes people who are negatively affected, not when it excludes people who avail from its decisions (Bohman 1999).

5 Arrhenius suggests as an example of how the all-affected principle would draw its boundaries that whereas the school curriculum in Waco, Texas, is not a matter of concern for Icelanders, the Texan teachers' hairspray is, in so far as the aerosol propellants deplete the atmospheric ozone layer. Again, real-life cases are rarely that clear-cut, and we can at least imagine that the Icelanders would care more about what is being taught in Texan schools

distribute them unequally. 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 very difficult (if not impossible) 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. A graded right to participate certainly 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.⁶ In effect, it grants a veto to minorities with strong preferences. I think few proponents of the all-affected principle would depart from this basic democratic principle of equality as happily as Tännsjö does.⁷

To sum up, then, in addition to the logical and procedural problems of constituting the relevant political communities, 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.

than about what their teachers use to coil their hair. Consider, as well, the concern that the French policy to ban headscarves and kippas in public schools raised among religious groups in other countries; or the outrage in many Western countries over Saudi school curricula and textbooks teaching children to abhor religions other than Wahhabite Islam. Are those concerned in these cases relevantly affected? Have their interests been infringed upon? They certainly seem to think so.

6 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?

7 But indeed, the all-affected principle does seem difficult to reconcile with majority rule.

So perhaps we should instead look for subjective criteria for affectedness. Michael Saward (2000a) endorses both the all-affected principle and a “subjective’ way of locating issue-based subject populations”. 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.

A subjective understanding of affectedness could, I believe, draw support from a different tradition in democratic theory. In Noortje Marres (2005) constructive reading of the debate between Walter Lippmann and John Dewey, the affected come to play a different role from the one which they have according to conventional transnational democratic theory. Despite their differences, Lippmann and Dewey both addressed not the subjects of politics, but its objects. 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. How are citizens supposed to govern themselves, when the issues that they have to deal with are so complex and extraordinary?

It now 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 or policy must organise themselves into a visible community—a public. On Dewey’s 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.⁸

On Roland Axtmann's (2006) 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.⁹ 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 conduct of the business of the republic". 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" (Arendt cited in Axtmann 2006)

There is something appealing about these subjective conceptions of affectedness, because they seem to fit with a political (as distinct from apolitical) view of democracy. But if we opt for this subjective notion of affectedness, then we cannot use the all-affected principle to draw objective normatively justified boundaries around political communities, because there is obviously nothing inherently justified in anyone's claim to be affected and therefore included (cf. Freeman 2000: 375).

2.2 The All-Affected Principle Does Not Solve the Boundary Problem

However, the most 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:

8 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.

9 Arendt's starting point for theorising on democracy is also similar to Marres, taking an interdependent, interrelated world—globalisation, we would say today—as the fact from which modern political theory starts, rather than first assuming an isolated community and only then adding the complicating circumstance of a surrounding world.

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 (Whelan 1983: 19).

Thus, once 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 try to apply the all-affected principle to substantive policy, its indeterminacy is obvious. In most cases, who is affected depends on what substantive decision the political community makes; and the problem is not just theoretical. For example, 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 is to be included in deciding taxation policy? The point is that, 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.

Whelan's 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. The 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. But this solution not only disregards the fact that the boundary problem arises recurrently 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. In a similar vein, David Held (1995: 237) suggested 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". 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 (2000a) notes, Held's proposal would vest enormous powers "in unelected authorities requiring inhuman levels of knowledge and wisdom".

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, different policies will result.¹⁰

2.3 The All-Affected Principle Leads to Fickle Boundaries

Whether we think of affectedness as objective or subjective, the all-affected principle seems 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 have to first decide the relevant political community, that is, who is affected and thus ought to be included. Some deliberative democrats who perceive themselves as radicals nod in this direction and embrace the fluid boundaries following from the all-affected principle. John Dryzek (1996), 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. 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

¹⁰ The practice of gerrymandering demonstrates that this is not just a hypothetical concern. Drawing the boundaries of political communities are essentially political issues of power.

permanent territorial layers of government, with regional and global democratic institutions added to those already existing at national and local levels.¹¹

Some critics argue that because the all-affected principle leads to political boundaries that are unstable and issue-area specific, it is not a very practical criterion of legitimacy for political institutions (Whelan 1983: 19; Dahl 1970: 64). 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. However, one could argue that as long as the consequences 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 literature on international institutions, which argues that international problem-solving is already organised into specific issue areas that are all but ephemeral (cf. Coleman & Porter 2000).¹²

Thus, in spite of these practical problems, I think we should worry more about what happens to the conditions for democratic participation once we redraw political boundaries according to the all-affected principle. Dynamic, issue-specific political boundaries could well 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 will be replaced by an array of institutions claiming authority, so the sole citizenship of the individual will be replaced with a variety of affiliations with different communities of fate, choice and chance (Held 1999). But what happens then to the rights, duties and belonging that territorial states, for better or for worse, have granted

11 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. Saward 2000a; Dryzek 1999; Coleman & Porter 2000).

12 In fact, a plausible fall-back position for transnational democrats would be to argue that, albeit far from perfect, the nation-state has provided a practical shortcut for application of the all-affected principle; in our globalised world, international regimes could offer an imperfect but decent approximation where improved democratic participation could allow for a better overlap between decisions and their consequences.

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 (Saward 2000a: 38).

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 (cf. Chandler 2003).

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 solutions 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.

2.4 The All-Affected Principle Leads to 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. 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 equally ruled out by the all-affected principle. 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 in the kind of solitary confinement within which democratic theory normally puts the state, 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 community interacts minimally with the surrounding world, some decisions that that community makes will affect some persons outside its borders who are not allowed to participate 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 taxpayer and a potential benefactor of public expenditures, then we may safely include everyone in deciding on tax policy. 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 participates in collective decision making can shield him- or herself from the consequences.¹³ In order to make

¹³ The same problem occurs if we interpret affectedness not as dichotomous but as a graded quality (you may be more or less affected by a collective decision). To the extent that some

the population more homogenous and less fragmented and stratified, it may be reasonable to try to isolate the community from influx from outside. Thus, the set of processes we call 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.¹⁴ 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].”

So, a community that takes the all-affected principle seriously would have to pursue a policy of isolation and homogenisation. Agné’s 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. Agné assumes that the political community attempting to approximate the all-affected principle is a state, but this is the very assumption challenged by transnational democrats.

Nevertheless, the implications that Agné spells out from 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—so transnational democrats 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—a congruence which before it was lost always required a high degree of homogenisation, unity and cohesion. If we

people who participate in a decision are less affected than others, the former are included illegitimately. How can we avoid such illegitimate inclusion? Again, the all-affected principle seems to require that all people share the characteristic or property with which the decision is concerned. All must live under similar economic conditions for economic policy to affect them equally; all must live under similar social conditions for social policy to affect them equally, and so on.

14 When Agné argues that heterogeneity in a political community poses a threat to realising the all-affected principle, his reasoning bears a striking resemblance (though an opposite conclusion) with Carl Schmitt’s dismissal of liberal democracy. Schmitt, who defined democracy as an identity between the rulers and the ruled, argued that fascism and communism were democratic in so far as they achieved this identity of governing and governed. By contrast, liberalism (and globalisation, we could add today) leads to pluralism, Schmitt argued, which inevitably undermines the identity between rulers and ruled, and so liberalism would not be compatible with democracy (Torfing 1999: 253).

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. For example, identity politics in the European Union seem to reproduce nationalist ideology at the European level, albeit under a flag of post-nationalism (Hellström 2006).

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. ... 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 (Lippmann, cited in Marres 2005).

2.5 Reading the Principle Not Quite So Literally

So far I have argued that the all-affected principle is indeterminable, virtually impossible to apply and leads to some peculiar guidelines for democratic communities 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 could lead to absurd conclusions if we were to try to follow them too rigidly and categorically. So perhaps we should not let the absurd implications that may arise in some concrete situations lead us to abandon a principle that may be sound in a more abstract sense.

Gustaf Arrhenius (2005) defends the all-affected principle against such easy confutation. 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 attempt-

ing 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. In a similar sense, the all-affected principle may sometimes lead to absurdities if applied in particular circumstances, but nevertheless provides 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.

Given that the all-affected principle is difficult to apply to concrete situations, it seems reasonable to consider the all-affected 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 principle in transnational democratic theory really view it at all. They, and indeed Arrhenius himself, apply it to 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 abstract questions of institutional design. It is difficult to determine what the all-affected principle implies as an abstract ideal rather than a concrete rule.

However, if we could distinguish decisions from ideals, this latter way of viewing the all-affected principle would allow us to escape Whelan's logical loop. Arrhenius suggests that instead of entering the infinite regress of constitutive decisions, we should simply concoct a theory of interests and analyse how different decisions, policies and institutions would affect people's interests, and then decide who is to be included.¹⁵ (After that, presumably, the community can go back to democratic business as usual.) But who is this "we" who are 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, such decisions should reasonably be made by anyone who is affected. Hence, we are drawn back to the infinite regress which Arrhenius has failed to bring to a convincing end.

¹⁵ This is the task that Held and Tännsjö wish to delegate to non-majoritarian institutions; Arrhenius seems to nod in the same direction and likewise supposes that we could find objective criteria for affectedness.

3. Transnational Democracy Beyond the All-Affected Principle

Thus far I have argued that the all-affected principle does not hold, for a number of reasons. Since both cosmopolitan democrats and deliberative democrats crucially rely on it, let us now consider how they would be affected by the critique I have suggested here.

3.1 Cosmopolitans Without a Cause

The all-affected principle seems to parallel a general, cosmopolitan universalism, namely, that we are all connected to one another on this globe and that no one can remain indifferent and unmoved by the suffering of others, regardless of where or when this may occur (Kleingeld & Brown 2002). Cosmopolitan democrats wish to turn this general universalism into a political cause by wedding it to democracy; the all-affected principle is just one of their means for doing so. Daniele Archibugi (2003) suggests that there is something wrong with democratic theory if, for example, it allows the French to decide in a perfectly democratic manner to perform nuclear tests in the Pacific, without ever having to consult the people who live there. And Susan Marks claims that the all-affected principle is the main message distinguishing cosmopolitan democracy from other notions of transnational democracy:

In place of the idea that the nation-state is democracy's container, [cosmopolitan democracy] seeks to entrench the idea that democracy is relevant wherever and whenever an action is taken which affects the capacity of individuals and groups to determine the conditions of their collective lives (Marks 2000: 104).

If we strip the cosmopolitan democrats' argument down to a basic practical syllogism, the all-affected principle is the crucial normative premise underlying that argument. The all-affected principle allows them to draw the conclusion that globalisation implies that we must take democracy to a transnational level. Given, then, how much prestige cosmopolitan democrats vest in the all-affected principle, the critique that I have suggested here must seem discouraging. Once we discard the all-affected principle, there is nothing to glue the practical conclusion to the factual diagnosis of the state of the world.

So how could cosmopolitan democrats respond to this critique? One way to rehabilitate the all-affected principle would be to say that in a global democracy some of the problems discussed here may disappear. Whelan's

infinite regress of constitutive decisions may have an end where everyone is included (cf. Arrhenius 2005; Näsström 2003). Furthermore, there would be no need for the isolationist policy that Agné deduced from the all-affected principle, since there would be no outside from which to fear a negative influx that could stratify the population. On the other hand, the all-affected principle may well suggest a policy for levelling differences among people so that they would all be more likely to be equally affected by collective decisions. Held's "democratic public law" is a far-reaching attempt to provide people all over the world with more equal living conditions—economic, social, cultural, political, and so on—and it would seem to be a proximate programme for realising this aspect of the all-affected principle on a global scale. But not even cosmopolitan democrats believe that Held's notion is realistic or that it represents a feasible, let alone desirable, plan to create a single global democratic system, at least not in the foreseeable future.

Furthermore, the all-affected principle could just as well (or just as poorly) support a conclusion opposite to cosmopolitan democracy. Whereas cosmopolitan democrats argue that because politics has become global, democracy must become global too; we could argue inversely that because democracy (as we know it) is national, the impacts of politics must remain under or be returned to national control too, that is, we must renationalise the authority accorded to supranational institutions beyond our democratic reach (cf. Zürn 2004). In fact, some green theorists invoke the all-affected principle to suggest that politics must be scaled down, even from the national level, in order to achieve the symmetry between causes and effects required by the all-affected principle (Hines 2000; cf. Barry 1999). The all-affected principle in itself has no preference for levels.

So the kind of cosmopolitan causes addressed by Archibugi and Marks may not at all be supported by the all-affected principle. In a broader sense, the problems of specifying the boundaries of democracy reveal the limits of democratic theory. Democratic theory goes a long way, but it is not a consummate moral or political theory, that is, the only one we would need in order to determine how we ought to order life in any kind of society. In fact, it would be a sorry state of affairs if democracy were the only argument we could invoke when facing difficult issues like nuclear weapons testing on faraway atolls. But once we invoke the all-affected principle on these issues as a matter of democracy, in order to express our moral indignation, and argue that these actions are wrong (not primarily because of their conse-

quences but because the people suffering those consequences have had no say in the decision-making process), then we have also effectively weakened our moral claims because the all-affected principle cannot by itself lead to particularly strong condemnation of anything.

3.2 Being Affected without Affect

Many proponents of deliberative democracy suggest that their account of democracy is especially well suited for a globalised, internationalised world, precisely because they elevate the all-affected principle to a central democratic principle. Theirs is “a democracy of the affected” (Eckersley 2000). Who should be a member of the relevant deliberative community depends on what particular stakeholders are affected by the exercise of public power on the issue at stake. Thus, deliberative democrats may fully recognise that abiding by the all-affected principle leads to the practical problem of redrawing the boundaries of the political community for every issue at stake, and yet maintain that this is precisely what a deliberative process always ought to look like. John Dryzek (2000) argues that “deliberation ... can cope with fluid boundaries, and the production of outcomes across boundaries”. Just like the issues, boundaries are the product of the deliberative process:

The process of deliberation itself becomes constitutive of the relevant deliberative community. This reflexivity, argue its advocates, makes deliberative democracy admirably suitable to a world in which there are overlapping communities of fate and in which the organization and exercise of power no longer coincide with the bounded territorial political community (McGrew 2002).

Deliberative democrats thus have a functional conception of the demos. Radical deliberative democrats here seem to believe that they can escape the boundary problem because they never presupposed a static demos or nation-state to begin with. But who is then to be included in the deliberative and decision-making process? Everyone affected, many deliberative democrats say, citing the all-affected principle; but, as we now know, this is not much of an answer (cf. Saward 2000b).

Actually, deliberative democratic theory and the all-affected principle make strange bedfellows. As we have seen so far, the all-affected principle seems to be most reasonably interpreted as an application of utilitarianism to democratic theory or, at any rate, as regarding democracy as a procedure for

interest aggregation. Deliberative democrats, however, usually take a strong stance against this understanding of democracy and define themselves in opposition to what they term as aggregative liberal democracy. So, how do they make ends meet?

Deliberative democracy is not just supposed to be a procedure for deliberating over issues and making collective decisions: it is also supposed to help us arrive at better and truer decisions, that is, it ought to have epistemic value (Warren 2002; Bohman 1998; Chambers 2003). As Habermas (2001) puts it, on a discourse-theoretical account,

the democratic procedure no longer draws its legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results (p. 110).

That is, deliberative democracy is justified when it is organised so as to provide us with the best answers.

But the all-affected principle as a criterion for inclusion seems to conflict with the epistemic conception of deliberative democracy (cf. Arrhenius 2005). If we cherish democratic deliberation because it helps us to arrive at the truth, why should affectedness be the main criterion for selecting the deliberators instead of, say, competence or expert knowledge? Just because someone is affected does not mean that he or she is more likely to arrive at truer or better answers or to deliberate in a more honestly truth-seeking manner. Habermas would probably reply that, in order to discover the truth, we must engage real people in real discourses, for otherwise we would not take into account and empathise with the situations, judgements and interests of everyone concerned.¹⁶ But as Samuel Freeman notes, this discords with the aim to discover what would be agreed to among fully rational, moral, and informed persons in ideal speech situations: “Empathy with existing citizens’ current situations and interests would not seem to be necessary for these purposes. It could even be distracting” (Freeman 2000: 386). And if there is any correlation between a person’s being affected and his or her capability to reach balanced, rational and impartial judgements, then that correlation is negative.

¹⁶ Habermas incorporates this regard for the affected in his central “discourse principle” which states that “just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses” (Habermas 1996: 107).

There are a few more reasons why it seems strange or contradictory for deliberative democratic theory to rely on the all-affected principle to delimit the relevant political community. On the one hand, deliberation is supposed to occur between all those who are, or who consider themselves to be, affected by a political decision. On both the objective and the subjective approach to affectedness, being affected has something to do with having bad things happening to you. You perceive your interests to be threatened and so you take political action to secure your interests but not necessarily to seek solutions that promote the common good. On the other hand, deliberation is a noble sport, where actors are not supposed to resort to such base, myopic or egoistic motivations as self-interest. Nor are they, in Habermasian terms, supposed to take strategic action which preys on the free and equal exchange of beliefs and intentions.

Proponents of deliberative democracy assume that people engaging in deliberation can be moved by motives such as concern for reciprocity, a sense of justice, a willingness to cooperate with others on fair terms or a commitment to public reason-giving (Freeman 2000: 380 f.). Otherwise, the ideal of a deliberative democracy would not be feasible. Such assumptions are also implied in the epistemic argument for deliberative democracy. Furthermore, radical deliberative democrats usually criticise aggregative models of democracy, claiming that these models simply treat people's interests as a pre-political given. Deliberative democracy, by contrast, they insist, has a potential to transform the participants' interests and identities (Dryzek 2000; King 2003).

Thus, using the all-affected principle as the criterion for whom to include in deliberative processes appears to be contradictory. People should get involved in politics because they are affected, but once they enter into deliberation, they must leave their affects, so to speak, out of the debate. Alternatively, the preferences which lead people to take political action should transmogrify into something different, higher-minded and less self-serving. But if the motivations for becoming involved in the first place are so suspect and so detrimental that they have to be kept out of the deliberative process, why should they then, at the same time, constitute the criterion of legitimate inclusion? If nothing else, the all-affected principle appears to saddle real people engaging in deliberation with unrealistic requirements.

In sum, we run into some peculiar tensions within deliberative democratic theory if we support it based on the all-affected principle as the crite-

tion to delineate the relevant political community. However, just as was the case for cosmopolitan democrats, there would not be much normative thrust in deliberative democrats' quest for transnational democracy if they were simply to discard the principle. Alternatively, deliberative democrats could stick with the tradition that regards being subjectively affected as an enabling condition of politics, but then they would have to tone down their epistemic claims. Additionally, adopting a subjective notion of affectedness renders their theory only slightly less different from the interest-aggregative models of democracy from which they prefer to distance themselves.

4. Rescuing Transnational Democracy

The all-affected principle, I have argued, is not a useful tool for drawing any political boundaries. So without the principle which has spurred recent claims for taking democracy to the transnational level, would the quests for transnational democracy be vapid as well? Not necessarily. Some philosophers of science suggest that there are anomalies to all theories, so we should not consider a theory refuted until we have something better to substitute for it. The same might be true for normative theories: A flawed and apparently contradictory principle may be better than no principle at all. If we do reject the all-affected principle, could we perhaps find a substitute that would rescue quests for transnational democracy? Let me conclude this paper by considering just such a replacement for the all-affected principle, and let us see whether the proposed replacement would actually advance transnational democratic theory.

A different way to express the congruence implied in the all-affected principle, between governing and being governed, between making decisions and being impacted by them, would be to declare that everyone who is subject to the laws should be allowed to participate in making them (cf. Beckman 2004).¹⁷ Because it is closer to the classic notion of democratic autonomy and reciprocity, this subject-to-the-law principle would solve some, although not all, of the problems that follow from the all-affected principle.

How does being subject to the law differ from being affected by collective decisions? The two principles do not necessarily overlap: You may be subject to laws that do not affect your interests in any sense, and vice versa. Unlike

¹⁷ With some qualifications, of course, such as excluding transients from the right to participate and specifying what a reasonable level of participation requires.

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. So the subject-to-the-law principle offers no real 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.

The point is, however, that the subject-to-the-law principle sets clearer (if not self-evident) criteria for illegitimate inclusion/exclusion than the all-affected principle does. We can easily think of cases when people are subjected to laws that they have not participated in making (even if merely indirectly or passively), or cases when people participate in making laws to which they are not subjected themselves. Moreover, given that it is easier to determine who is and who is not subject to a law than, say, who is affected by a particular decision,¹⁸ illegitimate inclusion and exclusion seem to be more readily identifiable by the subject-to-the-law principle than by the all-affected principle.¹⁹ Put differently, the subject-to-the-law principle is more specific as to *what* should be democratically controlled: namely, the power to legislate but not necessarily the power to make any decision or take any action, individually or collectively, which may affect someone else. Furthermore, we need not fear the consequences that Agné spells out from the all-affected principle, because a law (ideally at least) applies to all its subjects regardless of their individual properties.

Since there are already supranational law-making institutions in place, the subject-to-the-law principle could substantiate claims to democratise

18 Someone might object that the subject-to-the-law principle is only an explication of the all-affected principle which relies on a special theory of affectedness purporting that individuals have an interest of some sort not to be subjected to laws that they have not made themselves, and that such a theory is just as disputable as other theories of 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.

19 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 one concerns the all-affected principle. This shows why the two principles do not overlap and why they may even conflict.

them. This would be no modest claim, given the tendency toward increasing legalisation by transnational institutions (Zürn 2005). Consider, for example, the European Union: Although it allegedly offers European residents only poor possibilities to participate in all-European affairs, the EU creates many laws which override national legislation. Of course, the subject-to-the-law principle also lacks a preference for levels. Instead of suggesting supranational democratisation, we could conclude that the power to legislate should be brought back to national legislatures. On this point, the two principles are equally undetermined and would have to be complemented by some ideas about why renationalisation is either unfeasible or undesirable, or both.

Thus, while the subject-to-the-law principle could in fact lend some support to a quest for transnational democratisation, it would not allow the sweeping statements made by some cosmopolitan democrats and some deliberative democrats inspired by the all-affected principle. Although this principle would perhaps not allow them to condemn France for violating the democratic rights of others, by nuking Pacific atolls, it could, I think, allow them to suggest that institutions like the European Union and other international legislative bodies should be democratically accountable.

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