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The Boundary Problem and the Right to Justification

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Introduction

Democracy presumes a collective, a group of individuals, who are in a specific sense self-governing or self-determining. The problem of who should be included in this collective and thus take part in collective democratic decision-making, what is sometimes called the boundary problem in democratic theory, is an increasingly pressing political problem in the light of growing asymmetries between rule-makers and rule-takers in a globalized world. While the boundary problem can and has been approached in a variety of ways pleading to moral theory, through which democracy is justified instrumentally for realizing some other normative ideal, such as justice, the present chapter is a contribution to this debate with the intent to hold on to the ideal of democracy – that is, where democracy as collective self-determination (the ‘rule by the people’) is intrinsically justified¹ as the foundation of legitimate authority.²

¹ For sure, the question what is intrinsic value and what sort of things can have intrinsic value is contested among philosophers. The argument here remains neutral towards the much more complex questions concerning whether intrinsic value is non-derivative and whether it supervenes on intrinsic properties alone (see M. Zimmerman, *The Nature of Intrinsic Value*. Lanham: Rowman and Littlefield, 2001). Instead, it is the broader distinction between *valuable for its own sake* and *valuable for the sake of something else* that is of interest here, which perhaps makes it more appropriate to follow Christine Korsgaard and speak of ‘final value’ (C. Korsgaard, ‘Two Distinctions in Goodness’, *Philosophical Review* 92(1983), 169–95). On a normative pragmatic view, which I find convincing, something that has intrinsic (or final) value in one context might have instrumental value in another.

² Of course, such an intrinsic justification of democracy could – and in my view must – also draw on moral values or principles (or both).

A basic presumption of this chapter is that to the extent that we wish to hold on to democracy as a normative ideal when approaching the boundary question about justified inclusion (henceforth the 'B question' for simplicity), whatever solution we come up with, it must be *compatible* with the basic conditions of democracy, answering what is henceforth called the 'C question', that is, what conditions must an arrangement fulfil in order to be minimally democratic? The overall aim is to show that a particular discourse-theoretical approach has resources to achieve this. This will be done at the level of 'ideal theory'³ in the sense that the chapter will bracket questions of feasibility and the realization of democracy under non-ideal circumstances, for example, dealing with problems of immigration and border control.⁴ The thesis defended is that the so-called 'equal influence principle' is preferable to solutions to the boundary problem drawing on what is commonly called 'the all affected interests principle' as well as on the alternative discourse-theoretical views of Jürgen Habermas and Rainer Forst, since it can offer a criterion of justified inclusion compatible with a criterion of democratic legitimacy (thus answering the B and C questions in a compatible way).

The argument is pursued in four steps. In the first step, I call attention to the relationship between the B and C questions as well as

³ See, for example, J. Simmons, 'Ideal and Nonideal Theory', *Philosophy & Public Affairs* 38(2010), 5–36; L. Ypi, 'On the Confusion between Ideal and Non-ideal in Recent Debates on Global Justice', *Political Studies* 58(2010), 536–55; E. Erman, and N. Möller, 'Three Failed Charges Against Ideal Theory', *Social Theory & Practice* 39(1), (2013), 19–44; L. Valentini, 'On the Apparent Paradox of Ideal Theory', *Journal of Political Philosophy* 17(2009), 332–5.

⁴ Cf. A. Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control your Own Borders', *Political Theory* 36(1), (2008), 37–65; A. Abizadeh, 'Democratic Legitimacy and State Coercion: A Reply to David Miller', *Political Theory* 38(1), (2010), 121–30; J. Carens, 'Fear vs. Fairness: Migration, Citizenship and the Transformation of Political Community', in K. Lippert-Rasmussen, N. Holtug, and S. Laegaard (eds), *Nationalism and Multiculturalism in a World of Immigration*. Houndmills: Palgrave Macmillan, 2009; J. Carens, 'Aliens and Citizens: The Case for Open Borders', in R. Bellamy and A. Palumbo (eds), *Citizenship*. Aldershot: Ashgate Publishing, 2010; D. Miller, 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh', *Political Theory* 38(1), (2010), 111–20.

address the common claim that the B question is ‘prior’. I also propose an answer to the C question by presenting two basic conditions that I suggest are reasonable to require of an arrangement for it to qualify as minimally democratic, namely, *political equality* and *political bindingness* (I). In the second section, I take a look at ‘all affected solutions’ to the boundary problem in the light of these two conditions in an attempt to show why the all affected principle is not appropriate for solving the boundary problem (II). In the third section, the so-called equal influence principle is defended as the proper criterion of justified inclusion, which is a version of what is sometimes labelled ‘the all subjected principle’. Attention is drawn to the strengths of the equal influence principle for answering the B question in comparison with the discourse-theoretical alternatives of Habermas and Forst (III). In a final step, I specify in what contexts democracy is an applicable ideal, arguing that the equal influence principle is only applicable under circumstances of interdependent interests. Further, drawing on Forst’s distinction between different contexts of justification, I position the proposed equal influence principle in the larger context of justificatory practices among discursive agents in the space of reasons and suggest how we may approach contexts where democracy is not an applicable normative ideal but we still reasonably require of authorities to be politically legitimate (IV).

The boundary question versus the basic conditions question

In stark contrast to what has traditionally been the case among political theorists, those who today approach the boundary problem consider the question of *who* should be included in the ‘demos’ of a democracy to be the basic and first question of democracy, in particular in a transnational context. In fact, it is almost a truism among democratic theorists that the B question is *prior* to the C question in democratic

theory. The controversies have instead tended to revolve around the conceptual and normative implications of this claim.⁵

However, a crucial aspect that is overlooked is what exactly 'prior' alludes to in this context. Most importantly, from the fact that the B question is causally and empirically prior, it does not follow that it is also normatively prior. In fact, it would be peculiar to argue that it is normatively prior, since there are a lot of boundary problems 'out there' in normative space, concerned with the 'who question' from various normative ideals, such as who should be included and excluded from having group rights or certain primary goods. The particular boundary question of relevance here concerns the ideal of democracy. In other words, when approaching the B question, we need a pair of 'democratic glasses', specifying at least the basic requirements for an arrangement to qualify as minimally democratic (answering the C question), in order to know where to look.⁶

So let us take a closer look at the C question. What conditions are required for an arrangement to qualify as minimally democratic? Indeed, similar to most (if not all) normative concepts, democracy is highly contested. At the same time, we seem to need at least some shared idea of what the ideal of the rule by the people means in order to make comparisons and critical judgments about different conceptions of democracy.⁷ In broad strokes, what seems indisputable is that democracy,

⁵ For example, compare R. Goodin, 'Enfranchising All Affected Interests and Its Alternatives', *Philosophy and Public Affairs* 35(1), (2007), 40–68, at pp. 40–1; with R. Dahl, *Democracy and its Critics*. New Haven: Yale University Press, 1989, pp. 119–31; and J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by W. Rehg. Cambridge, MA: MIT Press, 1996a.

⁶ Naturally, there is a considerable amount of conceptual and normative work left for a full-fledged democratic theory when we have answered the B and C questions in a compatible way, not least pertaining to the institutional and practical dimensions of democracy, such as the contextual specification of these requirements and further conditions following from them. However, for the present purposes, the chapter is confined to an analysis of the boundary problem from a normative and conceptual point of view in ideal-theoretical terms.

⁷ Indeed, even to the extent that we would agree on the basic conditions of democracy, democratic theorists would certainly disagree on what needs to be done in order to fulfil them. However, we should distinguish the question of what democracy is from what it requires. The latter question is not of immediate interest in this section.

‘the rule by the people’, is a form of political arrangement in which people collectively rule themselves as political equals. Democracy expresses the idea of ‘equal political power’ or ‘equal decision-making power’, as it were. If we unpack this idea, *two* conditions come to the fore as fundamentally important and seem to me hard to dismiss for any modern account of democracy. The first condition is *political equality*. What distinguishes democracy from other forms of government, such as dictatorship, monarchy or aristocracy, is that it has components that express and secure some form of political equality, according to which anyone who is relevantly affected by a political decision (or law) has an equal opportunity, secured through an equal right, to participate (directly or indirectly) in the decision-making about it.⁸

Apart from this ‘deontological’ dimension of being given an equal *opportunity* to participate in the decision procedure through equal rights, the rule by the people also involves what we might call a ‘teleological’ dimension, in that people rule over themselves and shape their institutions only if they, at least a sufficient number of them, act politically by ‘exercising’ their political equality.⁹ In other words, democracy requires some sort of *democratic practice* (through informal and/or formal processes, depending on which conception of democracy is favoured). I call this condition *political bindingness*. More specifically, in order for people to rule over themselves through a political authority (i.e. a decision-making body), thereby making themselves authors of the laws, they have to *bind* themselves as equals to this authority, which requires certain forms of political action.¹⁰ Under modern conditions this *authorization* is usually made by taking part (directly or indirectly) in the decision-making or at a minimum

⁸ T. Christiano, ‘A Democratic Theory of Territory and Some Puzzles about Global Democracy’, *Journal of Political Philosophy* 17(2), (2006), 228–40.

⁹ On this point, compare Rawls’ theory of justice as fairness, which insists on the ‘equal worth of political rights’ (*Justice as Fairness. A Restatement*. Cambridge, MA: Harvard University Press, 2001). Of course, what is considered a ‘sufficient number’ will vary between different conceptions or models of democracy.

¹⁰ E. Erman, ‘In Search of Democratic Agency in Deliberative Governance’, *European Journal of International Relations*, (2013), pp. 847–68.

accepting the constitutionalized procedures as valid, without which the right to participate would not have any binding force.¹¹ We will have reason to return to this below.

The ideal of democracy and the all-affected principle

A common solution to the boundary problem is often referred to as the ‘all affected interests principle (or the all affected principle for short)’, which roughly states that all whose relevant (or significant) interests are affected by a decision should have influence over it.¹² There are of course as many versions of this principle as there are contestations about how to best interpret ‘decision-making’ or ‘relevantly affected’. There is also disagreement as to whether the principle should refer to those ‘possibly affected’ or those ‘actually affected’.¹³ But these internal disputes are bracketed here since of primary concern is how the general normative

¹¹ Again, what is of interest in this section is specifying the conditions for answering the C question, not what needs to be done in order to properly fulfil them. The answer to the latter question will vary among democratic theories.

¹² See, e.g. D. Archibugi, ‘Principles of Cosmopolitan Democracy’, in *ibid.*, D. Held, and M. Kohler (eds), *Re-Imagining Political Community: Studies in Cosmopolitan Democracy*. London: Polity, 1998; G. Arrhenius, ‘The Boundary Problem in Democratic Theory’, in F. Tersman (ed.), *Democracy Unbound*. Stockholm: Stockholm University Press, 2005; S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens*. Cambridge: Cambridge University Press, 2004; Goodin, ‘Enfranchising All Affected Interests and its Alternatives’; C. Gould, *Globalizing Democracy and Human Rights*. Cambridge: Cambridge University Press, 2004; D. Held, *Democracy and the Global Order*. Cambridge: Cambridge University Press, 1995; I. Shapiro, *Democratic Justice*. New Haven: Yale University Press, 1999; F. G. Whelan, ‘Democratic Theory and the Boundary Problem’, in J. R. Pennock and J. W. Chapman (eds), *Liberal Democracy*. New York: New York University Press, 1983. For a discussion of the different roles of the all affected principle for dealing with the problem of democratic boundary-making, see S. Näsström, ‘The Challenge of the All affected Principle’, *Political Studies* 59(1), (2011), 116–34. For a sceptical view of the principle, see J. Karlsson Schaffer, ‘The boundaries of transnational democracy: alternatives to the all-affected principle’, *Review of International Studies*, available on CJO 2011 doi: 10.1017/S0260210510001749.

¹³ Goodin, ‘Enfranchising All Affected Interests and its Alternatives’; D. Owen, ‘Constituting the Polity, Constituting the Demos: On the place of the all affected interests principle in democratic theory and in resolving the democratic boundary problem’, *Ethics and Global Politics* 5(3), (2012), 129–52.

structure of the principle feeds into the ideal of democracy. Despite the attractiveness of the all affected principle as a normative principle underpinning democracy, it is argued that it seems unable in its *general form* to answer the B question since it is neither able to accommodate a condition of political equality nor of political bindingness.

Let us first take a look at political equality. As argued by Robert Goodin, the all affected principle is fundamentally egalitarian since it counts all interests equally and equal political power is the cornerstone of democracy.¹⁴ However, it is not clear how it is able to get us from a conception of moral equality in terms of counting all interests equally to political equality in terms of the equal political power that Goodin stresses. For political equality is not *only* premised on the idea that members of a constituency are morally equal and as such have *an* opportunity (secured by a right) to participate in the decision-making to the extent that they are relevantly affected, but more specifically, that they have an *equal* opportunity to do so (i.e. equal decision-making power).

The difference is crucial: the all affected principle allows for a proportional view of affectedness, according to which those who are more affected by a decision should have more influence than those who are less affected.¹⁵ Indeed, supporting proportional influence seems sensible since it is affectedness that *motivates* a right to participate in the decision-making in the first place; it is one of the features that make the principle so attractive from a normative point of view. Consider the alternative, according to which those who are affected should have the same degree of influence. This would draw an indefensible dividing line between those that are not at all affected and those that are very little affected.¹⁶ It would also undermine majority voting as a

¹⁴ Goodin, 'Enfranchising All Affected Interests and its Alternatives', p. 50; see also C. Beitz, *Political Equality*. Princeton: Princeton University Press, 1989.

¹⁵ See Gould, *Globalizing Democracy*; T. Macdonald, *Global Stakeholder Democracy*. Oxford: Oxford University Press, 2008; J. Rawls, *A Theory of Justice*. Cambridge, MA: Harvard University Press, 1971.

¹⁶ L. Bergström, 'Democracy and Political Boundaries', in F. Tersman (ed.), *The Viability and Desirability of Global Democracy*. Stockholm: Stockholm University Press, 2007.

justified procedure from the standpoint of democracy, since voting on an issue would generate clear winners and losers in the light of the fact that it will never be the case that people are equally affected.

In a democracy, members are supposed to rule over themselves through a political arrangement that takes numerous decisions on a wide range of social, political, legal and economic issues. To the extent that such arrangements have 'proportional influence' due to 'proportional affectedness,' it is at set levels (e.g. local municipality) within a legal-institutional framework that secures *equal* decision-making power on *each* level, and in which the ultimate legal competence derives from the *same* source. In fact, even if we abandoned the idea of political equality by applying the all affected principle within such a framework, such that people had the opportunity to participate in the decision-making to the extent that they were relevantly affected, it is difficult to see how we could justifiably use the principle for setting up this framework and establishing these decision-making structures in the first place (i.e. answering the B question). Hence, while the all affected principle might be used as a justification of democratic borders as part of a moral theory, it is difficult to see how it can constitute part of a democratic theory, equipped to translate by itself its moral egalitarian underpinnings into political equality.

Moving to political bindingness, this condition also seems to pose a problem for the all affected principle, stressing that all those whose interests are affected should have a right (and thus an opportunity) to participate in the decision-making. For no matter how fully implemented, this right is *individual* and does not by itself say anything about *collective* decision-making, that is, about the democratic practice being the result of the *exercise* of this very right. This has nothing to do with whether rights are successfully implemented or not. We can have numerous of fully secured rights (and opportunities) without any democratic rule-making or political action whatsoever.¹⁷ At a minimum,

¹⁷ E. Erman, 'Human Rights do not make Global Democracy', *Contemporary Political Theory* 10(4), (2011), 463–81; *ibid.*, 'The Right to Have Rights' to the Rescue: From Human Rights to Global Democracy', in M. Goodale (ed.), *Human Rights at the Crossroads*. Oxford: Oxford University Press, 2012.

‘affected persons’ must *authorize* the authority (decision-making body) in question by accepting the constitutionalized procedures as valid for this right to have a binding force.

Winding up this section, the first step of the argument pursued here is thus that these two conditions, the answer to the C question, as it were, set the normative and conceptual limits on possible answers to the B question, insofar as we approach the boundary problem with the intent of holding on to democracy as an ideal. Now, of course, one might not agree on the proposed basic conditions of democracy. If we were to answer the C question by construing conditions that made up a thinner notion of democracy, this would certainly give us more options for answering the B question. However, I suspect that whatever suggestion we would come up with that dismissed either political equality or political bindingness, would very likely be controversial and go against strong normative intuitions about what we could possibly mean by democratic rule-making, that is, the ideal of the rule by the people.

Discourse theory and the boundary problem

So far I have tried to expose some of the problems that the all affected principle faces as a candidate for solving the boundary problem *within* democratic theory. In this section the question addressed is whether discourse theory is better equipped to solve the boundary problem. I contend that it is, but not the way it has been theorized by two of its most influential proponents, namely, Habermas and Forst.

One possible explanation for the incompatibility of the all affected principle with the basic conditions of democracy, such as political equality, could be traced to its reliance on a very limited notion of ‘democratic politics’, which does not seem to capture crucial aspects of the broader established understanding of the concept. The demand for democratic legitimacy does not arise primarily because decisions on separate issues to which people are differently affected must be

made, but because people have interdependent interests and therefore are in need of a collective decision-making apparatus to solve common problems in a justified way. On this established view, democratic politics consists of numerous different potential issues and deals among other things precisely with the question of what should count as a political problem in the first place.

That said, this doesn't take away the normative attractiveness of the all affected principle. That people who are affected by a law should have a say in its making is indeed a strong intuition underlying the ideal of democracy. In order to account for this intuition, but at the same time meet the challenges this principle faces, an alternative route to take is to go for another candidate in the debate, namely, the so-called 'all subjected principle'. In its general form, this principle states that all those who are subjected to the laws, that is, those whose actions are governed by them, should have a say in their making.¹⁸ Hence, while people might be (and presumably are) differently affected by a society's laws and regulations, they are still equally subjected to them. Thus, on the standard version of the all subjected principle, the criterion of inclusion is not gradually but *binary* coded such that either one is a legal subject or not.

Habermas's principle of democracy is perhaps the most influential all subjected principle in the contemporary debate. It states, 'only those laws count as legitimate to which all members of the legal community can assent in a discursive process of legislation that has in turn been legally constituted'.¹⁹ In brief, the democratic principle arises from a specific interpretation of Habermas's discourse principle and the legal code (basically a legal community and legal subjects), the latter of which can be neither epistemologically nor normatively justified,

¹⁸ Dahl, *Democracy and its Critics*; Habermas, *Between Facts and Norms*; Abizadeh, 'Democratic Theory and Border Coercion'; Lopez-Guerra, 'Should Expatriates Vote?'; D. Owen, 'Transnational Citizenship and the Democratic State', *Critical Review of International Social and Political Philosophy* 14(5), (2011), 641–64; *ibid.*, 'Constituting the polity, constituting the demos'; Erman, 'Human Rights do not make Global Democracy'; *ibid.*, "'The Right to have Rights" to the Rescue'.

¹⁹ Habermas, *Between Facts and Norms*, p. 110.

according to Habermas.²⁰ While 'assent' on this principle is supposed to be the outcome of legally constituted processes of legislation, a strength of the Habermasian view is that it stresses not only a formal 'track' in terms of *formalized* deliberative decision procedures of will-formation in this regard, but also an interconnected informal 'track' in terms of *informal* deliberative practices of opinion-formation, channelled into these procedures – both secured through a constitutionalized system of rights.²¹

It is clear that Habermas's principle does not offer any guidance concerning the B question, since it has already the democratic boundary built into it in terms of a presupposed legal community, which allegedly can be neither epistemologically nor normatively justified. Still, it has several attractive discourse-theoretical components. Therefore, I suggest a reformulation of the all subjected principle in terms of what I call 'the equal influence principle', which is equipped to accommodate a criterion of justified inclusion and thereby makes the boundaries of the community a justificatory question rather than a premise, as Habermas does. The equal influence principle states that 'all those who are systematically and over time subjected to an authority's (i.e. a decision-making body's) laws, political decisions and rules, in the sense of being governed by them, should systematically and over time have an *equal influence* over its decision-making and in the shaping of its institutions'. 'Influence' is a useful concept for capturing the two basic conditions harboured by the idea of equal decision-making power, expressing equal political status (political equality) and the properties tied to it (such as a set of basic rights) as well as an action-oriented aspect, since you 'bind yourself' to something or 'authorize' it by influencing it (political bindingness). This dual structure is not easily captured by the concept of 'power', which on most accounts a person could possess but not necessarily exercise.

²⁰ Ibid., p. 455.

²¹ J. Habermas, 'Reply to Symposium Participants', *Cardozo Law Review* 17(1996c), 1477–557, at p. 1494.

More specifically, 'influence' on the proposed view at a minimum requires a democratic practice in terms of robust participation in both *formal* decision procedures (e.g. through electoral vote) and *informal* processes (e.g. in civil society and the public sphere), in which a *major and not fixed part of the members* takes part.²² Further, in line with the established view of democratic politics submitted earlier, 'systematically and over time' suggests an institutional approach to democracy, stating that this participation does not concern each and every decision but the complete set of decisions over time.²³ Needless to say, much more fine-grained specifications would have to be made for example concerning how many 'a major part' must consist of, if we were to realize this principle in practice. But at a principled level, we don't have to offer such specifications, as this will vary depending on the context to which the equal influence principle is supposed to be applied.

Now, the sceptic might object that when it comes down to it, the equal influence principle offers as little guidance to the boundary problem as does Habermas's principle of democracy, since it also relies on an authority which makes laws, the only difference being that Habermas's principle explicitly relies on a legal community, whereas the defended principle does so only implicitly. But this is a chimera. In the equal influence principle, 'authority' is a *descriptive* concept, referring to any authority that subjects people to its laws and regulations. It cannot be turned into a normative concept of democratically legitimate authority by other means than by following the principle itself. In Habermas's principle, by contrast, 'legal community' is a *moralized* concept, referring to a horizontal association of individuals, who voluntarily have come together and recognized one another as free and equals, as

²² The 'not fixed' condition is crucial to avoid persistent minorities.

²³ Erman, "'The Right to have Rights' to the Rescue"; In contrast to those who see rights as a protection 'against' democratic rule-makers and democratic authority, my institutional approach, following Habermas, sees a set of rights protecting fundamental interests as an essential part of any reasonable conception of democracy applied under modern conditions, not only for the protection of members but also in large part for non-members, such as short term residents, resident aliens, visitors and people seeking asylum.

well as mutually accorded each other a set of rights.²⁴ With the collective intention of legitimately regulating their life by means of positive law, they have entered into a common practice that allows them to frame a constitution, the latter of which precisely takes form by adopting and fleshing out these rights in a deliberative and egalitarian fashion.²⁵ So this legal community is far from empty of normative content.²⁶

In other words, the work of justifying the boundaries of a democratic arrangement on the proposed account is made *through* the equal influence principle, which decides who are supposed to have equal rights and equal decision-making power. By contrast, this normative groundwork is already presupposed in Habermas's principle of democracy. The reference to 'all' in Habermas's principle refers to 'all members of the legal community', whilst the reference to 'all' in the equal influence principle refers to all persons, not just to members (citizens), which makes it open *in principle*.

Let me demonstrate some strengths of the defended proposal in comparison with another influential discourse-theoretical view, namely that of Forst. In Forst's view, the common source of all claims of validity in normative space is the principle of equal respect for autonomous agency, from which he derives a basic moral right to justification. This principle requires that we regard others as autonomous sources of normative claims within a justificatory practice such that each person is an 'authority' in the space of reasons, as it were.²⁷ Justification on this view is understood as a *discursive* process whose primary addressees are those affected in relevant ways.²⁸ Thus, insofar as we get our normative statuses in practices of giving and asking for reasons, Forst argues, we should have a moral right to justification in those very

²⁴ J. Habermas, 'Paradigms of Law', *Cardozo Law Review* 17(1996b), 771–84, at p. 777.

²⁵ This constitution-making process is guided by Habermas' discourse principle.

²⁶ Habermas, 'Reply to Symposium Participants', pp. 1504–5.

²⁷ R. Brandom, *Making it Explicit*. Cambridge, MA: Harvard University Press, 1994; *ibid.*, 'Some Pragmatist Themes in Hegel's Idealism', *European Journal of Philosophy* 7(2), (1999), 164–89.

²⁸ Forst, *Right to Justification*, ch. 1; As such, the principle of equal respect for autonomous agency is a 'dialogical' version of the all-affected principle.

practices, that is, a right to be recognized as an agent who can demand acceptable reasons for any institution or structure which claims to be binding upon her or any action that claims to be morally justified.²⁹

However, the right to justification does not constitute the criterion of rightness solely in contexts of *moral* justification, on Forst's account, but also the criterion of democratic legitimacy in contexts of *political* justification. Forst's discursive conception of justice as non-domination³⁰ is seen as inseparable from his conception of democracy, because the moral point of human rights, that is, to have an active status as a justificatory equal, is not only about the *protection* of our agency but also about *expressing* our agency and autonomy in practice as 'norm-givers'. This is by Forst articulated as a human right to democracy in terms of a basic right to democratic participation, viz. a *right to full membership in a democratic community*, which

²⁹ R. Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach', *Ethics* 120(4), (2010), 711–40. On Forst's account, the right to justification accommodates two criteria, *reciprocity* and *generality*. In moral contexts, the criterion of generality takes the form of *universality* or 'generality in a strict sense' (R. Forst, 'The Rule of Reasons: Three Models of Deliberative Democracy', *Ratio Juris* 14(4), (2001), 345–78, p. 363; Forst, 'The Justification of Human Rights', p. 734), similar to Habermas' universalization principle (J. Habermas, *Moral Consciousness and Communicative Action*, trans. by C. Lenhardt and S. Nicholsen. Cambridge, MA: MIT Press, 1990; J. Habermas, *Justification and Application: Remarks on Discourse Ethics*, trans. by C. Cronin. Cambridge, MA: MIT Press, 1993; J. Habermas, *The Inclusion of the Other*, eds. C. Cronin and P. De Greiff. Cambridge, MA: MIT Press, 1998; J. Habermas, *Truth and Justification*, trans. by B. Fultner. Cambridge, MA: MIT Press, 2003; E. Erman, 'Conflict and Universal Moral Theory: From Reasonableness to Reason-Giving', *Political Theory* 35(5), (2007), 598–623). However, in contrast to pure consent theories of moral justification, the criteria of reciprocity and generality allow for the justifiability of claims even in cases of dissent, because normative claims are justified to the extent that they are not 'reasonably rejectable', viz. as long as no reciprocal and general reasons can be legitimately raised against them. Of course, within this dialogical framework, universalizing a maxim of action is not about an agent asking herself whether her action can be willed generally without contradiction in a monological fashion. Instead, justification is understood as a discursive process whose primary addressees are those *affected in relevant ways*. And disputes about 'relevantly affected' could only be addressed by way of a process of reciprocal and general justification (R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans. by J. Flynn. New York: Columbia University Press, 2012, ch. 1).

³⁰ R. Forst, 'Radical Justice: On Iris Marion Young's Critique of the "Distributive Paradigm"', *Constellation* 14(2), (2007c), 260–65, at p. 260; *ibid.*, 'First Things First: Redistribution, Recognition and Justification', *European Journal of Political Theory* 6(3), (2007b), 291–304, at pp. 299–300.

realizes for agents the right to justification in the political realm, and thus recognizes their equal right to effective political justification.³¹ Hence, rather than limiting the right to democracy by appealing to the principle of collective self-determination, which is a 'recursive' principle according to Forst, the border of the democratic community is to be decided and justified with reference to the right to democracy, viz. the right to democratic participation.³²

The problem with Forst's proposal is that while *political equality* is a necessary condition for democracy, it cannot alone satisfactorily answer the C question. Hence, the equal right to participation (i.e. the right to justification applied to a political context) cannot constitute a criterion of democratic legitimacy standing by itself, since it doesn't say anything about collective decision-making, which is dependent on a condition of *political bindingness* in order for authorization to take place. To repeat the argument against the all affected principle: universal rights alone (legal or moral) cannot substantiate a normative theory of democracy mainly because no matter how fully implemented, universal rights of any kind are *individual* rights, which could be enforced without any *collective* exercise of egalitarian decision-making whatsoever on any level.³³ There are two points of importance here. First, in contrast to basic civil rights, such as freedom of speech, and basic socio-economic rights, such as the right to healthcare, a condition of political rights, at least of those labelled 'democratic rights', is that they depend on being exercised jointly with others. Thus, while I may have a right to vote, I cannot exercise this right anytime I want, but only in an election together with others. Second, if we all had a right to vote in an election but nobody ever did (or, minimally, if we had a moral right to create a constitutional structure, but no one participated in this endeavour), we would not

³¹ Forst, 'The Justification of Human Rights', pp. 724–35; *ibid.*, 'The Rule of Reasons', p. 362–70.

³² Forst, 'The Justification of Human Rights', p. 730.

³³ E. Erman, 'Human Rights do not Make Global Democracy'.

fulfil the condition of political bindingness since there would be no authorization involved. Something similar would not be the case if we all had a right to healthcare but never got sick. In other words, what is peculiar about democracy is that individual and collective autonomy are simultaneously at work when democratic legitimacy is generated.

Thus, Forst faces a dilemma pertaining to how a condition of bindingness is to be accommodated by his principle. For even if he wishes to avoid requirements of actual participation in the decision-making, he would at least have to require that an authorization takes place by the subjects involved through which the basic constitutional procedures are accepted as valid. In order to do so, the first option would be to claim that his principle already relies on such an authorization (bindingness), similar to Habermas's principle of democracy, which presupposes a moralized legal community whose constitutional structure is already accepted (authorized) by members who have mutually accorded each other a set of rights. However, in this case Forst's theory becomes impotent for addressing the boundary problem. The other option would be to build a condition of bindingness into the principle itself as a normative criterion, similar to the equal influence principle defended here, in case of which something more must be added to the right to justification so that it can take a collectively binding form.

To sum up, Forst's approach to the boundary problem (answering the B question) is not compatible with the basic conditions of democracy (answering the C question). By defining democracy in terms of the right to justification, Forst is at the most able to offer a theory of *democratization*, according to which processes of democratization are instrumentally justified to the extent that they approximate an *ideal of justice* as non-domination. But however attractive such a theory may be, it does not suffice as an ideal of *democracy*, that is, an ideal about the rule by the people as a form of political arrangement in which people collectively rule over themselves as political equals.

Winding up: The ideal of democracy and different contexts of justification

Let me conclude by specifying the conditions under which the equal influence principle is applicable and how we may approach contexts where democracy is not an applicable normative ideal. Undeniably, we live in a world in which our interests are affected by what people do around the globe. As argued by Goodin, virtually everybody in one way or the other seems affected by everybody else.³⁴ In a democratic arrangement or polity, however, members' interests are deeply interdependent and connected in multiple ways, such that the realization of nearly all of the fundamental interests of each member is connected with the realization of nearly all fundamental interests of every other member.³⁵ So, while the call for collective decision-making and common institutions may emerge in other contexts too, there seems to be no reason why collective *democratic* decision-procedures and common *democratic* institutions would emerge if people's interests were not deeply interconnected in this way. Hence, it is under the empirical condition of interdependent interests that the call for democratic decision-making emerges and democracy becomes a applicable ideal. On the proposed account, it is in such contexts that the equal influence principle is applicable.³⁶

³⁴ Goodin, 'Enfranchising All Affected Interests and its Alternatives'.

³⁵ Christiano, 'A Democratic Theory of Territory', p. 97.

³⁶ In the light of the requirement of interdependent interests, the equal influence principle has several advantages to competing all subjected principles in the debate (Abizadeh, 'Democratic Theory and Border Coercion'; C. Lopez-Guerra, 'Should Expatriates Vote?', *The Journal of Political Philosophy* 13(2), (2005), 216–34; L. Beckman, *The Frontiers of Democracy: The Right to Vote and Its Limits*. Basingstoke: Palgrave Macmillan, 2009; L. Beckman, 'Is Residence Special? Democracy in the Age of Migration and Human Mobility', in L. Beckman and E. Erman (eds), *Territories of Citizenship*. New York: Palgrave Macmillan, 2012). Most importantly, it is equipped to distinguish the businessman who visits a democratic society on a long-term basis from a long-term resident alien. While both are subjected to the laws, the businessman is not likely to be *systematically* subjected to them (even if he is subjected to some of them 'over time') or to have *interdependent interests*. By contrast, this may be the case for the resident alien.

Now, that interdependent interests are normatively relevant empirical facts for the applicability of the ideal of democracy does not take away the fact they are products of morally arbitrary and contingent causes.³⁷ Moreover, democracy is merely one ideal among several that we strive towards. In fact, it is not even the only ideal that is valuable for elaborating the notion of political legitimacy, since we would also want political authority to be sufficiently just. Contexts of interdependent interests are only *one* context of political justification and we should be able to require that authority is politically legitimate also under circumstances in which people's interests are not interdependent and thus when democracy is not applicable. To address this question and account for its complexity from the standpoint of discourse theory as well as position the proposed equal influence principle in the larger context of justificatory practices among discursive agents in the space of reasons, I find Forst's work particularly valuable since he distinguishes between different contexts of justification.

Following Forst, I consider the right to justification to be the best candidate for a criterion of rightness in both 'contexts of moral justification' and 'contexts of political justification', the difference being that the former concern interpersonal moral conduct, whilst the latter concern legal, political and institutional structures. To these two contexts of justification, however, I have added 'contexts of interdependent interests', which is a specific kind of political context. These contexts are neither mutually exclusive nor mutually constitutive, since a moral context of justification need not be a political context, whereas a context of interdependent interests is always a kind of political context.

The equal respect for autonomous agency forms the normative basis for the evaluation of all three contexts of justification, requiring that our normative considerations be guided by the right to justification. However, the specification of this abstract right varies depending on context. On the proposed account, there is a division

³⁷ Christiano, 'A Democratic Theory of Territory', p. 87.

of labour between the all affected principle and the all subjected principle. In both moral and general political contexts, justification is understood as a discursive process whose primary addressees are those who are *relevantly affected*, in line with Forst. As we have seen, however, the all affected principle is not appropriate for theorizing democratic legitimacy and justified (democratic) inclusion.³⁸ Instead, in contexts of interdependent interests, a particular version of the all subjected principle is applied, securing the equal influence among those who are systematically and over time *subjected* to the decisions and laws.³⁹

To illustrate this, take the nuclear plant Barsebäck located at the south coast of Sweden, very close to Denmark. From the view defended here, Danes should not have an equal influence over the democratic decision-making in Sweden, because they are not systematically and over time subjected to Swedish laws. Neither is the realization of nearly all of their fundamental interests connected with the realization of nearly all fundamental interests of Swedes. However, their fundamental

³⁸ Of course, this does not imply that democracy cannot be instrumentally justified in contexts of political justification generally, for example, as the best practical device for securing our interest in non-domination or the just distribution of primary goods (E. Erman, and A. Follesdal, 'Multiple Citizenship: Normative Ideals and Institutional Challenges', *Critical Review of International Social and Political Philosophy* 15(3), 2012), 279-302. Neither does it imply that there aren't other normative ideals of importance in the space of reasons (G. A. Cohen, 'Facts and Principles', *Philosophy & Public Affairs* 31(3), (2003), 211-45, at pp. 244-45). As with the application of any normative principle, assessments, judgements and trade-offs will inevitably have to be made between ideal conditions against the backdrop of the specific social context in which the action is supposed to take place, specifying which conditions to prioritize and for what reasons (R. Goodin, 'Political Ideals and Political Practice', *British Journal of Political Science* 25(1), (1995), 37-56; I. Kant, 'On the common saying: this may be true in theory, but it does not apply in practice', in H. S. Reiss (ed.), *Kant's Political Writings*. Cambridge: Cambridge University Press, 1970; O. O'Neill, 'Abstraction, idealization and ideology in ethics', in J. D. G. Evans (ed.), *Moral Philosophy and Contemporary Problems*. Cambridge: Cambridge University Press, 1987).

³⁹ In order to protect the equal respect for autonomous agency in contexts of political justification, I argue, the right to justification requires the fulfilment of two conditions in order for institutions to be *politically* legitimate: first, the *substantive* condition that subjects' fundamental interests be secured through a set of basic rights, including political rights; and second, the *procedural* condition that channels and procedures are established on the basis of and through this set of basic rights, which secure the opportunity for discursive agents *relevantly affected* by the decisions and laws of a political arrangement to demand *acceptable reasons* from it.

interests are still affected in relevant ways by decisions made by the Swedish people concerning Barsebäck. Therefore, some kind of ‘say’ for Danes concerning this particular issue is called for, so that they have an institutionalized opportunity to require acceptable reasons for the decisions taken (see note 39 for details).